

25 January 2012

**Submission to the House of  
Representatives Standing  
Committee on Social Policy  
and Legal Affairs: people  
with Foetal Alcohol  
Spectrum Disorder in the  
disability regime and  
criminal justice system**

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## 1. INTRODUCTION

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Blake Dawson welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs (**Committee**) on the management of Foetal Alcohol Spectrum Disorder (**FASD**) in Australia.

Through this submission we aim to bring the Committee's attention to:

- the characteristics of FASD as a cognitive impairment which can result in people with FASD falling outside the eligibility criteria for government support and services;
- some of the changes necessary to Commonwealth law to enable people with FASD and their carers to access appropriate government support and services; and
- people with FASD and the criminal justice system.

Given the timeframe for comment and the breadth of law and policy affecting people with FASD we have been unable to give detailed consideration to every aspect of Commonwealth law and policy impacting on people with FASD and their carers. We note that, while we have concentrated on Commonwealth law, programs and policy in this submission, the same issues exist at a State and Territory level.

We would be pleased to provide further comment on any issue the Committee considers requires further or more detailed consideration.

### 1.1 Terms of Reference

The Committee is to inquire into and report on developing a national approach to the prevention, intervention and management of FASD in Australia, with particular reference to:

- **prevention strategies** – including education campaigns and consideration of options such as product warnings and other mechanisms to raise awareness of the harmful nature of alcohol consumption during pregnancy;
- **intervention needs** – including FASD diagnostic tools for health and other professionals, and the early intervention therapies aimed at minimising the impact of FASD on affected individuals; and
- **management issues** – including access to appropriate community care and support services across education, health, community services, employment and criminal justice sectors for the communities, families and individuals impacted by FASD.<sup>1</sup>

Our submission focuses on the third Term of Reference, management issues.

### 1.2 Definitions

In this submission, we use the following definitions:

- **Committee** – means the House of Representatives Standing Committee on Social Policy and Legal Affairs
- **Crimes Act** – means the *Crimes Act 1914* (Cth).

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<sup>1</sup> Parliament of Australia, House of Representatives, House Standing Committee on Social Policy and Legal Affairs, *Inquiry into Fetal Alcohol Spectrum Disorder: Terms of Reference* (2011) <<http://www.aph.gov.au/house/committee/spla/fasd/tor.htm>> at 29 November 2011.

- **Criminal Code** – means the Schedule to the *Criminal Code Act 1995* (Cth).
- **FASD** – means Fetal Alcohol Spectrum Disorders
- **Social Security Act** – means the *Social Security Act 1991* (Cth).
- **Terms of Reference** – means the Terms of Reference of the Committee for the Inquiry into FASD, reproduced at 1.1 of this submission.

### 1.3 Executive summary

While people with FASD and their carers will often be eligible for income support and for services supplied or funded by government, many people with FASD miss out.

Law and policy in the areas of welfare and criminal justice developed largely with awareness of and in response to intellectual disability and mental illness. Consequently, the determination as to whether a person is able to access government support or have their reduced culpability recognised and taken into account in the criminal law often depends on the person falling within the definitions of 'mental illness' or 'intellectual disability'.

To be diagnosed with an intellectual disability, among other things, a person must have an IQ of 70 or below. While many people with FASD will meet the criteria for intellectual disability (or, indeed, may also have a mental illness) a person with FASD who has behavioural or other symptoms resulting in a need for support, but whose IQ is above 70 and who does not have a mental illness may not meet the eligibility criteria to receive the support they need.

Even where other terms are used to determine eligibility, such as 'intellectual impairment', the lack of a consistent or clear definition of those terms results in uncertainty at best for people with FASD and at worst an inability to obtain assistance.

To ensure people with FASD are able to access the support they need and have their lesser culpability recognised, where appropriate, in the criminal law, we recommend the development of a model definition of 'cognitive impairment' which includes FASD as well as intellectual disability and other forms of disability or impairment such as acquired brain injury and degenerative diseases. We further recommend the Commonwealth adopts the model definition in Commonwealth legislation and policy and encourages its adoption by the States and Territories.

## 2. SUMMARY OF RECOMMENDATIONS

### **Recommendation 1**

That the Commonwealth support the development of diagnostic criteria for FASD.

### **Recommendation 2**

That relevant health service providers and others such as those in the criminal justice system are made aware of FASD and, where appropriate, are trained in the use of the diagnostic criteria.

### **Recommendation 3**

That the Commonwealth support the work of Indigenous organisations addressing FASD in their communities.

**Recommendation 4**

That the Commonwealth support the development of a model definition of cognitive impairment to be used to determine eligibility for government support and services and in the criminal law. The model definition should be capable of extending to all forms of cognitive disability, however and whenever incurred.

**Recommendation 5**

That the Commonwealth encourage the adoption of the model definition of cognitive impairment in Commonwealth law and policy and by the States and Territories.

**Recommendation 6**

That FASD or the more disabling forms of FASD be added to the List of Recognised Disabilities so that people caring for children with FASD may access the Carer Allowance more easily.

**Recommendation 7**

That the *Social Security Act*, *Disability Services Act*, their regulations and the policies developed pursuant to those Acts be amended to replace 'intellectual disability' and 'intellectual impairment' with 'cognitive impairment' as defined in the model definition.

**Recommendation 8**

That an audit be conducted of all Commonwealth legislation and policy providing for people with disability to ensure people with FASD are not precluded from obtaining benefits and support or from having their disability taken into account, where appropriate, because of terms which exclude people with FASD or leave their eligibility uncertain.

**Recommendation 9**

That people entering the criminal justice system be screened for FASD and that those involved in the criminal justice system be trained on the nature and impact of FASD.

**Recommendation 10**

That the threshold criteria for diversion from the criminal justice system and for a person's disability to be taken into consideration in criminal proceedings be amended in the Commonwealth criminal law to ensure people with FASD can fall within the relevant legislative provisions.

**Recommendation 11**

That State, Territory and Commonwealth approaches to the recognition of FASD in the criminal law be harmonised through the Standing Council on Law and Justice.

**3. BLAKE DAWSON'S EXPERIENCE IN ACTING FOR PEOPLE WITH FETAL ALCOHOL SPECTRUM DISORDERS**

Blake Dawson is a national (and international) law firm. For the last twelve years a focus of our pro bono program has been assisting people with mental illness and/or cognitive impairment and their carers.

Our practice includes:

- seconding a lawyer full-time to the Intellectual Disability Rights Service;
- acting for people with cognitive impairment and/or mental illness and their carers in a range of matters including, most commonly:
  - on criminal charges;

- in apprehended violence order applications as both complainants and defendants;
  - to apply for and defend applications for substitute decision-makers;
  - to apply to revoke the authority of a substitute decision-maker;
  - in negotiations with the NSW Trustee and Guardian;
  - to make a Power of Attorney or Appointment of Enduring Guardian;
  - in Wills and estate planning and applications;
  - in credit and debt matters;
  - to apply for victims' compensation; and
  - in discrimination and unfair dismissal claims;
- providing community legal education workshops for parents, carers and caseworkers of people with cognitive impairment and/or mental illness;
  - acting for and otherwise supporting the work of a number of not-for-profit service providers and their clients including Brain Injury Australia, the Intellectual Disability Rights Service, the Aboriginal Disability Network, Disability Advocacy NSW, People with Disability Australia, Ability First and Northcott; and
  - law reform work on legal issues affecting people with mental illness and/or impaired capacity.

Over the last three years Blake Dawson has been supporting the work of the communities of the Fitzroy Valley to reduce the use of alcohol in the Fitzroy Valley and to address the issue of FASD.

#### 4. FETAL ALCOHOL SPECTRUM DISORDERS

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##### 4.1 What are Fetal Alcohol Spectrum Disorders?

FASD is a general term which describes the range of conditions that can result when a fetus is exposed to alcohol in utero. FASD represents a range of diagnoses that fall under the spectrum.<sup>2</sup> The most severe FASD condition is Fetal Alcohol Syndrome (**FAS**). Other diagnoses include Alcohol Related Neurodevelopmental Disorder (**ARND**) and Alcohol Related Birth Defects (**ARBD**).

The features of these disorders include:

- FAS — a child has problems with growth, learning, distinctive facial features and structural abnormalities secondary to in-utero alcohol exposure
- Partial FAS — a child has some, but not all, features reported in FAS
- ARND — a child has problems with learning and behaviour related to alcohol exposure

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<sup>2</sup> The National Organisation for Fetal Alcohol Syndrome and Related Disorders Inc, What is Fetal Alcohol Spectrum Disorder? (2011) No Fasard <<http://www.nofasard.org/>> at 28 November 2011.

- ARBD — a child has abnormalities of organs such as the heart or kidneys related to alcohol exposure <sup>3</sup>

FASD can be characterised as a spectrum disorder. The term 'spectrum' refers to the wide range of symptoms and impairments that different people with the condition may have, ranging from mild impairments to severe disabilities. Symptoms vary from person to person. Autism Spectrum Disorder is another well-known example of a spectrum disorder.

FASD is often referred to as a 'hidden disability' because it affects intangible processes like thinking and behaviour. It is less readily identified and recognised than mental illness or other forms of cognitive impairment such as intellectual disability.

People who have been exposed to alcohol in utero may have problems with learning, remembering things, attention span, communicating, reasoning and/or controlling their behaviour.<sup>4</sup>

FASD is sometimes confused with developmental delay and behavioural disorders or misdiagnosed as ADHD or ADD.

## 4.2 Prevalence of FASD

The number of infants born in Australia with FASD is unknown, as diagnosis can be difficult.<sup>5</sup> Studies attempting to measure the number of infants born with FASD in Australia have shown frequencies from 0.06 to 0.68 per 1,000 babies born.<sup>6</sup>

FASD occurs across the community. However, several sources indicate higher rates of prevalence of FASD among Indigenous populations.<sup>7</sup> Estimates suggest that up to one in 40 Indigenous children are affected by FASD.<sup>8</sup> Data from the Western Australian Birth Defects Registry and Rural Paediatric Service database, for example, indicate that rates of FASD are substantially higher in Indigenous children (2.76 per 1000) compared with non-Indigenous children (0.02 per 1000).<sup>9</sup>

<sup>3</sup> State Government of Victoria, Fetal alcohol spectrum disorder (November 2011) Better Health Channel <[http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Fetal\\_alcohol\\_spectrum\\_disorder?open](http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Fetal_alcohol_spectrum_disorder?open)> at 28 November 2011.

<sup>4</sup> The National Organisation for Fetal Alcohol Syndrome and Related Disorders Inc, *What is Fetal Alcohol Spectrum Disorder?* (2011) No Fasard <<http://www.nofasard.org/>> at 28 November 2011.

<sup>5</sup> State Government of Victoria, *Fetal alcohol spectrum disorder* (November 2011) Better Health Channel <[http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Fetal\\_alcohol\\_spectrum\\_disorder?open](http://www.betterhealth.vic.gov.au/bhcv2/bhcarticles.nsf/pages/Fetal_alcohol_spectrum_disorder?open)> at 28 November 2011.

<sup>6</sup> Queensland, Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009) 67.

<sup>7</sup> See, for example, Australian Institute of Health and Welfare, Australian Government, *Response to Questions Taken on Notice by the AIHW at the Hearing into the Inquiry into Regional and Remote Indigenous Communities by the Australian Senate Select Committee on Regional and Remote Indigenous Communities* (9 June 2009) <[http://www.aph.gov.au/Senate/Committee/indig\\_ctte/qon/QoN\\_AIHW\\_9\\_June\\_09.pdf](http://www.aph.gov.au/Senate/Committee/indig_ctte/qon/QoN_AIHW_9_June_09.pdf)> 7, and the sources cited therein.

<sup>8</sup> Marcia Langton, 'The end of 'big men' politics' (2009) 14 *Griffith Review* 13, 25.

<sup>9</sup> Department of the Attorney General of Western Australia, *Equality Before the Law: Bench Book* (2009) [4.1.8]; E Tindle, 'Raising a FAS/FAE Child: Helping Carers Cope' (2002) 12(1) *Australian Journal of Guidance and Counselling* 50, 53.

See also, for example, Australian Paediatric Surveillance Unit, 'Australian Paediatric Surveillance Unit 15th Anniversary Publication 1993-2007' (2007) 19 and Department of the Attorney General of Western Australia, *Equality Before the Law: Bench Book* (2009) [4.1.8].

We note the work of the Marulu Project in the Fitzroy Valley (with which the Committee is familiar) and commend the Project to the Inquiry as a model for community devised and driven solutions to community challenges. We recommend that project derives from its leaders and from the people of the Fitzroy Valley. We suggest projects such as this should be supported as part of any strategy to address FASD rather than government taking a wholly generalised approach to prevention and intervention, given FASD exists in many disparate communities. For further information on the Marulu Project and the successes in the Fitzroy Valley more generally see [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport10/chap3.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport10/chap3.html).

The incidence of FASD varies markedly from study to study for a number of reasons including:

- few comprehensive prevalence studies;
- differences in definition and diagnostic measures of FASD symptoms;
- lack of awareness of FASD; and
- difficulties in diagnosing FASD:

This has led some researchers to believe that the actual incidence of FASD may be much higher than currently estimated in the literature.

#### 4.3 Difficulty diagnosing FASD

FASD may not be diagnosed at birth or thereafter for a range of reasons including that:

- maternal intake of alcohol is difficult to accurately record. In addition, many children diagnosed with alcohol-related symptoms are being cared for by someone other than their birth mother and information about maternal intake of alcohol is difficult to obtain;
- there may be multiple causes of a person's symptoms. Alcohol may not be the only drug consumed during pregnancy. Evidence suggests that a person who drinks while pregnant is also more likely to smoke cigarettes, use prescription and non-prescription drugs, and/or take recreational drugs such as cannabis. Like alcohol, these substances cross the placenta and affect fetal development. The complications arising from these combinations of harmful substances makes it difficult to ascertain the cause of the infant's symptoms. Further, there are many environmental and individual factors that can contribute to learning and behavioural problems. Alcohol may be one of many contributing factors;
- there is a lack of paediatric expertise available to make a diagnosis of FASD; and
- there is currently no widely accepted diagnostic criteria for FASD in Australia.

The lack of sufficiently certain, generally accepted and widely implemented diagnostic criteria and screening have significant implications for the ability of a person with FASD to access benefits and services. It means FASD may go unrecognised in the person. It reduces the likelihood of FASD being listed as a disability where access to support or services depends on a person having a particular disability. Given that access to most benefits and funded support requires proof of disability, it makes it difficult for a person with FASD to obtain the required proof.



**Recommendation 1**

That the Commonwealth support the development of diagnostic criteria for FASD.

**Recommendation 2**

That relevant health service providers and others such as those in the criminal justice system are made aware of FASD and, where appropriate, are trained in the use of the diagnostic criteria.

**Recommendation 3**

That the Commonwealth support the work of Indigenous organisations addressing FASD in their communities.

**5. DIFFERENCES BETWEEN FASD, INTELLECTUAL DISABILITY AND MENTAL ILLNESS**

**5.1 Why do the differences matter?**

People who care for or work with people with FASD consistently tell us that one of the things which must change if people with FASD are to receive the support they need is that FASD needs to be recognised by government as a disability. We hear of people denied benefits and services on the basis that a diagnosis of FASD does not qualify them for the support they are seeking.

The law as it affects people with an illness or disability of the mind or brain has developed largely through awareness of and focus on the support and other needs of people with mental illness and intellectual disability. As a result, people with other forms of cognitive disability or impairment are often ineligible for benefits which are available to people with mental illness or intellectual disability. They may also fall outside diversionary and other criminal laws which reflect the lesser culpability of a person with mental illness or cognitive disability.

**5.2 The difference between FASD, intellectual disability and mental illness**

An intellectual disability primarily affects the capacity to learn. To be diagnosed with an intellectual disability a person must have acquired the disability before the age of 18, have an IQ of 70 or below (or two standard deviations under the mean) and have deficits in at least two areas of adaptive behaviour (age-appropriate behaviours required to live independently and safely, such as communication, self-care and functional academics)<sup>10</sup>.

While FASD are now recognised as the most common preventable cause of intellectual disability, a person with FASD will not necessarily have an intellectual disability.<sup>11</sup>

A person with FASD will have acquired their disability before the age of 18. A person with FASD requiring funded support is likely to have deficits in at least two areas of adaptive behaviour. However, a person with FASD will not necessarily have an IQ of below 70. The person may have an IQ above 70 but require support due to impairments arising from FASD such as lack of impulse control, short attention span, fixed patterns of thinking

<sup>10</sup> See for example *The American Psychiatric Association Diagnostic and Statistical Manual (DSM-IV-TR, 2000)* or the definition published by *The American Association on Intellectual and Developmental Disabilities (AAIDD)* set out in Schedule 4.

<sup>11</sup> Colleen O'Leary, *Fetal Alcohol Syndrome: A Literature Review, prepared for the National Expert Advisory Committee on Alcohol* (August 2002), Department of Health and Ageing <[http://www.health.gov.au/internet/alcohol/publishing.nsf/Content/746BAD892492B586CA2572610010C29A/\\$File/etalcsyn.pdf](http://www.health.gov.au/internet/alcohol/publishing.nsf/Content/746BAD892492B586CA2572610010C29A/$File/etalcsyn.pdf)>.

See also Abel, E. L. and Sokol, R. J. (1986a) Fetal alcohol syndrome is now leading cause of mental retardation, *Lancet*, 2, 1222.

and/or difficulty interpreting social cues. The impairments may mean that the person requires support in employment or is unable to maintain employment. The person may require assistance in the home, with transport, with budgeting or shopping. The impairments may mean the person should be viewed as having reduced culpability when charged with a criminal offence.

Mental illness is a clinically recognisable set of symptoms or behaviours associated, in most cases, with distress and interference with personal functions.<sup>12</sup> It is generally considered to be an abnormality in the functioning of the brain which is not currently physically observable. In contrast, a chief symptom of FASD is an observable abnormality in the structure and size of the brain; that is, a physical condition which causes a change in function. Mental illness is characterised by the presence of symptoms including delusions, hallucinations, serious disorders of thought 'form', severe disability of mood or sustained or repeated irrational behaviours. Mental illness is generally episodic and a person with mental illness may be assisted by medication which may reduce the symptoms of the illness and the extent of their impairment. FASD, on the other hand, is permanent and consistent, though some effects may be relieved in part by medication and/or ongoing therapy.

Many people with FASD may have a mental illness as well. Mental illness is recognised as a secondary symptom of FASD and may arise where the person with FASD does not receive the support they need.

A person with FASD may, then, also have an intellectual disability or mental illness. However, those who do not are often ineligible for support and services because FASD does not come within the definitions of intellectual disability or mental illness required for eligibility for such support and services.

### 5.3 Range of terms and definitions

Across and within the Australian jurisdictions a variety of terms are used in legislation and policy to refer to people with a physical condition which causes a change in the function of the brain. Indeed sometimes different terms are used within the same piece of legislation for no apparent reason. The terms include 'intellectual disability', 'intellectual impairment', 'cognitive impairment', 'cognitive disorder', 'mental disorder' and 'disorder of the mind'. Not only are a variety of terms used, but the same term may be defined differently across and within jurisdictions. The terms may be undefined or defined in a circular manner, each by reference to another.<sup>13</sup> Further, each of the concepts is multifaceted and encompasses medical, scientific and social criteria.<sup>14</sup>

To an extent the current lack of consistency reflects the changing nature of knowledge about brain function and cognition and how these affect behaviour and functioning. Many definitions are out-dated and do not reflect the current state of knowledge and

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<sup>12</sup> World Health Organization, *The ICD-10 Classification of Mental and Behavioural Disorders Clinical descriptions and diagnostic guidelines* (1992) World Health Organization, Geneva, p. 5.

<sup>13</sup> Indeed there is not even agreement on definitions among medical experts. This was recognised in New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, (1996) Report 80, Explanatory Note to Recommendation 1.

See Bernadette McSherry, 'A Review of the New South Wales Law Reform Commission's Report *People with an Intellectual Disability and the Criminal Justice System* (1999) 7 *Monash Law Review* 166; L Crowley-Smith, 'Intellectual Disability and Mental Illness: A Call for Unambiguous and Uniform Statutory Definitions' (1995) 3(2) *Journal of Law and Medicine* 192-201.

Intellectual Disability Rights Service, in conjunction with the Council on Intellectual Disability and Criminal Justice and the NSW Council for Intellectual Disability, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the NSW Local Court System* (2008), 30.

<sup>14</sup> New South Wales Law Reform Commission *Consultation Paper 11 – Young people with cognitive and mental health impairments in the criminal justice system* (December 2010) p. 5.

understanding. Further, each of the concepts is multifaceted and encompasses medical, scientific and social criteria.<sup>15</sup>

#### 5.4 The use of 'intellectual impairment' in law and policy

The *Social Security Act* (among other welfare-related legislation and policy) uses the term 'intellectual impairment' in its eligibility criteria for income support and other benefits a number of times. For example, to obtain the Disability Support Pension, among other criteria a person must have a 'physical, intellectual or psychiatric impairment'. The term 'intellectual impairment' is undefined in this and many other pieces of legislation.

'Intellectual impairment' is frequently used interchangeably with 'intellectual disability' in law and policy. Sometimes it is given the same meaning as intellectual disability but sometimes it is defined more broadly than intellectual disability.<sup>16</sup> Where it is undefined in legislation, there is no guidance from case law on the meaning of 'intellectual impairment' and its meaning does not appear to be settled in medicine or psychology.

For further discussion on the meaning and use of the terms 'intellectual disability' and 'intellectual impairment' see Schedules 4 and 5.

#### 5.5 The need for a more inclusive term and avoiding 'the flood'

People with FASD are just one group excluded from support and from consideration of their disability when the terms 'intellectual disability' or 'intellectual impairment' are used in eligibility criteria. People with acquired brain injury or degenerative diseases such as dementia, for example, would not fall within the definition of 'intellectual disability' where their disability did not occur during the development phase or where they maintain an IQ of above 70.

The need for a broader term to cover all forms of cognitive impairment is starting to be recognised.<sup>17</sup> The term 'cognitive impairment' is increasingly preferred to 'intellectual impairment' or 'intellectual disability' as a more inclusive term to identify impairments that may significantly impact a person's functioning.

Cognitive impairment encompasses, but is not limited to, intellectual impairment, and is not measured by reference to IQ. The American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders (DSM- IV-TR)*<sup>18</sup> stated that generally, a cognitive impairment or disorder means a loss of brain function affecting judgment and resulting in a decreased ability to process, learn or remember information. As it is not tied to IQ or onset before the age of 18, cognitive impairment may manifest itself in conditions such as Alzheimer's, dementia, autism and autistic spectrum disorders, multiple sclerosis, acquired brain injury and FASD.

Concern has been expressed in previous law reform discussion on this issue that to broaden such definitions will 'open the floodgates' to people not requiring services, or who should not receive a concession for their disability under the criminal law. The NSW Law Reform Commission, for example, took the approach of advocating different definitions for

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<sup>15</sup> New South Wales Law Reform Commission *Consultation Paper 11 – Young people with cognitive and mental health impairments in the criminal justice system* (December 2010) p. 5.

<sup>16</sup> For example, to be eligible for the Education Adjustment Program Qld, in the category of Intellectual Impairment the criteria match the diagnostic criteria for intellectual disability. In contrast, under the *NSW Community Welfare Act 1987* (s3(13)), 'intellectual impairment' is defined more broadly as 'any defect or disturbance in the normal structure and functioning of a person's brain, whether arising from a condition subsisting at birth or from subsequent illness or injury'.

<sup>17</sup> For example, NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview*, Consultation Paper 5, January 2010  
[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/vwFiles/CP05.pdf/\\$file/CP05.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/CP05.pdf/$file/CP05.pdf)

<sup>18</sup> 4th ed, APA Press, 2000

welfare and criminal law on the basis that the welfare system 'usually favours a broad definition so as not to deny people services, whereas definitions in a criminal law context need to be as unambiguous as possible, bearing in mind the consequences involved'.<sup>19</sup>

Those concerned about broadening the definition in either context argue that people with FASD (or acquired brain injury or degenerative disorders) are on a spectrum and not everyone requires or deserves support or special consideration.

In response to those concerns we submit that:

- (a) intellectual disability and mental illness are also on a spectrum. A person may have a mild intellectual disability or mental illness and require far less support than a person with FASD whose behavioural problems result in them being unable to sustain employment, housing or a network of community support; and
- (b) to be eligible for financial support or services from government (or to have your culpability reduced in the criminal law) you must not only prove that you have a particular type of illness or disability but also that, as a result, you have functional or other impairments to the requisite degree (for example, an inability to work for more than a certain period of time each week or that you did not know the nature and quality of your act). These additional criteria apply to people with FASD as they apply to people with mental illness and/or intellectual disability and would appropriately limit access to benefits and support and to concessions within the criminal law.

## 5.6 A model definition

As discussed, there is significant inconsistency in the use of terms to describe cognitive impairment in law and policy across Australia. A nationally consistent definition, which is not exhaustive but which provides strong guidance to those implementing the law and policy, would increase certainty for government and people with FASD about when particular laws and policies apply to people with FASD. It would also assist to remove the barriers faced by people with FASD to the support and services they need.

The NSW Law Reform Commission's Inquiry into the Bail Act is considering replacing the term 'intellectual disability' in the *Bail Act 1978* (NSW) with the term 'cognitive impairment', defined as follows:

Cognitive impairment is an ongoing impairment in comprehension, reason, judgment, learning or memory that is the result of any damage to or dysfunction, developmental delay, or deterioration of the brain or mind.

Such cognitive impairment may arise from, but is not limited to, the following:

- Intellectual disability
- Borderline intellectual functioning
- Dementias
- Acquired brain injury
- Drug or alcohol related brain damage
- Autism spectrum disorders.

The term 'cognitive impairment' defined as set out above may be appropriate as a model definition. The term could then be used to replace 'intellectual disability' and 'intellectual impairment' in all law and policy except where the intention is to refer solely to people with

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<sup>19</sup>

New South Wales Law Reform Commission *Discussion Paper 35 – People with an Intellectual Disability and the Criminal Justice System: Courts and Sentencing Issues* (1994) Part 2.

an intellectual disability. The term 'mental illness' would be retained and could be used in conjunction with 'cognitive impairment' where appropriate.

**Recommendation 4**

That the Commonwealth support the development of a model definition of cognitive impairment to be used to determine eligibility for government support and services and in the criminal law. The model definition should be capable of extending to all forms of cognitive disability, however and whenever incurred.

**Recommendation 5**

That the Commonwealth encourage the adoption of the model definition of cognitive impairment in Commonwealth law and policy and by the States and Territories.

**6. AUSTRALIAN GOVERNMENT DEPARTMENT OF FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS**

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The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) provides support to people with disabilities by way of:

- benefits and payments from Centrelink;
- programs and services; and
- grants and funding for organisations delivering services to people with disabilities.

This section of the Submission provides an overview of these Commonwealth disability programs, services, pensions and benefits, and considers whether people with FASD could be eligible for support.

**6.1 Centrelink Benefits and Payments**

Centrelink is part of the Department of Human Services portfolio and is the main provider of Government services. Centrelink payments are governed by a variety of Commonwealth Acts and legislative sources. The major instruments are the:

- *Social Security Act 1991* (Cth);
- *Social Security (Administration) Act 1999* (Cth);
- *A New Tax System (Family Assistance) Act 1999* (Cth); and
- *Privacy Act 1988* (Cth).

The diagram in section (a) below provides a high level summary of direct Commonwealth disability support payments, currently available under the Social Security Act, to which we consider people with FASD should have access if they can satisfy the relevant requirements.

The direct Commonwealth support payments which we consider to be relevant to people with FASD and their carers are:

- the Disability Support Pension ;<sup>20</sup>
- the Youth Disability Supplement;<sup>21</sup>

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<sup>20</sup> *Social Security Act 1991* (Cth) part 2.3, ss 94 -146Q.

<sup>21</sup> *Social Security Act 1991* (Cth) ss 1066A-C1, 1066B-C1, 1067G-D1, 1190.

- the Carer Payment;<sup>22</sup>
- the Carer Allowance;<sup>23</sup> and
- the Mobility Allowance,<sup>24</sup>

each of which are discussed in more detail below. Additionally, the Government also provides Disability Employment Assistance Services, which are set out below.

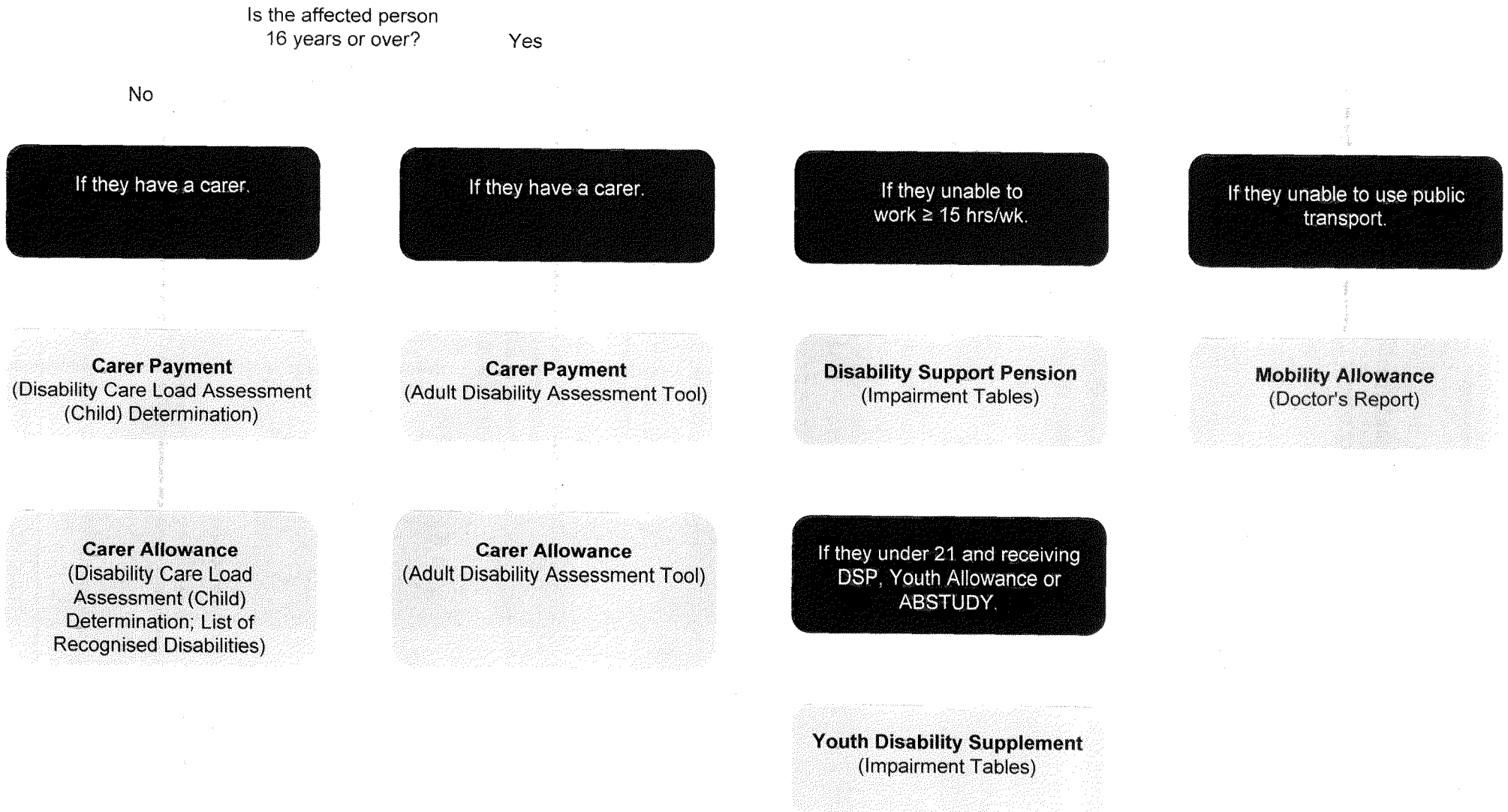
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<sup>22</sup> Ibid part 2.5, ss 197-246; part 2.5A, ss 247-276.

<sup>23</sup> Ibid part 2.19, ss 952-992M; part 2.19A, ss 992N-992W.

<sup>24</sup> Ibid part 2.21, ss 1035-1046.

(a) Summary of direct disability support payments relevant to FASD



(b) **Disability Support Pension**

**TEST**

To receive the Disability Support Pension a person must:

- be 16 years or over;
- have a physical, intellectual or psychiatric impairment;
- have an impairment of 20 points or more under the Impairment Tables; and
- have a continuing inability to work or are participating in the supported wage system.<sup>25</sup>

(i) **Physical, intellectual or psychiatric impairment**

For a person with FASD to be eligible for the Disability Support Pension, they must show that they have a 'physical, intellectual or psychiatric impairment'.

The term 'intellectual impairment' is not defined in the *Social Security Act* and we can find no definition of the term in the case law on the *Social Security Act*.

The term 'impairment' is not defined in the *Social Security Act* either. The case law on s94(1)(a) of the *Social Security Act* states that the ordinary meaning of 'impairment' should be adopted.<sup>26</sup> The case law also states that the concept of impairment should not be given a narrow construction.<sup>27</sup> It is not necessary to identify the precise nature of a person's impairment to be eligible for a pension.<sup>28</sup>

Arguably, 'intellectual impairment' is a broader term than 'intellectual disability' and a person with FASD may fall within the term 'intellectual impairment' under the *Social Security Act*. However:

- (A) as discussed at 5.4, 'intellectual impairment' is often defined or interpreted to mean 'intellectual disability';
- (B) it would be necessary to prove not just that the person has an impairment but that it is an impairment of the intellect as opposed to, for example, an impairment with primarily behavioural symptoms or another kind of cognitive impairment affecting memory or judgment;
- (C) it leaves a person with FASD who does not have an intellectual disability or mental illness in an uncertain situation, dependent on the interpretation of the particular officer who is determining whether or not the person is eligible for the Disability Support Pension; and

<sup>25</sup> *Social Security Act 1991* (Cth) s 94(1).

<sup>26</sup> See for example the decision of the Administrative Appeals Tribunal in *Bugnov v Secretary, Department of Employment and Workplace Relations* [2005] AATA 788 at 17).

<sup>27</sup> *Ibid* at 34.

<sup>28</sup> *Kroushev v Secretary DFACS (No. 2)* [2005] FMCA 455 at 27.



- (D) the person applying for the pension and attempting to advocate for the broader interpretation is likely to be a person with FASD or their carer. It is unlikely the applicant will have the technical knowledge to make the argument as to why FASD falls within the definition of 'intellectual impairment'.

The adoption of a broader and clearer term than 'intellectual impairment' would create greater certainty for people with FASD and other cognitive impairments about whether or not they fall within this limb of the test for a Disability Support Pension. As noted in paragraph 5.5 above, we recommend the adoption of the term 'cognitive impairment' defined as suggested in that paragraph.

(ii) **The Impairment Tables**

To be eligible for the Disability Support Pension, a person must also have an impairment of 20 points or more (**Impairment Test**) as assessed against Impairment Tables (which are now made by Ministerial Determination).

From 1 January 2012, new claims for the Disability Support Pension will be assessed using revised Impairment Tables. The new Tables are function- rather than diagnosis-based. They assess functional activities, abilities, symptoms and limitations to determine a person's ability to work. They are not designed to assess conditions.

The categories of impairment under the revised Impairment Tables include 'Intellectual Function' (similar to the current 'Intellectual Disability' category) and 'Brain Function', used where the person has a diagnosed medical condition resulting in functional impairment related to neurological or cognitive function. An extract of the 'Brain Function' and 'Intellectual Function' tests is included in Schedule 2.

People whose FASD results in the need for income support through the Disability Support Pension are likely to fall within the new Impairment Tables.

(iii) **'Inability to work' test**

To receive the Disability Support Pension, a person must be unable to work for 15 hours or more per week<sup>29</sup> for the next 2 years<sup>30</sup> independently of a program of support. 'Work' includes some vocational or educational training activities. Applicants for the Disability Support Pension are required to provide evidence that they have been unable to obtain employment through an open employment service or vocational rehabilitation.<sup>31</sup> Therefore, a person with FASD must be able to show that they cannot prepare for, find or maintain work (or training) without Commonwealth assistance.

This criterion need not be amended for people with FASD.

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<sup>29</sup> *Social Security Act 1991* (Cth) s 94(5).

<sup>30</sup> *Ibid* s 94(2).

<sup>31</sup> Parliament of Australia, Senate, Senate Standing Committees on Community Affairs, *Disability Impairment Tables: Provisions of Schedule 3 of the Social Security and Other Legislation Amendment Bill 2011* (19 September 2011) [4.9] <[http://www.aph.gov.au/senate/committee/clac\\_ctte/Soc\\_Sec\\_Amend/report/c04.htm](http://www.aph.gov.au/senate/committee/clac_ctte/Soc_Sec_Amend/report/c04.htm)> at 5 December 2011.

(c) **Youth Disability Supplement**

The Youth Disability Supplement provides additional financial support on top of the Disability Support Pension,<sup>32</sup> Youth Allowance<sup>33</sup> or ABSTUDY.<sup>34</sup> As this does not operate as a standalone payment, but rather as an increase to an existing payment<sup>35</sup>, for the person to receive the Supplement they must already receive one of those forms of financial support.

(i) **Disability Support Pension**

**TEST**

To receive the Youth Disability Supplement if you are on a Disability Support Pension you must:

- be under 21; and
- only be able to work up to 30 hours per week.

People with a disability who are aged between 16 and 21 may receive both the Disability Support Pension and the Youth Disability Supplement.

If a person with FASD is able to obtain the Disability Support Pension and meets the additional criteria set out above, he or she will be eligible for the Youth Disability Supplement.

(ii) **Youth Allowance as a job seeker or full-time student, or ABSTUDY as a full-time student or Australian apprentice**

**TEST**

To receive the Youth Disability Supplement if you are on Youth Allowance or ABSTUDY you must:

- be under 21;
- have a physical, intellectual or psychiatric impairment; and
- be unable by reason of that impairment to work independently for more than 30 hours per week.

A person with FASD, then, may be ineligible for the Youth Disability Supplement because he or she is not found to have an 'intellectual impairment' (as discussed at 5.4).

(d) **Carer Payment and Carer Allowance**

As their names suggest, the Carer Payment and Carer Allowance provide income support for carers. The payments are made not to the person with the disability, but to the person who cares for them in recognition of the fact that their caring responsibilities may prevent them undertaking substantial paid employment. They are paid to carers of both adults and children who meet the eligibility criteria.

<sup>32</sup> Determined using the Pension Rate Calculator D or E: *ibid*, ss 1066A and 1066B.

<sup>33</sup> Determined using the Youth Allowance Rate Calculator: *ibid*, s 1067G.

<sup>34</sup> Prescribed under the *ABSTUDY Supplement Regulations 1992*.

<sup>35</sup> *Shaban and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs and Anor* [2010] AATA 767

The relevant obstacle to carers of people with FASD receiving either payment is that their eligibility to receive the payment turns on the disability of the person they care for (**care receiver**).

(i) Carer payment

The Carer Payment is subject to an income<sup>36</sup> and assets<sup>37</sup> test. A person who receives certain other pensions or benefits<sup>38</sup> will not be eligible.

To qualify for a carer payment, among other criteria, the person must care for:<sup>39</sup>

- (A) a child with a severe disability or severe medical condition (section 197B);
- (B) 2 or more children each with a disability or medical condition (section 197C);
- (C) a disabled adult and one or more children each with a disability or medical condition (section 197D); or
- (D) a disabled adult, or disabled adult and dependent child (section 198).

*Child with a severe disability or severe medical condition*

To qualify as a carer for a child with a severe disability or severe medical condition:

- the carer must have been given a qualifying rating of intense under the Disability Care Load Assessment (Child) Determination for caring for the care receiver<sup>40</sup>; and
- a treating health professional must have certified in writing, that because of that disability or condition, the care receiver will need personal care for 6 months or more and that the personal care is required to be provided by a specific number of persons.<sup>41</sup>

The Disability Care Load Assessment (Child) Determination is used in respect of people aged under 16 to determine an Assessment of Care Load (ACL).<sup>42</sup> The Assessment for a child with a severe disability or severe medical condition requires completion of two questionnaires: a questionnaire which is made up of four categories of question: 2 behavioural domains, a functional abilities domain and a special care needs domain, and a professional questionnaire.<sup>43</sup>

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<sup>36</sup> Social Security Act 1991 (Cth) s 198A

<sup>37</sup> Social Security Act 1991 (Cth) s 198D

<sup>38</sup> Social Security Act 1991 (Cth) ss 202, 202A

<sup>39</sup> Social Security Act 1991 (Cth) s 197B(1)

<sup>40</sup> Social Security Act 1991 (Cth) s 197B(1)(b)

<sup>41</sup> Social Security Act 1991 (Cth) s 197B(1)(c)(i)-(ii)

<sup>42</sup> Social Security Act 1991 (Cth) s 38E, Disability Care Load Assessment (Child) Determination 2010 cl 12

<sup>43</sup> Disability Care Load Assessment (Child) Determination 2010 cl 12

It is impossible to predict whether or not any particular child with FASD would achieve a qualifying score under the test. However, as the test depends on individual circumstances (the care level required for the child), people caring for a child with FASD are not excluded.

*Children with disability or medical condition*

For the carer to qualify as carer for a child with a disability or medical condition, they must care for 2 or more children each with a disability or medical condition.<sup>44</sup>

As above for carers of a child with a severe disability, the care load must be assessed as intense under the Disability Care Load Assessment (Child) Determination, and a treating health professional must have certified in writing, in respect of *each* of the care receivers that because of their disability or condition, the care receiver will need personal care for 6 months or more and that the personal care is required to be provided by a specific number of persons.

Again, as the assessment is based on the care needs of the child and not on a particular type of disability, carers of children with FASD are not excluded from the Carer Payment.

*Care of a disabled adult*

To be eligible for the Carer Payment when caring for an adult, the carer must, among other criteria, be caring for a 'disabled adult'.

A 'disabled adult' is defined to mean:

- 'a person aged 16 or more;
- who has a physical, intellectual or psychiatric disability;
- who is likely to suffer from that disability permanently or for an extended period<sup>45</sup>; and
- who has been assessed and rated under Adult Disability Assessment Tool and given the required score (which is not relevant for these submissions).<sup>46</sup>

As discussed at 5.2 a person with FASD will not necessarily have an intellectual or psychiatric disability, and therefore their carer may be ineligible for a Carer Payment despite the level of disability or the care requirements of the person with FASD.

The requirement that a person caring for an adult must care for a person with an intellectual (or physical or psychiatric) disability to receive the Carer Payment also creates an anomaly. A carer may be eligible to receive the Carer Payment for a child with FASD but cease to be eligible when the child turns 16 because the eligibility criteria changes, even though the person's FASD symptoms and the care they require is unchanged.

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<sup>44</sup> Social Security Act 1991 (Cth) s 197C

<sup>45</sup> Social Security Act 1991 (Cth) s 197

<sup>46</sup> Social Security Act 1991 (Cth) s 197D(1)(a)(i)

(ii) Carer Allowance

This payment is not subject to the same income and means tests as the Carer Payment and can be paid to carers of adults or children with a disability in addition to wages or other Centrelink payments.

To be eligible for the Carer Allowance when caring for an adult, among other criteria the carer must care for a 'disabled adult'.<sup>47</sup> A 'disabled adult' is defined as for the Carer Payment.<sup>48</sup> The definition, which requires the person being cared for to have a 'physical, intellectual or psychiatric disability' once again is likely to exclude many carers of people with FASD.

To be eligible for the Carer Allowance when caring for a child, the carer must:

- care for a child who is a 'disabled child' as defined; and
- care for a child who has a disability on the List of Recognised Disabilities<sup>49</sup>; or
- be given a qualifying rating of intense under the Disability Care Load Assessment (Child) Determination<sup>50</sup>.

'Disabled Child' is defined as a person under 16 who:

- has a physical, intellectual or psychiatric disability; and
- is likely to suffer from that disability permanently or for an extended period<sup>51</sup>.

In addition to the difficulty arising from the fact that a child with FASD may not also have an intellectual disability, the List of Recognised Disabilities does not include FASD.<sup>52</sup> Although there is the alternative means of establishing eligibility through the Disability Care Load Assessment (Child) Determination it is more time consuming and difficult to establish eligibility this way. The List of Recognised Disabilities streamlines the process for carers of children with other forms of disability and FASD should be recognised on that list.

The List of Recognised Disabilities is at Schedule 4.

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<sup>47</sup> *Social Security Act 1991* (Cth) s 954 and 954A

<sup>48</sup> *Social Security Act 1991* (Cth) s 952

<sup>49</sup> Disability Care Load Assessment (Child) Determination 2010 Schedule 3 made under section 38E *Social Security Act 1991* (Cth).

<sup>50</sup> Disability Care Load Assessment (Child) Determination 2010 Schedule 3

<sup>51</sup> *Social Security Act 1991* (Cth) s 952

<sup>52</sup> Australian Government Department of Family and Community Services, *Guide to the revised lists of recognised disabilities* (5 August 2010) <[www.facs.gov.au/sa/carers/payments/CarerAllowance/Pages/ListsOfRecognisedDisabilities.aspx](http://www.facs.gov.au/sa/carers/payments/CarerAllowance/Pages/ListsOfRecognisedDisabilities.aspx)> at 5 December 2011.

### **Recommendation 6**

That FASD or the more disabling forms of FASD be added to the List of Recognised Disabilities so that people caring for children with FASD may access the Carer Allowance more easily.

#### **(e) Mobility Allowance**

##### **Test**

To be eligible for the Mobility Allowance a person must be:

- 16 years or over;
- a 'handicapped person'; that is, have a physical or mental disability;
- unable to use public transport without substantial assistance, either permanently or for an extended period;
- unable to use public transport without substantial assistance due to the person's physical or mental disability; and
- either:
  - in gainful employment, vocational training or voluntary work for at least 32 hours in every 4 weeks on a continuing basis;
  - undertaking approved job search activities; or
  - undertaking a vocational rehabilitation program.<sup>53</sup>

To obtain the mobility allowance, a person must be a 'handicapped person', among other criteria. A 'handicapped person' is defined as a person with 'a physical or mental disability'.<sup>54</sup>

The term 'physical or mental disability' is not defined in the *Social Security Act*, nor in case law on the *Social Security Act* or otherwise. As with 'intellectual impairment' there does not seem to be an agreed definition of 'mental disability' in the law, medicine or psychology.

The term may be broad enough to include cognitive impairments like FASD. While there is no precedential law, in one case the AAT held that a person with learning difficulties did have a mental disability which could justify her being granted a mobility allowance<sup>55</sup> and in another that a man who suffered a psychological condition which included panic attacks was also eligible.<sup>56</sup> Those two cases suggest that 'mental disorder' might indeed include a range of cognitive impairments and mental illness. In another analogous decision, the AAT affirmed a decision that a person who had an acquired brain injury (following surgery to remove a cancer from her brain) was ineligible for the Mobility Allowance, but did so based on the fact that the Tribunal did not recognise the activity in which she

<sup>53</sup> *Social Security Act 1991* (Cth) ss 1035(1) and 1035(2).

<sup>54</sup> *Social Security Act 1991* (Cth) s 19

<sup>55</sup> *Re Colleen Larkin and Secretary To the Department of Social Security* [1986] AATA 35

<sup>56</sup> *Maklenovich and Secretary, Department of Education, Employment and Workplace Relations* [2011] AATA 148

was engaged as a vocational training program, apparently assuming that her condition was a mental disability.<sup>57</sup>

It would assist to clarify who is eligible for the Mobility Allowance if the term 'mental disorder' were changed to 'mental illness and/or cognitive impairment using the definition of 'cognitive impairment' set out at paragraph 5.5 (or another model definition).

**(f) Disability Employment Assistance Services**

The Government provides a specialised form of employment assistance to people with disabilities, injuries or illnesses.<sup>58</sup> It is not a prerequisite to the access of these services that an individual is in receipt, or is eligible to be in receipt, of any of the abovementioned payments.

**Test**

To be eligible to access Disability Employment Assistance Services, a person must have a disability which:

- is attributable to an intellectual, psychiatric, sensory or physical impairment or combination of such impairments;
- is or is likely to be permanent; and
- results in the person suffering a substantially reduced capacity for communication, learning or mobility and the need for ongoing support services.

<sup>59</sup>

A person with FASD requiring employment assistance may fall within the various types of disability for which such assistance is available. However, we refer, once again, to the discussion at 5.4 on whether or not FASD is an 'intellectual impairment' and the lack of clarity for officers charged with determining whether an applicant is eligible.

## 6.2 Current FaCHSIA Initiatives

FaCHSIA also provides a variety of other support for people with disabilities. These initiatives are bracketed by relevant age groups, and include:

- Australian Disability Parking Scheme;
- Home and Community Care Program;
- National Companion Card;
- National Disability Advocacy Program;
- Outside School Hours Care for Teenagers with Disability;
- Special Disability Trusts;
- Australian Disability Enterprises;

<sup>57</sup> Koutelas and Secretary, Department of Education, Employment and Workplace Relations [2010] AATA 501

<sup>58</sup> Pursuant to grants approved under Division 2A of the *Disability Services Act 1986* (Cth); *Disability Services Standards (FACSIA) 2007*; *Disability Services Standards (DEWR) 2007*.

<sup>59</sup> *Disability Services Act 1986* (Cth) s8.

- Disability Employment Services;
- CRS Australia (formerly known as the Commonwealth Rehabilitation Service);
- Disabled Australian Apprentice Wage Support Program;
- Job in Jeopardy; and
- Job Access.

The initiatives and their availability to people with FASD are set out in further detail in Schedule 2.

### 6.3 Difficulty obtaining reports

We note that to be eligible for the payments and other support discussed above the applicant must be able to prove their disability or the disability of the person they care for. For some payments, detailed reports on a person's functional capacity are required in addition to specialist medical reports.

For many people with FASD, particularly those outside metropolitan areas, obtaining the reports they require can be extremely difficult. The relevant specialists and other report writers are unlikely to be available where they live and their ability to travel to obtain reports is often curtailed by limited finances, their disability or carer responsibilities and a lack of familiarity with who can assist them.

It is, of course, appropriate that a person seeking financial or other assistance from the government prove the basis on which they say they are entitled to such assistance. Any package to address the needs of people with FASD, however, should include assistance to obtain the reports necessary to satisfy any eligibility criteria for support or services.

#### **Recommendation 7**

That the *Social Security Act*, *Disability Services Act*, their regulations and the policies developed pursuant to those Acts be amended to replace 'intellectual disability' and 'intellectual impairment' with 'cognitive impairment' as defined in the model definition in paragraph 5.6.

#### **Recommendation 8**

That an audit be conducted of all Commonwealth legislation and policy providing for people with disability to ensure people with FASD are not precluded from obtaining benefits and support or from having their disability taken into account, where appropriate, because of terms which exclude people with FASD or leave their eligibility uncertain.

## 7. FASD AND THE CRIMINAL JUSTICE SYSTEM

Finally, we briefly address three issues for people with FASD in the criminal justice system:

- the need for early identification of FASD when a person is in contact with the criminal justice system;
- the exclusion of people with FASD from criminal laws which recognise the reduced culpability of people with other forms of cognitive impairment or mental illness; and
- the desirability of shifting funding from incarceration to supporting people with FASD to assist them to avoid contact with the criminal justice system.



## 7.1 The need for early identification of FASD

People may become involved with the criminal justice system in a variety of ways. The primary ways in which people with FASD are likely to come into contact with the criminal justice system are as a witness, victim or defendant.

Regardless of the person's role in the system, it is critical that, where a person's FASD is likely to detrimentally affect them in that role, their FASD is identified.

For victims and witnesses, the identification of FASD allows for appropriate support to be provided to the person to help them understand the law and process, to give a statement and, if necessary, to give credible and useful evidence.

For a defendant, the identification of FASD may enable:

- appropriate assistance to be provided to enable the person to better understand the process and their options;
- miscarriages of justice arising from the fact that the person does not understand what is being asked of him or her or cannot respond as required by the system;
- diversion from the criminal justice system;
- any reduction in culpability on account of their FASD to be considered in determining the person's guilt or innocence or in sentencing;
- support to be provided to a person to carry out their sentence without being set up to fail; and
- any symptoms of FASD which are causing the person's offending behaviour to be addressed.

The report of the House Standing Committee on Aboriginal and Torres Strait Islander Affairs *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* and the report of the Senate Select Committee on Regional and Remote Indigenous Communities both noted the disproportionately large number of young people and adults with FASD who are engaged with the criminal justice system.<sup>60</sup>

The *Doing Time – Time for Doing* report quotes Heather Douglas, Associate Professor, School of Law at the University of Queensland, who estimates 60% of adolescents with FASD have been in trouble with the law.<sup>61</sup> Associate Professor Douglas describes the cognitive, social and behavioural problems associated with FASD which bring people with FASD to the attention of the criminal justice system.<sup>62</sup>

The need for both identification of the fact that a person has FASD when they enter the criminal justice system and the need for more education and training on FASD for people working within that system is well-recognised.<sup>63</sup>

Without an appropriate diagnostic tool, training of those best-placed to identify that a person has FASD when they first come into contact with the criminal justice system and a

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<sup>60</sup> *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 4.37-4.4 and report of the Senate Select Committee on Regional and Remote Indigenous Communities, Third Report p98 and Fourth Report, p125 and 144.

<sup>61</sup> *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 4.38.

<sup>62</sup> Report of the Senate Select Committee on Regional and Remote Indigenous Communities, Third Report 3.363.

<sup>63</sup> See, for example, Fast, D and Conry, J, *Fetal Alcohol Spectrum Disorders and the Criminal Justice System*, *Developmental Disabilities Research Reviews* 15: 250 – 270. This article examines the literature on people with FASD in the criminal justice system.

screening system to ensure such identification, the person with FASD will miss the opportunity to obtain the support they need and to have their disability taken into consideration. The community will miss an opportunity to address the causes of the person's offending and thereby reduce the likelihood the person will offend again.

## 7.2 Failure to consider the reduced culpability of people with FASD

Much of the criminal law addressing reduced culpability developed with an awareness of and in response to intellectual disability and mental illness. There are many circumstances, primarily arising from State and Territory law but also at Commonwealth level, in which people with FASD are not able to have their disability taken into account in the criminal justice system.

As with welfare-related law and policy, the terms used to determine who may have their disability taken into account in the criminal law, and the definitions of those terms, are varied and often inconsistent.

The defence of mental impairment under the *Criminal Code Act 1995* (Cth) states a person is not criminally responsible if he or she was suffering from a 'mental impairment' among other criteria (s7.3(1)). 'Mental impairment' is defined under the *Criminal Code* to include 'senility, intellectual disability, mental illness, brain damage and severe personality disorder'.<sup>64</sup> Arguably a person with FASD would meet the threshold criteria for mental impairment as FASD arises from damage to the developing brain.

In contrast, the *Crimes Act 1914* (Cth) gives a court of summary jurisdiction the power to dismiss charges for a federal offence and discharge the person where the person is suffering from mental illness or intellectual disability (s20 BQ). A person with FASD who does not also have an intellectual disability or mental illness will be precluded from having their lesser culpability taken into account in the lower courts when charged with a federal offence.

Given the proportion of people dealt with in a court of summary jurisdiction as opposed to those dealt with in the higher courts, the lack of access to the diversionary mechanism available under s20BQ of the *Crimes Act* has widespread impact. In 2010, 16,834 matters were finalised nationally in higher courts nationally compared with 603,604 in Magistrates' Courts.<sup>65</sup>

Similar gaps exist in the criminal law of the States and Territories.

Harmonisation of a State and Commonwealth approach to the recognition of FASD in the criminal law could be pursued as part of the work of the recently formed Standing Council on Law and Justice (the successor to the Standing Committee of Attorneys-General (SCAG)).<sup>66</sup> SCAG achieved many successes in the harmonisation of State and Commonwealth legislation, including issues of criminal law through the establishment of the Model Criminal Law Officers Committee to work towards creating a national model criminal code for Australian jurisdictions.<sup>67</sup>

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<sup>64</sup> *Criminal Code* (Cth) s 7.3(8) (definition of 'mental impairment').

<sup>65</sup> Australian Bureau of Statistics (27 June 2011) 4513.0 - *Criminal Courts, Australia, 2009-10* <[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/\\$File/45130\\_2009-10.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/4AF5F0DDDDA509BFCA25782300154372/$File/45130_2009-10.pdf)>

<sup>66</sup> NSW Government, *Standing Council on Law and Justice* (22 November 2011) *Lawlink: Attorney-General & Justice* <<http://www.scag.gov.au/>>.

<sup>67</sup> NSW Government, *Model Criminal Law Officers Committee (MCLOC)* (22 November 2011) *Lawlink: Attorney-General & Justice* <[http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_mloc](http://www.lawlink.nsw.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_mloc)>.

### 7.3 Justice reinvestment

When considering the cost of the measures proposed in submissions to the Committee on management of FASD, prevention strategies and addressing intervention needs, we submit that cost should be offset against savings in the criminal justice system down the line.

Nationally, the average cost of keeping an adult in prison for a year, including capital costs, is approximately \$100 000. The cost of detaining a young person is higher.<sup>68</sup> There is a strong evidentiary base for the proposition that early intervention can substantially reduce the risk of contact with the criminal justice system in adolescence and adulthood.<sup>69</sup>

The Commonwealth Senate Legal and Constitutional Affairs Reference Committee has supported trialling justice reinvestment after further mapping. The Committee recommended in 2009 'that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.'<sup>70</sup> We support that recommendation.

#### **Recommendation 9**

That people entering the criminal justice system be screened for FASD and that those involved in the criminal justice system be trained on the nature and impact of FASD.

#### **Recommendation 10**

That the threshold criteria for diversion from the criminal justice system and for a person's disability to be taken into consideration in criminal proceedings be amended in the Commonwealth criminal law to ensure people with FASD can fall within the relevant legislative provisions.

#### **Recommendation 11**

That State, Territory and Commonwealth approaches to the recognition of FASD in the criminal law be harmonised through the Standing Council of on Law and Justice.

<sup>68</sup> Select Committee on Regional and Remote Indigenous Communities Discussion Paper, *Indigenous Australians, Incarceration and the Criminal Justice System*, March 2010.

<sup>69</sup> See, for example, Fast, D and Conry, J, "Fetal Alcohol Spectrum Disorders and the Criminal Justice System", *Developmental Disabilities Research Reviews 15: 250 – 270*, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 4.37, Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice*, April 2010, "Justice Reinvestment - A new solution to the problem of Indigenous over-representation in the Criminal justice system?" *HREOC Social Justice Report 2009* (2009) 9 at 21, Schwartz, "Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-imprisonment", 14 *Australian Indigenous Law Review* 1

<sup>70</sup> Senate Legal and Constitutional Affairs Committee, *Access to Justice Report*, December 2009, p. 107.

# Schedule 1

## FAHCSIA CURRENT INITIATIVES

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>Australian Disability Parking Permit Scheme</b>	<p>The Australian Disability Parking Scheme (ADPS) may issue parking permits to people with disabilities who have been registered as eligible by the relevant State and Territory bodies.</p> <p>The Australian Disability Parking Permit was introduced in 2010 as part of a harmonisation project which introduced a nationally common design for disability parking permits and will move towards harmonised eligibility criteria. Australian Disability Parking Permits are now issued in conjunction with state permits.</p>	<p>An ADPS permit entitles you to use the easy access parking bays, including:</p> <ul style="list-style-type: none"> <li>• on-street parking;</li> <li>• shopping centres;</li> <li>• hospitals;</li> <li>• libraries; and</li> <li>• schools.</li> </ul> <p>Refer to local councils for information on availability of concessions for parking and a list of rules and regulations.</p>	<p>Eligibility criteria varies from State to State.</p> <p>In WA applicants must<sup>71</sup>:</p> <ul style="list-style-type: none"> <li>• have a severe mobility impairment where walking more than 50m causes the physical condition to deteriorate; and/or</li> <li>• require the use of a mobility/medical aid such as a wheelchair, crutches, walking frame or oxygen and therefore require a wide bay to transfer in/out of a vehicle.</li> </ul> <p>In NSW, an applicant for the Mobility Parking Scheme must have a disability, which is defined to require that they are someone:</p> <ul style="list-style-type: none"> <li>• who is unable to walk due to the permanent or temporary loss of use of one or both legs or other permanent medical or</li> </ul>	<p>The eligibility criteria are quite strict and relate primarily to physical disabilities.</p>	<p>People with FASD will be able to benefit from the ADPS if they have a physical impairment which results in severe impairment of their mobility and they satisfy the eligibility criteria for their State or Territory.</p>

<sup>71</sup> Local Government (Parking for Disabled Persons) Regulations 1988 (WA) regs 3-5.

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>Home and Community Care Program</b>	<p>The Home and Community Care (HACC) Program is a joint Australian, State and Territory Government Initiative which provides services such as:<sup>72</sup></p> <ul style="list-style-type: none"> <li>• domestic assistance;</li> <li>• personal care; and</li> <li>• professional allied health care and nursing services.</li> </ul>	<p>Some of the services funded through the HACC Program include:<sup>74</sup></p> <ul style="list-style-type: none"> <li>• nursing care;</li> <li>• allied health care;</li> <li>• meals and other food services;</li> <li>• domestic assistance;</li> <li>• personal care;</li> </ul>	<p>physical condition; or</p> <ul style="list-style-type: none"> <li>• whose physical condition is detrimentally affected as a result of walking 100 metres; or</li> <li>• who requires the use of crutches, a walking frame, callipers, scooter, wheelchair or other similar mobility aid.</li> </ul> <p>A Clinically Recognisable Disability (CRD) is a permanent disability certified by a doctor for the purposes of issuing a permit. People who are recorded as meeting the CRD criteria do not require a doctor to certify their disability when applying to renew their permit. FASD is not a CRD.</p> <p>The Home and Community Care Program is targeted at the following people:<sup>75</sup></p> <ul style="list-style-type: none"> <li>• older and frail people with moderate, severe or profound disabilities;</li> <li>• younger people with moderate, severe or profound disabilities; and</li> <li>• such other classes of people as</li> </ul>		<p>This service is for people who cannot care for themselves and require high level nursing. This may be of assistance to people with severe FASD. As funding is directed to approved programs rather than to individuals, the eligibility of people with FASD for participation depends on the</p>

<sup>72</sup> Home and Community Care Act 1985 (Cth) s3(1).

<sup>74</sup> Home and Community Care Act 1985 (Cth) sch 6.

<sup>75</sup> Home and Community Care Act 1985 (Cth) sch 6.

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
	<p>The HACC Program aims to support, as well as older Australians, younger people with a disability and their carers to be more independent at home and in the community and to reduce the potential or inappropriate need for admission to residential care.<sup>73</sup></p> <p>The state and territory governments are responsible for program management, including the approval and funding of individual HACC services in their jurisdictions.</p>	<ul style="list-style-type: none"> <li>• home modification and maintenance;</li> <li>• transport;</li> <li>• respite care;</li> <li>• counselling, support, information and advocacy; and</li> <li>• assessment.</li> </ul>	<p>are agreed upon, from time to time, by the Australian Government Minister and the State Minister; and</p> <ul style="list-style-type: none"> <li>• the unpaid carers of people assessed as being within this 'target population'.</li> </ul> <p>The HACC target population also includes people who might not have access to long term residential care for cultural, geographical reasons, or other special needs. The groups are –<sup>76</sup></p> <ul style="list-style-type: none"> <li>• people from culturally and linguistically diverse backgrounds;</li> <li>• Aboriginal and Torres Strait Islander peoples;</li> <li>• people with dementia;</li> <li>• financially disadvantaged people; and</li> <li>• people living in remote or isolated areas.</li> </ul>		<p>scope of, and eligibility criteria for, the service which they are seeking to access.</p>

<sup>73</sup> *Home and Community Care Act 1985* (Cth) sch 5(1)(a).

<sup>76</sup> *Home and Community Care Act 1985* (Cth) sch 5(1)(c).

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>National Companion Card</b>	<p>The National Companion Card scheme enables eligible people with disabilities to participate at venues and activities without incurring the cost of a second ticket for their attendant carer.<sup>77</sup></p> <p>The National Card Scheme is comprised of Companion Card programs run by each State and Territory.</p>	<p>Saves the cost of a second ticket at participating affiliate organisations for their attendant carer.</p>	<p>Companion Card applications are assessed by each State or Territory.</p> <p>In general, the person must have a significant and permanent disability and always need a companion to provide attendant care type support in order to participate at most available community venues and activities.</p> <p>Companion Cards can only be issued when an ongoing (life-long) need for a companion can be demonstrated.</p> <p>For example, in NSW, the companion card will be issued to people who are assessed as meeting all of the following eligibility criteria –</p> <ul style="list-style-type: none"> <li>• severe or profound and permanent disability</li> <li>• unable to participate in most community-based activities without significant assistance with: <ul style="list-style-type: none"> <li>• mobility</li> <li>• communication</li> <li>• self-care</li> <li>• planning</li> </ul> </li> </ul>	<p>The requirements for obtaining a Companion Card are quite strict.</p>	<p>Some people with severe FASD diagnoses may satisfy the strict requirements necessary to obtain a national Companion Card, whilst those with less severe diagnoses may not qualify, especially as the the card is only provided to people if their level of support is life-long and they meet all of the eligibility criteria. The card is not provided to people who require social support, assurance or encouragement.</p>

<sup>77</sup> Australian Government, *The National Companion Card Scheme* (1 November 2011) <<http://companioncard.gov.au/>> at 5 December 2011.

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
			and where the use of aids and other technologies do not meet those needs. <ul style="list-style-type: none"> <li>• their level of support is lifelong.</li> </ul>		
<b>National Disability Advocacy Program (NDAP)</b>	The NDAP provides organisations with funding to assist people with disability to overcome barriers that impact on their daily life and their ability to participate in the community (i.e. physical access, discriminatory attitudes, abuse, neglect etc). <sup>78</sup>	Available support is dependent upon the various disability advocacy agencies receiving funding from time to time, but generally may include support in the form of: <sup>79</sup> <ul style="list-style-type: none"> <li>• individual advocacy;</li> <li>• citizen advocacy;</li> <li>• family advocacy;</li> <li>• self advocacy; and</li> <li>• systemic advocacy.</li> </ul>	The target group for advocacy support provided by NDAP agencies, as required under section 8 of the <i>Disability Services Act 1986</i> (Cth), consists of people with disability that: <ol style="list-style-type: none"> <li>• 'is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;</li> <li>• is permanent or likely to be permanent; and</li> <li>• results in: <ol style="list-style-type: none"> <li>• a substantially reduced capacity of the person for communication, learning or mobility; and</li> <li>• the need for ongoing support services.</li> </ol> </li> </ol>	Advocacy support will be limited to those services provided by advocacy agencies under the NDAP.	It is likely that some people with FASD may be able to benefit from services funded by the NDAP. However, we note the potential exclusion of people with FASD given that the person is required, relevantly, to have an 'intellectual impairment'.
<b>Outside School Hours Care for</b>	Outside School Hours Care for Teenagers with Disability	Provides teenagers with disability, aged 12 to 18 years	The child must be aged 12 to 18 years old. <sup>81</sup>	Services are for a short-term basis	Some people with FASD are likely to require OSHC

<sup>78</sup> See generally, FaHCSIA, *Information for the National Disability Advocacy Program: Part C: Services and Support for People with Disability Program: Application Information for National Disability Advocacy Program* (December 2010); *Disability Services Act 1986* (Cth) s 7 defines 'advocacy services' to include self-advocacy, citizen-advocacy and group-advocacy services.

<sup>79</sup> FaHCSIA, *National Disability Advocacy Program* (18 October 2011) <<http://www.facs.gov.au/sa/disability/progserv/providers/NationalDisabilityAdvocacyProgram/Pages/NationalDisabilityAdvocacyProgram.aspx>> at 5 December 2011.



Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
Teenagers with Disability (OSHC)		with quality outside school hours care. <sup>80</sup> OSHC includes before school, after school and holiday care. This allows their carers and parents to work or participate in the community.	Some further eligibility requirements may be imposed at the State/Territory level, given the limited number of positions available. <sup>82</sup>	only. However, if families require extended support they are able to purchase additional services.	services during between 12 and 18 years of age since they may not be able to look after themselves in the same way that people without FASD may be able to at this age point.
Special Disability Trusts	Help for parents and immediate family members responsible for the future care and accommodation needs of a person with a severe disability	<p>A Special Disability Trust attracts social security means test concessions for the beneficiary and eligible contributors.</p> <p>The purpose of the trust is to assist immediate family members and carers who have the financial means to do so, to make private financial provision for the current and future care and accommodation needs of a family member with severe disability and receive means test concessions.</p>	<p>To be eligible to be the principal beneficiary of a Special Disability Trust, a person must meet the beneficiary requirements under section 1209M of the Social Security Act.</p> <p>If the principal beneficiary has reached 16 years of age, they must:<sup>83</sup></p> <ul style="list-style-type: none"> <li>• have an impairment that would qualify the person for a Disability Support Pension ; or</li> <li>• be receiving an invalidity service pension under Part III of the <i>Veterans' Entitlements Act</i>; or</li> <li>• be receiving an income</li> </ul>	Special Disability Trusts must comply with the detailed requirements of Part 3.18A of the Social Security Act, which requires a carefully drafted deed to establish the trust.	<p>It is possible people with FASD may not satisfy the strict requirements necessary to be a beneficiary of a special disability trust, or may not have the means to have one settled on their behalf.</p> <p>See discussion in the body of the submission on the eligibility of people with FASD for Disability Support Pension , Carer Payment and Carer Allowance.</p>

<sup>81</sup> Ibid.

<sup>80</sup> FaHCSIA , *Services and Support for People with Disability Program Guidelines — Outside School Hours Care for Teenagers with Disability* (version 2, July 2011) Part B.1 <[http://www.facs.gov.au/sa/disability/funding/outsidingschoolcare/Pages/otdp\\_guidelines.aspx](http://www.facs.gov.au/sa/disability/funding/outsidingschoolcare/Pages/otdp_guidelines.aspx)> at 5 December 2011.

<sup>82</sup> See, for example, in Western Australia, Disability Services Commission, *Guidelines: Eligibility Policy for Specialist Disability Services Funded or Provided by The Disability Services Commission* (December 2010).

<sup>83</sup> *Social Security Act 1991* (Cth) s 1209M(2).

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
			<p>support supplement under the <i>Veterans' Entitlement Act</i> on the grounds of permanent incapacity; <b>and</b></p> <ul style="list-style-type: none"> <li>• have a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance, or</li> <li>• be living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories; <b>and</b></li> <li>• have a disability as a result of which either: <ul style="list-style-type: none"> <li>○ he or she is not working, and has no likelihood of working, for more than 7 hours a week for a wage that is at or above the relevant minimum wage, or</li> <li>○ he or she is working for wages set in accordance with the program administered by the Commonwealth known as the supported wage system.</li> </ul> </li> </ul>		

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
			<p>If the principal beneficiary is under 16 years of age:<sup>84</sup></p> <ul style="list-style-type: none"> <li>• the must have a severe disability or a severe medical condition; <b>and</b></li> <li>• their care must have been given a qualifying rating of intense under the <i>Disability Care Load Assessment (Child) Determination</i> for caring for the principal beneficiary; <b>and</b></li> <li>• a treating health professional must have certified in writing that, because of that disability or condition: <ul style="list-style-type: none"> <li>○ the principal beneficiary will need personal care for 6 months or more; <b>and</b></li> <li>○ the personal care is require to be provided by a specified number of persons; <b>and</b></li> <li>○ the carer has certified in writing that the principal beneficiary will require the same care, or an increased level of care, to be provided to him or her in the future.</li> </ul> </li> </ul>		

<sup>84</sup> Social Security Act 1991 (Cth) ss 1209M(4), 1209M(4A).

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>Australian Disability Enterprises</b> <sup>85</sup>	<p>Australian Disability Enterprises are commercial businesses that provide employment to people with disability.</p> <p>Australian Disability Enterprises receive funding and support from the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs to recognise their additional operating costs such as employing staff to support their employees with disability.</p>	<p>There are 355 Australian Disability Enterprise outlets across Australia, providing supported employment assistance to approximately 20,000 people who have a disability, injury or illness.<sup>86</sup></p> <p>This type of service approach is aimed at people with disabilities who want to work but choose to do so in a supported employment environment or who, because they have higher support needs, normally find it hard to find and keep a job.</p> <p>'Supported' means assistance is given, where necessary, so that each person can do their job successfully. For example, a person with restricted mobility may need the height of their workbench adjusted so they can reach their tools. Or a person with learning difficulties may need regular reminders from their supervisor about</p>	<p>In most cases a person must be assessed by an Employment Services Assessment Provider before they can access these services.</p> <p>The assessment must indicate:<sup>87</sup></p> <ul style="list-style-type: none"> <li>• that the person has a disability, illness or injury;</li> <li>• the level of support a person requires; and</li> <li>• the types of assistance required to help them get a job or to stay in a job.</li> </ul> <p>An Employment Services Assessment will determine the impact of a person's medical conditions and disabilities on their ability to work and whether they can benefit from employment assistance.</p> <p>Employment Services Assessments are conducted on behalf of the Department of Families, Housing, Community Services and Indigenous Affairs.</p>		<p>It is likely that some people with FASD will be able to meet the eligibility criteria in order to gain access employment in these services.</p>

<sup>85</sup> FaHCSIA , *Australian Disability Enterprises* (2011) <<http://www.FaHCSIA.gov.au/sa/disability/progserv/providers/AustralianDisabilityEnterprises/Pages/AustralianDisabilityEnterprises.aspx>> at 5 December 2011; FaHCSIA , *Australian Disability Enterprises* (2010) <<http://www.australiandisabilityenterprises.com.au/>> at 5 December 2011.

<sup>86</sup> This section is drawn from FaHCSIA , *About Disability Employment Services: a Factsheet for Parents and Carers* <[http://www.FaHCSIA.gov.au/sa/disability/pubs/Documents/ConsumerTrainingSupportProducts/docs/external/parents\\_and\\_carers.pdf](http://www.FaHCSIA.gov.au/sa/disability/pubs/Documents/ConsumerTrainingSupportProducts/docs/external/parents_and_carers.pdf)> at 5 December 2011.

<sup>87</sup> See above 6.1(f) (Disability Employment Assistance Services).

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>Disability Employment Services<sup>88</sup></b>	Disability Employment Services offer a range of free services to people with disabilities, their families, carers and employers.	<p>doing a task.</p> <p>Employees of Australian Disability Enterprises enjoy the same working conditions as those in the general workforce.</p> <p>People employed by a Australian Disability Enterprise may be involved in:</p> <ul style="list-style-type: none"> <li>• packaging;</li> <li>• manufacturing products;</li> <li>• gardening;</li> <li>• recycling materials;</li> <li>• cleaning;</li> <li>• making timber products;</li> <li>• sorting mail;</li> <li>• preparing food; and</li> <li>• selling clothes and books.</li> </ul>	<p>A person does not have to be receiving, or be eligible to receive, a payment from Centrelink to use these disability employment assistance services.</p>		
		<p>Disability Employment Services include:</p> <ul style="list-style-type: none"> <li>• Disability Management Service - for job seekers with a disability, injury or health condition who require the assistance of a disability employment service but who are not expected to need long-</li> </ul>	<p>Individuals will also need to be assessed by an Employment Services Assessment Provider before they can access these services. Centrelink will also assess the person's situation and work out which services a person may be eligible for.</p> <p>People may also directly register with a Disability Employment</p>	<p>Disability Employment Services are uncapped, so that all eligible people with disability have immediate access to the service they need. There are no waiting lists.</p>	<p>It is likely that some people with FASD will be able to meet the eligibility criteria in order to gain access to these services.</p>

<sup>88</sup> See above, 6.1(f) (Disability Employment Assistance Services); Department of Education, Employment and Workplace Relations, *About Disability Enterprises*, (2011) <<http://www.deewr.gov.au/Employment/Programs/DES/Pages/About.aspx>> at 5 December 2011.

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
		<p>term support in the workplace.</p> <ul style="list-style-type: none"> <li>• Employment Support Service - for job seekers with a permanent disability and with an assessed need for more long-term, regular ongoing support needs in the workplace.</li> </ul> <p>In particular these services may include the following tasks:</p> <ul style="list-style-type: none"> <li>• tailoring an Employment Pathway Plan;</li> <li>• professional recruitment advice and job matching;</li> <li>• help with job design for employees with disability;</li> <li>• on-the-job or off-site support to ensure new employees with disability settle into their job;</li> <li>• ongoing support for as long as it is required, for employees and employers who require support to maintain their employment;</li> </ul> <p>training information and awareness activities for employers and staff.</p>	<p>Service in your area without going to Centrelink.</p> <p>The three basic criteria to access to Disability Employment Services are that a person must have.</p> <ul style="list-style-type: none"> <li>• have a disability, injury or health condition that impacts on their ability to get and/or keep a job;</li> <li>• be aged between 14 and 65 years; and</li> <li>• be an Australian citizen or permanent resident.</li> </ul>		

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>CRS Australia (formerly known as the Commonwealth Rehabilitation Service)</b>	<p>CRS Australia's primary role when providing disability management services is to help people with a disability, injury or health condition to choose, get and keep employment.</p> <p>The disability management process assists clients to come to terms with their disability, injury or health condition and its impact on their options as a job seeker and their daily life.</p>	<p>CRS Australia can help by:</p> <ul style="list-style-type: none"> <li>• assessing a person's rehabilitation and employment assistance needs;</li> <li>• developing and managing individually tailored rehabilitation programs;</li> <li>• drawing up written rehabilitation plans for clients;</li> <li>• working with clients to maximise their participation and employability.</li> </ul> <p>CRS Australia provides professional services for people with a disability, injury or health condition who find it difficult to get or keep a job. This includes:</p> <ul style="list-style-type: none"> <li>• Physical, for example back injuries, muscle and joint problems.</li> <li>• Visual impairment (eye/vision problems).</li> <li>• Communication and hearing disorders.</li> <li>• Mental health, such as</li> </ul>	<p>CRS Australia is a Disability Employment Service contracted by the Australian Government.<sup>90</sup></p> <p>To be eligible for the services provided by CRS Australia a person must have an Employment Services Assessment undertaken.</p> <p>A person must meet three basic criteria to have access to CRS Services.<sup>91</sup> They must:</p> <ul style="list-style-type: none"> <li>• have a disability, injury or health condition that impacts on their ability to get and/or keep a job;</li> <li>• be aged between 14 and 65 years; and</li> <li>• be an Australian citizen or permanent resident.</li> </ul>		<p>It is likely that some people with FASD will be able to meet the eligibility criteria in order to gain access to these services.</p>

Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>Disabled Australian Apprentice Wage Support Program</b>	This is a payment (through the Department of Education, Employment and Workplace Relations) to employers who employ eligible apprentices with disabilities who would normally face difficulty obtaining an approved apprenticeship.	<p>depression or anxiety.</p> <ul style="list-style-type: none"> <li>Acquired brain injury.<sup>89</sup></li> </ul> <p>The employer may receive wage support of either \$104.30 for a full-time Australian Apprentice, or pro-rata amount for part time Apprentices.<sup>92</sup></p>	<p>Employer must be assessed as a person requiring assistance.</p> <p>Australian apprentices with disability must undergo an Occupational Assessment to be undertaken by a medical practitioner or registered psychologist.</p>	Other than eligibility requirements, none evident.	It is likely that some people with FASD will be able to meet the eligibility criteria in order to gain access to these services.
<b>Job in Jeopardy</b>	Disability Employment Services provide assistance for those at risk of losing their employment in the immediate future as a result of their illness, injury or disability through Job in Jeopardy assistance. Job in Jeopardy services are not designed to assist with finding new employment but are intended to assist customers to maintain their current employment.	<p>Job in Jeopardy participants will receive face to face support, as well as assistance such as:</p> <ul style="list-style-type: none"> <li>advice about job redesign;</li> <li>workplace assessments;</li> <li>workplace modifications;</li> <li>specialised equipment to help participants perform the requirements of the job.</li> </ul>	<p>An applicant must:<sup>93</sup></p> <ul style="list-style-type: none"> <li>have been employed for at least 8 hours a week on average over the last 13 weeks; and</li> <li>not be receiving assistance from another Disability Employment Services Provider.</li> </ul> <p>Applicants who meet these requirements can approach a Disability Employment Services Provider directly for assistance and</p>		It is likely that some people with FASD will be able to meet the eligibility criteria in order to gain access to these services.

<sup>90</sup> *Disability Services Act 1986* (Cth) s12AD(1).

<sup>91</sup> *Disability Services Act 1986* (Cth) s18.

<sup>89</sup> CRS Australia, *Types of Disability* <[http://www.crsaaustralia.gov.au/types\\_of\\_disability.htm](http://www.crsaaustralia.gov.au/types_of_disability.htm)> at 5 December 2011.

<sup>92</sup> This section is drawn from DEEWR, *Support for Australian Apprentices With Disability*, (September 2011), <Error! Hyperlink reference not valid.[http://www.australianapprenticeships.gov.au/FAQ/Documents/FactSheet\\_SFPAWD.pdf](http://www.australianapprenticeships.gov.au/FAQ/Documents/FactSheet_SFPAWD.pdf)> at 5 December 2011.

<sup>93</sup> Department of Education, Employment and Workplace Relations, *Jobs in Jeopardy Guidelines* (version 2.2, 2011) 6.



Service	Overview	Support provided	Eligibility criteria	Limitations	Availability to people with FASD
<b>JobAccess</b>	JobAccess provides an advice and information service for disability related employment. <sup>94</sup>	JobAccess is the first, free information and advice service of its kind in Australia. It provides a 'one-stop shop' for information and advice on the employment of people with a disability and offers practical workplace solutions for job seekers and their employers.	can contact Centrelink for information on their local providers.  It is a free service.	It is a search tool and does not necessarily provide conclusive answers.	This service is available to people with FASD.

<sup>94</sup> Australian Government, *JobAccess — Help and Workplace Solutions for the Employment of People with Disability* (1 December 2011) <<http://www.jobaccess.gov.au/>> at 5 December 2011.

# Schedule 2

## IMPAIRMENT TABLES – EFFECTIVE 1 JANUARY 2012

### Intellectual Function

Table 9 – Intellectual Function Introduction to Impairment Table 9	
<ul style="list-style-type: none"> <li>• Impairment Table 9 should be used where the person has a diagnosis of intellectual disability resulting in functional impairment related to their level of intellectual function.</li> <li>• A diagnosis must be made by an appropriately qualified medical practitioner with supporting evidence from a specialist assessment by a psychologist.</li> <li>• A report from the treating doctor must be provided.</li> <li>• Self-report of symptoms alone is insufficient. There must also be corroborating evidence of the person's impairment.</li> <li>• An assessment of intellectual function, in the form of a WAIS IV or equivalent contemporary assessment deemed acceptable by the Health Professional Advisory Unit, must be completed by a psychologist. This assessment should be conducted after the person turns 16 years of age. A WISC (Wechsler Intelligence Scale for Children) assessment completed between the ages of 12 and 16 years is also acceptable for people aged 18 years or under at the time of Impairment Table assessment.</li> <li>• Assessors need to consider the adaptation of recognised assessments of intellectual function for use with Aboriginal and Torres Strait Islander consumers.</li> <li>• Assessors should note the diagnostic definition of intellectual disability in the current version of the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association).</li> <li>• Assessors should note that diagnosis of a learning disorder such as dyslexia does not equate to a diagnosis of intellectual disability.</li> <li>• Assessors should consider evidence from a range of sources in determining which rating applies to the person being assessed.</li> <li>• Examples of corroborating evidence may include (but are not limited to):               <ul style="list-style-type: none"> <li>• supporting letters, reports and/or assessments relating to the person's development, intellectual function, adaptive behaviour and/or programs</li> <li>• interviews with the person and those providing care, support or treatment to the person.</li> </ul> </li> </ul>	

Points	Descriptors
0	<p>There is <b>no</b> impact on intellectual functions such as learning, reasoning and problem solving.</p> <p>For example, the person has intellectual functioning within the average range and displays an average range of adult skills in activities of daily living, socialisation, communication and appropriate behaviour and is able to live independently in the community.</p>
5	<p>There is <b>mild</b> impact on intellectual functions in at least two of the following domains:</p> <p><b>Learning and applying knowledge</b></p> <ul style="list-style-type: none"> <li>• may have mild difficulties with literacy and/or numeracy e.g. difficulty reading a complex newspaper article</li> <li>• may need more instructions and demonstrations than peers to learn a complex task</li> </ul>

Points	Descriptors
	<p><b>Daily living skills</b></p> <ul style="list-style-type: none"> <li>• may have some difficulties in managing personal finances e.g. may need occasional assistance with budgeting</li> <li>• may have some difficulties managing personal safety.</li> </ul> <p><b>Social skills</b></p> <ul style="list-style-type: none"> <li>• may have minor difficulties with interpersonal skills and understanding social responsibilities</li> </ul>
10	<p>There is <b>moderate</b> impact on intellectual functions in at least two of the following domains:</p> <p><b>Learning and applying knowledge</b></p> <ul style="list-style-type: none"> <li>• difficulties with literacy and/or numeracy are evident e.g. significant difficulty reading and completing forms</li> <li>• needs repeated demonstrations to learn tasks involving several steps and/or concepts</li> </ul> <p><b>Daily living skills</b></p> <ul style="list-style-type: none"> <li>• difficulties in managing money and needs regular assistance with budgeting</li> <li>• may need assistance with travel and public transport arrangements to new destinations</li> <li>• may need occasional reminders to maintain adequate personal hygiene, nutrition and health care</li> </ul> <p><b>Social skills</b></p> <ul style="list-style-type: none"> <li>• difficulties with interpersonal skills e.g. social interactions and behaviour may not always be appropriate to the situation</li> <li>• may have difficulty communicating more complex needs or issues</li> <li>• needs guidance and advice to understand and follow rules, obey laws and maintain personal safety</li> </ul> <p>The person will have an assessed intellectual impairment using the WAIS IV or equivalent contemporary assessment of intellectual function, deficits in adaptive behaviour and a history of developmental difficulties before 18 years of age.</p>
20	<p>There is <b>severe</b> impact on intellectual functions in at least two of the following domains:</p> <p><b>Learning and applying knowledge</b></p> <ul style="list-style-type: none"> <li>• has only basic reading and writing skills e.g. can read only simple text and perform only basic counting but not calculations such as addition or subtraction of double digit numbers</li> <li>• needs repeated demonstrations to learn tasks involving two or three steps and/or concepts</li> </ul> <p><b>Daily living skills</b></p> <ul style="list-style-type: none"> <li>• needs assistance to make routine purchases and receive correct change and needs full assistance with budgeting</li> <li>• needs to be accompanied when travelling to new destinations</li> <li>• needs regular supervision and/or assistance to maintain adequate personal hygiene, nutrition and health care</li> <li>• needs regular assistance to live in the community</li> </ul> <p><b>Social skills</b></p> <ul style="list-style-type: none"> <li>• interpersonal skills are limited e.g. social interactions are limited and/or often not appropriate to the situation</li> </ul>

Points	Descriptors
	<ul style="list-style-type: none"> <li>• has difficulty communicating with others</li> <li>• needs regular supervision and assistance to understand and follow rules, obey laws and maintain personal safety</li> <li>• may display behaviours that are inappropriate or unacceptable to the community</li> </ul> <p>The person will have an assessed intellectual impairment using the WAIS IV or equivalent contemporary assessment of intellectual function, deficits in adaptive behaviour and a history of developmental difficulties before 18 years of age.</p>
30	<p>There is an <b>extreme</b> impact on intellectual function in <u>all</u> of the following domains:</p> <p><b>Learning and applying knowledge</b></p> <ul style="list-style-type: none"> <li>• unable to read, write or count objects and needs repeated demonstrations to learn simple tasks involving one or two steps or is unable to complete even simple tasks</li> </ul> <p><b>Daily living skills</b></p> <ul style="list-style-type: none"> <li>• needs complete supervision and/or assistance to maintain adequate personal hygiene, nutrition and health care</li> <li>• needs complete assistance to manage money</li> <li>• needs complete assistance to travel/ use transport</li> <li>• needs continual support and lives with family or in supported accommodation</li> </ul> <p><b>Social skills</b></p> <ul style="list-style-type: none"> <li>• interpersonal skills are extremely limited e.g. can manage only very basic social interactions such as smiling or responding with simple language or gestures</li> <li>• communication skills are extremely limited</li> <li>• the person needs complete assistance to participate in social and community activities</li> <li>• may display behaviours that are highly inappropriate and/or dangerous to self, others or property</li> </ul> <p>The person will have an assessed intellectual impairment or be deemed unassessable using the WAIS IV or equivalent contemporary assessment of intellectual function, deficits in adaptive behaviour and a history of developmental difficulties before 18 years of age.</p>

## Brain Function

**Table 7 – Brain Function Introduction to Impairment Table 7**

- Impairment Table 7 should be used where the person has a diagnosed medical condition resulting in functional impairment related to neurological or cognitive function.
- The diagnosis must be made by an appropriately qualified medical practitioner and supported where appropriate by expert opinion in this field such as a neurologist, neuropsychologist, rehabilitation physician, psychiatrist or other specialist relevant to the person's diagnosis.
- A report from the treating doctor must be provided.
- Self-report of symptoms alone is insufficient. There must also be corroborating evidence of the person's impairment.
- Examples of corroborating evidence may include (but are not limited to):
  - reports from specialists (e.g. neurologist, rehabilitation physician, psychiatrist or neuropsychologist) supporting the diagnosis of conditions associated with neurological or cognitive impairment (e.g. acquired brain injury, stroke/CVA, conditions resulting in dementia, tumour in the brain, some neurodegenerative disorders)
  - results of diagnostic tests (e.g. MRI, CT scans, EEGs)
  - results of cognitive function assessments.

Points	Descriptors
0	There is <b>no</b> functional impact resulting from a neurological/cognitive diagnosis, i.e. the person has no significant problems with memory, attention, concentration, problem solving, visuo-spatial function, planning, decision making, comprehension, self awareness and/or behavioural control.
5	<p>There is a <b>mild</b> functional impact resulting from a neurological/cognitive diagnosis. The person has <u>mild difficulties</u> in <u>at least one</u> of the following areas but is able to complete most day to day activities without assistance:</p> <p><b>Memory</b> occasionally forgets to complete a regular task, sometimes misplaces important items</p> <p><b>Attention and Concentration</b></p> <ul style="list-style-type: none"> <li>• has some difficulty concentrating on complex tasks for more than one hour</li> <li>• may have some difficulty focussing on a task if there are other activities occurring nearby</li> </ul> <p><b>Problem solving</b></p> <ul style="list-style-type: none"> <li>• has difficulty solving complex problems that may involve multiple factors and/or abstract concepts</li> <li>• may show a lack of awareness of problems in some situations</li> </ul> <p><b>Planning</b></p> <ul style="list-style-type: none"> <li>• has some difficulty planning and organising complex activities such as arranging travel and accommodation for an interstate or overseas holiday</li> </ul> <p><b>Decision making</b></p> <ul style="list-style-type: none"> <li>• has some difficulty in prioritising and complex decision making when there are several options to choose from</li> </ul>

Points	Descriptors
	<p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>has some minor difficulty in understanding complex instructions involving multiple steps</li> </ul>
20	<p>There is a <b>severe</b> functional impact resulting from a neurological/cognitive diagnosis. The person has <u>severe difficulties in at least one</u> of the following areas and <u>needs frequent (at least once a day) assistance and supervision</u>:</p> <p><b>Memory</b></p> <ul style="list-style-type: none"> <li>unable to remember routines, regular tasks and instructions, has difficulty recalling events of the past few days, may get easily lost in unfamiliar places</li> </ul> <p><b>Attention and Concentration</b></p> <ul style="list-style-type: none"> <li>unable to concentrate on any task, even a task that interests the person, for more than 30 minutes is easily distracted from any task</li> </ul> <p><b>Problem solving</b></p> <ul style="list-style-type: none"> <li>unable to solve routine day to day problems (e.g. what to do if a household appliance breaks down) and needs regular assistance and advice</li> </ul> <p><b>Planning</b></p> <ul style="list-style-type: none"> <li>unable to plan and organise routine daily activities (such as an outing to the movies or supermarket shopping trip)</li> </ul> <p><b>Decision making</b></p> <ul style="list-style-type: none"> <li>unable to prioritise and make complex decisions and often displays poor judgement, resulting in negative outcomes for self or others</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>unable to understand basic instructions and needs regular prompts to complete tasks, has difficulty understanding abstract concepts</li> </ul> <p><b>Visuo-spatial function</b></p> <ul style="list-style-type: none"> <li>unable to perform many visuo-spatial functions e.g. is unable to read maps or give directions (such as how to get to the person's house) or unable to judge distance or depth (e.g. stumbles on steps or bumps into objects)</li> </ul> <p><b>Behavioural Control</b></p> <ul style="list-style-type: none"> <li>often (more than once a week) unable to control behaviour even in routine, day to day situations and may be verbally abusive to others or threaten physical aggression</li> </ul> <p><b>Self Awareness</b></p> <ul style="list-style-type: none"> <li>lacks awareness of own limitations, resulting in significant difficulties or problems arising in day to day activities</li> </ul>
30	<p>There is an <b>extreme</b> functional impact resulting from a neurological/cognitive diagnosis. The person has <u>extreme difficulties in at least one</u> of the following areas and needs continual assistance and supervision:</p> <p><b>Memory</b></p> <ul style="list-style-type: none"> <li>needs constant prompts and reminders to remember routine tasks, familiar people and places, may get lost even in familiar places if not accompanied, has difficulties remembering events that happened earlier in the day such as what he/she ate for breakfast</li> </ul> <p><b>Attention and Concentration</b></p> <ul style="list-style-type: none"> <li>unable to concentrate on any task for more than a few minutes</li> </ul>

Points	Descriptors
	<p><b>Problem solving</b></p> <ul style="list-style-type: none"> <li>unable to solve even the most basic problems (such as what to do if the kettle is empty) and needs complete assistance with problem solving</li> </ul> <p><b>Planning</b></p> <ul style="list-style-type: none"> <li>unable to plan and organise daily activities and needs complete assistance to organise daily routine</li> </ul> <p><b>Decision making</b></p> <ul style="list-style-type: none"> <li>unable to prioritise and make simple decisions and needs a guardian or other delegate to make decisions or give consent on the person's behalf</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>unable to understand even simple, single step instructions and needs assistance to complete most tasks</li> </ul> <p><b>Visuo-spatial function</b></p> <ul style="list-style-type: none"> <li>unable to perform even basic visuo-spatial functions - for instance, is unable to follow spatial directions (e.g. 'turn left at the corner'), or unable to judge distance or depth which severely limits mobility</li> <li>has left or right-sided neglect, i.e. is not aware of objects, people and/or body parts in the left or right field of vision (even though the person's eyes can see these things, the brain does not register their presence)</li> </ul> <p><b>Behavioural Control</b></p> <ul style="list-style-type: none"> <li>frequently (e.g. every day) unable to control behaviour in a range of day to day situations and this interferes with participation in activities outside the home and requires supervision and possibly restriction to a home or institutional environment</li> </ul> <p><b>Self Awareness</b></p> <ul style="list-style-type: none"> <li>has very poor or no awareness of own limitations resulting in frequent and serious risks to self or others.</li> </ul>

# Schedule 3

## LIST OF RECOGNISED DISABILITIES

- (a) Moderate to severe multiple disability or moderate to severe physical disability (including neurological disability) where the child is, or is likely to be, dependent for mobility indoors and outdoors from the age of three onwards. Example: A child who has cerebral palsy, lower limb deficiencies or spina bifida and is dependent on a stroller, wheelchair, crutches or walking frame.
- (b) Severe multiple or physical disability (including uncontrolled seizures) requiring constant care and attention where the child is less than six months of age.
- (c) Epilepsy (uncontrolled while on medication).
- (d) Chromosomal or syndromic conditions that are not specified elsewhere and where there is moderate or severe intellectual disability and/or multiple, major and permanent physical abnormalities as diagnosed by a paediatrician, paediatric subspecialist or clinical geneticist.
- (e) Down syndrome.
- (f) Fragile X syndrome.
- (g) Neurometabolic degenerative conditions where there is moderate or severe intellectual and/or moderate or severe physical disability and where the condition is diagnosed by a paediatrician, paediatric sub-specialist or clinical geneticist:
  - Lysosomal storage disorders
  - Neurometabolic conditions
- (h) Neurodegenerative disorders where there is moderate or severe intellectual and/or moderate or severe physical disability and where the condition is diagnosed by a paediatrician, paediatric sub-specialist or clinical geneticist.
- (i) Any of the following neuromuscular conditions:
  - Duchenne (or Becker) muscular dystrophy.
  - Autosomal recessive muscular dystrophy.
  - Spinal muscular atrophy conditions (e.g. Werdnig-Hoffman).
  - Friedreich's ataxia.
- (j) Moderate, severe, or profound intellectual disability where IQ is less than 55, (including a child with a known syndrome).
- (k) Autistic Disorder or Asperger's Disorder (not including Pervasive Developmental Disorder not otherwise specified) when diagnosed:
  - by a psychiatrist, developmental paediatrician, or a psychologist experienced in the assessment of Pervasive Developmental Disorders; and
  - using the current Diagnostic and Statistical Manual of Mental Disorders (DSM).



- (l) The following conditions diagnosed by a psychiatrist using the current DSM:
- Child Disintegrative Disorder;
  - major depression of childhood; and
  - childhood schizophrenia.
- (m) Any of the following sensory impairments:
- bilateral blindness where: visual acuity is less than or equal to 6/60 with corrected vision, or visual fields are reduced to a measured arc of less than 10 degrees;
  - hearing loss - at 45 decibels or greater hearing impairment in the better ear, based on a 4 frequency pure tone average (using 500, 1000, 2000 and 4000Hz); and
  - deaf-blindness - diagnosed by a specialist multidisciplinary team, including a professional audiological and ophthalmological evaluation.
- (n) The following dermatological conditions:
- Epidermolysis Bullosa Dystrophica.
  - Hypohidrotic ectodermal dysplasia.
  - Hay Wells syndrome.
  - Severe congenital ichthyoses.
- (o) Phenylketonuria (PKU).
- (p) Other inborn errors of metabolism not specified elsewhere that are treated by medically prescribed diet to prevent neurological disability and/or severe organ damage. Examples include:
- organic acidaemias;
  - urea cycle defects;
  - galactosaemia; and
  - some fatty acid or oxidation defects.
- (q) Cystic Fibrosis.
- (r) Moderate to severe osteogenesis imperfect with two or more fractures per year and/or significant pain that significantly limits activities of daily living.

# Schedule 4

## 'INTELLECTUAL IMPAIRMENT' AND 'INTELLECTUAL DISABILITY' COMPARED

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
<p>'Intellectual impairment'</p>	<p><i>American Psychiatric Association, DSM-IV-TR. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual (DSM-IV-TR, 2000) includes in its section on neurodevelopmental disorders a definition of 'Mental Retardation (Intellectual Impairment)' which refers to substantial limitations in present functioning. Its elements are (a) significantly sub-average general intellectual functioning, (b) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academics, skills, work, leisure, health, and safety, and (c) the onset must occur before age 18 years. This definition is a strictly medical assessment, measured objectively against 'normality'.</i></p> <p>The <i>Butterworths Medical Dictionary</i> entry for intellect is:</p> <ol style="list-style-type: none"> <li>1. The cognitive faculty of the mind as it operates at higher abstract and conceptual</li> </ol>	<ol style="list-style-type: none"> <li>1. <i>Community Welfare Act 1987 (NSW) defines 'intellectual impairment' as 'any defect or disturbance in the normal structure and functioning of the person's brain, whether arising from a condition subsisting at birth or from illness or injury'. It also defines 'intellectually disabled person' as 'a person who, as a result of disabilities arising from intellectual impairment, is substantially limited in one or more major life activities'.</i></li> <li>2. In the <i>Criminal Code (Qld)</i> a 'person with an impairment of the mind' means a person with a disability that:               <ol style="list-style-type: none"> <li>(a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and</li> <li>(b) results in---                   <ol style="list-style-type: none"> <li>(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and</li> </ol> </li> </ol> </li> </ol>	<p>The ambit of each definition varies. Where used in NSW, and arguably Queensland, legislation the term 'intellectual impairment' might be broader than 'intellectual disability'. Yet the DSM definition adopts the traditional three criteria approach, so that FASD could not be guaranteed to be an intellectual impairment. Note, however, that the next edition of the DSM is due in 2013 and includes a proposed revision which would change the name of the diagnosis to 'Intellectual development disorder'.<sup>95</sup> The new criteria will continue to use IQ as a measure, but will not do so as rigidly as the current model.</p> <p>In their common and medical usage, the difference between intellectual <i>disability</i> and <i>impairment</i> seems to be largely semantic, but an exception to this is past proposals by the NSW and Victorian Law Reform Commissions which envisaged intellectual impairment as a broader 'umbrella term' which would include intellectual disability, brain injury or dementia. The NSWLRC later rejected this approach, noting that 'impaired intellectual functioning is</p>

<sup>95</sup> American Psychiatric Association (5 July 2011) *Proposed Revisions – Neurodevelopmental Disorders – A 00-01 Intellectual Developmental Disorders* <<http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=384#>>

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
	<p>levels</p> <p>2. The faculty of the mind by which one knows and reasons.</p> <p>The <i>Penguin Dictionary of Psychology</i> entry for intellect is: 'Originally this term referred specifically to the rational thought functions of the human mind; today it is a generic term covering the cognitive processes as a whole'.</p> <p>The <i>Penguin Dictionary of Psychology</i> entry for impairment is 'Generally, any loss of or decrement in function. More specifically, such loss or decrement due to injury or disease'.</p>	<p>(ii) the person needing support.</p> <p>3. The term also appears, but is not directly defined in:</p> <p><i>Social Security Act 1991</i> (Cth)</p> <p><i>Schools Assistance Act 2008</i> (Cth)</p> <p><i>Community Land Management Act 1989</i> (NSW) s 111A</p> <p><i>Residential Parks Act 1988</i> (NSW) s 32</p> <p><i>Strata Schemes Management Act 1996</i> (NSW) s 121.</p> <p><i>Guardianship and Administration Act 2000</i> (Qld) (where in Schedule 4 'impairment' is defined to mean 'a cognitive, intellectual, neurological or psychiatric impairment')</p>	<p>not a clinical term with a well-recognised meaning', that it is difficult to define impaired intellectual functioning in other than circular or inclusive terms, and that it is impossible to list all the impairments which could fall under the term, leading to uncertainty in application.<sup>96</sup></p>

<sup>96</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, (1996) Report 80, Explanatory Note to Recommendation 1.

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
<p>'Intellectual disability', and 'disability' generally.</p>	<p>The American Association on Intellectual and Developmental Disabilities (AAIDD) has developed a definition of intellectual disability, which it defines as 'characterised by significant limitations both in intellectual functioning and in adaptive behaviour as expressed in conceptual, social, and practical adaptive skills' and which 'originates before the age of 18'. The intellectual functioning criterion for a diagnosis of intellectual disability is approximately two standard deviations below the mean, considering the standard error of measurement for the specific assessment instruments used, and the strengths and limitations of the instrument. This definition also uses standardised tests to measure limitations in adaptive behaviour. The AAIDD's definition reflects a move towards more 'social' definitions of intellectual disability rather than an IQ or a set of definable systems.</p>	<p>1. The <i>Disability Services Act 2006</i> (Vic) defines disability as:</p> <p>(a) a sensory, physical or neurological impairment or acquired brain injury or any combination thereof, which—</p> <p>(i) is, or is likely to be, permanent; and</p> <p>(ii) causes a substantially reduced capacity in at least one of the areas of self-care, self-management, mobility or communication; and</p> <p>(iii) requires significant ongoing or long term episodic support; and</p> <p>(iv) is not related to ageing; or</p> <p>(b) an intellectual disability; or</p> <p>(C) a developmental delay.</p> <p>An 'intellectual disability', in relation to a person over the age of 5 years, means the concurrent existence of:</p> <p>(a) significant sub-average general intellectual functioning; and</p> <p>(b) significant deficits in adaptive behaviour—</p> <p>each of which became manifest before the age of 18 years;</p> <p>2. The <i>Law of Property Act 2000</i> (NT) defines intellectual disability as 'a disability resulting from an illness, injury, congenital disorder or organic</p>	<p>Where the Act adopts the traditional three criteria from the DSM-IV-TR (albeit that in the DSM the terminology is impairment rather than disability) (see for example the Victorian <i>Disability Act 2006</i> definition of intellectual disability), the definition does not guarantee that a person with FASD would fall within that definition. Confusingly, however, some definitions of the same term are broader and do not require the traditional three criteria, such as the one in the Northern Territory <i>Law of Property Act 2000</i>.</p> <p>Where, however, a general definition of disability is adopted, there is more scope for people with FASD to be protected. An example is the <i>Anti-Discrimination Act 1977</i> (NSW) which now adopts a general definition of 'disability', without referring specifically to an intellectual disability. Instead, subsection (d) of the definition of 'disability' refers to 'a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction' and (e) refers, in the alternative, to 'a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour'.</p> <p>The equivalent provision of the Victorian <i>Disability Act 2006</i> (then in the <i>Intellectually Disabled Persons' Services Act 1986</i>, where it was defined in substantially the same terms) was considered in <i>Clancy v Director General of the Department of Community Services Victoria</i> [1994] 1 VR 426. The Victorian Supreme Court held that it was impermissible</p>

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
		<p>deterioration, or of unknown origin, and by reason of which the person appears to be unable to make reasonable judgments or informed decisions relevant to daily living'.</p> <p>3. The repealed <i>Intellectually Disabled Citizens' Act 1986</i> (Qld) included a definition of 'intellectually disabled citizen' which defined the term as: 'a citizen who is limited in his or her functional competence by reason of intellectual impairment which is:</p> <p>(a) of congenital or early childhood origin; or</p> <p>(b) the result of illness, injury or organic deterioration.</p>	<p>for the Intellectual Disability Review Panel strictly to limit the measurement of intelligence to that which could be accomplished by IQ tests. In cases where results of IQ tests were equivocal it might be appropriate, or even necessary, for the panel to have regard to an assessment of social competence and personal adaptability not simply as a measure of adaptive behaviour but also as a measure of general intellectual functioning. On the facts, however, the relevant decision was not open to review because failure to have regard to other assessments was not unreasonable in the Wednesbury sense.</p> <p>The NSW Law Reform Commission proposed in its Report 80 a definition of intellectual disability in these terms: 'a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour'.<sup>97</sup> This definition would be helpful to those with an acquired brain injury as it does not require onset before age 18, but it is not clear on what basis it would measure 'significantly below average intellectual functioning' which, at any rate, may exclude some people with FASD. In any event, that definition was recommended to apply only in a criminal context (and not to welfare or service provision), and was never adopted in NSW. In a statement which could be argued in respect of FASD, the Commission suggested that it may not be appropriate to apply the procedures (again, in a criminal context only)</p>

<sup>97</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, (1996) Report 80, Recommendation 1.

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
			used for a person with below average intellectual functioning and deficits in such areas as communication skills and independent living, to a person with perhaps reduced, but still above average, intelligence and with adaptive deficits such as mood swings or a short attention span.
'Cognitive impairment'	<p>There is no internationally agreed standard definition or assessment for this term. Rather, it is a hybrid of two terms which tends to be used more inclusively than 'intellectual disability' and to refer generally to a loss of brain function affecting judgment, resulting in a decreased ability to process, learn and remember information.<sup>98</sup></p> <p>The US National Library of Medicine/<i>Merriam-Webster</i> definition of 'cognitive' is 'of, relating to, or being conscious intellectual activity (as thinking, reasoning, remembering, imagining, or learning words)'.</p> <p>Black's Medical Dictionary, 42nd edition, defines cognition as 'The mental processes by which a person acquires knowledge. Among these are reasoning, creative actions and solving problems.' It defines disability as 'An observable mental or physical loss or impairment which is measurable and which may be permanent or temporary. If the disability is serious enough to affect a person's normal function adversely, it is</p>	<ol style="list-style-type: none"> <li>1. <i>Criminal Procedure Act 1986</i> (NSW) s 306M(1) defines a cognitively impaired person as 'a person who has a cognitive impairment'.</li> <li>2. <i>Crimes Act 1900</i> (NSW) s 61H (1A) states that, for the purposes of the Division (which relates to sexual assault offences), a person has a cognitive impairment if the person has: <ul style="list-style-type: none"> <li>(a) an intellectual disability, or</li> <li>(b) a developmental disorder (including an autistic spectrum disorder), or</li> <li>(c) a neurological disorder, or</li> <li>(d) dementia, or</li> <li>(e) a severe mental illness, or</li> <li>(f) a brain injury,</li> </ul> that results in the person requiring supervision or social habilitation in connection with daily life activities. <p>This definition was inserted by the <i>Crimes Amendment (Cognitive Impairment—</i></p> </li> </ol>	<p>The <i>Crimes Act 1900</i> (NSW) definition seems to envisage 'cognitive impairment' as an umbrella term which includes but is not limited to intellectual disability. The term 'cognitive impairment' could therefore encompass disabilities other than those fitting the criteria for intellectual disability, such as those set out in (b)-(f). There would arguably be scope for FASD to fit within the definition of cognitive impairment on this basis. The Victorian <i>Evidence Act</i> mirrors this. Both definitions seem to be in accordance with the definition of 'cognitive disabilities' produced by the National Council on Intellectual Disability, which describes people with cognitive disabilities as having less than average intellectual function and adaptive behaviour skills - but at a level not significant enough to be classified as intellectual disability.<sup>99</sup></p> <p>The change in definition in both the NSW and Victorian Acts mentioned above occurred after, but did not follow, the NSWLRC's recommended definition of intellectual disability. The NSWLRC criticised the older</p>

<sup>98</sup> New South Wales Law Reform Commission (January 2010) *Consultation Paper 5 – People with cognitive and mental health impairments in the criminal justice system: an overview*, p 11-12.

<sup>99</sup> National Council on Intellectual Disability (3 November 2011) *Definition of Cognitive Disabilities* < <http://ncid.org.au/index.php/definition-cd>> at 27 January 2012.

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
	<p>described as a handicap'.</p> <p><i>Butterworths Medical Dictionary</i> defines cognition as 'A psychological term for the activity of the mind by which one 'knows' things, ie the means by which one is aware of the processes of thinking and perceiving. The faculties of understanding and reasoning are included in the term'.</p> <p>The Penguin Dictionary of Psychology defines 'cognitive impairment disorders as 'an umbrella term covering those disorders the primary symptoms of which include impaired cognitive functioning.'</p> <p>It also contains entries for:</p> <ul style="list-style-type: none"> <li>• 'cognition': a broad (almost unspecifiable so) term which has been traditionally used to refer to such activities as thinking, conceiving and reasoning. Most psychologists have used it to refer to any class of mental 'behaviours' (using that term very loosely) with underlying characteristics of an abstract nature involving symbolizing, insight, expectancy, complex rule use, imagery, belief, intentionality, problem-solving and so forth. While the term is typically applied to mental activities in the general sense, individual thoughts, ideas or pieces of knowledge are also sometimes referred to as cognitions.</li> <li>• impairment : 'Generally, any loss of or decrement in function. More specifically, such loss or decrement due to injury or disease'</li> <li>• Disability: 'generally, any lack of ability to</li> </ul>	<p><i>Sexual Offences) Act 2008</i> (NSW). That Act inserted 'cognitive impairment' in place of 'serious intellectual disability' throughout the entire <i>Crimes Act</i> and for 'intellectually impaired person' throughout the <i>Criminal Procedure Act</i>.</p> <p>The term cognitive impairment is also used in the <i>Fines Act 1996</i> (NSW)</p> <p>3. <i>Evidence (Miscellaneous Provisions) Act 1958</i> (Vic) defines 'cognitive' impairment to include impairment because of mental illness, intellectual disability, dementia or brain injury.</p> <p>4. The <i>Mental Health and Related Services Amendment</i> bill is currently before the Northern Territory Legislative Assembly. It includes a definition of the term 'cognitive impairment' in s 5, which inserts into the <i>Mental Health and Related Services Act</i> a new section 6A:</p> <p><i>A person has a cognitive impairment if the person has an intellectual impairment, neurological impairment or acquired brain injury (or any combination of these) that:</i></p> <p>(a) <i>is, or is likely to be, permanent</i></p> <p>(b) <i>results in substantially reduced capacity in at least one of the following:</i></p> <p>(i) <i>self-care or management;</i></p> <p>(ii) <i>decision making or problem solving;</i></p> <p>(iii) <i>communication or social functioning.</i></p> <p>If a person has a cognitive impairment and</p>	<p>version of the Crimes Act for being inconsistent with the term 'intellectual disability' as understood by psychiatrists, requiring 'an appreciably below average general intellectual function that results in the person requiring supervision or social habilitation in connection with daily life activities'. The NSWLRC observed that the requirement of social habilitation appeared to indicate a higher level of disability than experienced by many people with an intellectual disability.</p>

Term	Medical/psychiatric/diagnostic definitions	Where it appears in legislation, and how it is defined.	Is there scope for it to include FASD?
	perform some function; more specifically, a congenital impairment or loss of function through trauma, disease, etc'	a behavioural disturbance, they are defined by subsection (1) as having a 'complex cognitive impairment'. A person has a 'behavioural disturbance' according to subsection (3) 'if the person's mental condition has deteriorated to the extent that the person is behaving in an aggressive manner or is engaging in seriously irresponsible conduct.	
'Neurological impairment'	<p><i>Black's Medical Dictionary</i>, 42nd edition, defines neurology as The branch of medical practice and science which is concerned with the study of the nervous and its disorders. Specialists in neurology - neurologists - examine a patient's nerves, sensory and motor functions and reflexes.</p> <p><i>Levitt's Short Encyclopaedia of Medicine for Lawyers</i> defines neurology as 'the branch of medicine dealing with diseases of the nervous system; the study of the structures and functions of nervous tissue'.</p> <p><i>Butterworths Medical Dictionary</i> defines neurology as 'the section of medicine that deals with the study and treatment of diseases of the nervous system'.</p>		



# Schedule 5

## DEFINITIONS IN DISABILITY SERVICES LEGISLATION COMPARED

State/Territory	Legislation and Definition
[Commonwealth]	<p>Section 8 of the <i>Disability Services Act</i> 1986 states that</p> <p>(1) The target group for the purposes of this Part consists of persons with a disability that:</p> <ul style="list-style-type: none"> <li>(a) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;</li> <li>(b) is permanent or likely to be permanent; and</li> <li>(c) results in: <ul style="list-style-type: none"> <li>(i) a substantially reduced capacity of the person for communication, learning or mobility; and</li> <li>(ii) the need for ongoing support services.</li> </ul> </li> </ul> <p>Section 18 of the Act states that the target group for Part III of the Act, concerning provision of rehabilitation services by the Commonwealth, is persons who:</p> <ul style="list-style-type: none"> <li>(a) have attained 14 years of age but have not attained 65 years of age; and</li> <li>(b) have a disability that: <ul style="list-style-type: none"> <li>(i) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments; and</li> <li>(ii) results in a substantially reduced capacity of the person: <ul style="list-style-type: none"> <li>(A) to obtain or retain unsupported paid employment; or</li> <li>(B) to live independently.</li> </ul> </li> </ul> </li> </ul>
Queensland	<p>The <i>Disability Services Act 2006</i> (Qld) s 11 defines a disability as:</p> <p>(1) A person's condition that—</p> <ul style="list-style-type: none"> <li>(a) is attributable to— <ul style="list-style-type: none"> <li>(i) an intellectual, psychiatric, cognitive, neurological, sensory or physical impairment; or</li> <li>(ii) a combination of impairments mentioned in subparagraph (i); and</li> </ul> </li> <li>(b) results in— <ul style="list-style-type: none"> <li>(i) a substantial reduction of the person's capacity for communication, social interaction, learning, mobility or self care or management; and</li> <li>(ii) the person needing support.</li> </ul> </li> </ul> <p>(2) For subsection (1), the impairment may result from an acquired brain injury.</p> <p>(3) The disability must be permanent or likely to be permanent.</p> <p>(4) The disability may be, but need not be, of a chronic episodic nature.</p>

State/Territory	Legislation and Definition
ACT	<p>In the <i>Disability Services Act 1991</i> (ACT) a disability, in respect of a person, is defined as a disability—</p> <ul style="list-style-type: none"> <li>(a) that is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments; and</li> <li>(b) that is permanent or likely to be permanent; and</li> <li>(c) that results in— <ul style="list-style-type: none"> <li>(i) a substantially reduced capacity of the person for communication, learning or mobility; and</li> <li>(ii) the need for continuing support services; and</li> </ul> </li> <li>(d) that may or may not be of a chronic episodic nature.</li> </ul>
NSW	<p>In the <i>Disability Services Act 1993</i> (NSW) s 5 a person is in the target group if the person has a disability (however arising and whether or not of a chronic episodic nature):</p> <ul style="list-style-type: none"> <li>(a) that is attributable to an intellectual, psychiatric, sensory, physical or like impairment or to a combination of such impairments, and</li> <li>(b) that is permanent or is likely to be permanent, and</li> <li>(c) that results in: <ul style="list-style-type: none"> <li>(i) a significantly reduced capacity in one or more major life activities, such as communication, learning, mobility, decision-making or self-care, and</li> <li>(ii) the need for support, whether or not of an ongoing nature.</li> </ul> </li> </ul> <p>In the <i>Guardianship Act 1987</i> s 3(2), a reference to a person who has a disability is a reference to a person:</p> <ul style="list-style-type: none"> <li>(a) who is intellectually, physically, psychologically or sensorily disabled,</li> <li>(b) who is of advanced age,</li> <li>(c) who is a mentally ill person within the meaning of the <i>Mental Health Act 2007</i>, or</li> <li>(d) who is otherwise disabled,</li> </ul> <p>and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.</p>
NT	<p>The <i>Disability Services Act</i> s 2(1) defines disability as a disability:</p> <ul style="list-style-type: none"> <li>(a) which is attributable to an intellectual, sensory, physical or psychiatric impairment or a combination of those impairments;</li> <li>(b) which is permanent or likely to be permanent;</li> <li>(c) which results in: <ul style="list-style-type: none"> <li>(i) a substantially reduced capacity of the person for communication, learning or mobility; and</li> <li>(ii) the need for continuing support services; and</li> </ul> </li> <li>(d) which may or may not be of a chronic episodic nature.</li> </ul> <p>NOTE that this definition remains the same in the <i>Disability Services Act 2011</i>.</p>

State/Territory	Legislation and Definition
Tasmania	<p>The <i>Disability Services Act 1992</i> (Tas) s 3 defines a disability as a disability:</p> <ul style="list-style-type: none"> <li>(a) which is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of those impairments; and</li> <li>(b) which is permanent or likely to be permanent; and</li> <li>(c) which results in – <ul style="list-style-type: none"> <li>(i) a substantially reduced capacity of a person for communication, learning or mobility; and</li> <li>(ii) the need for continuing support services; and</li> </ul> </li> <li>(d) which may or may not be of a chronic episodic nature</li> </ul>
South Australia	<p>The <i>Disability Services Act 1993</i> (SA) s 3 defines a disability in relation to a person as a disability:</p> <ul style="list-style-type: none"> <li>(a) that is attributable to intellectual, psychiatric, cognitive, neurological, sensory or physical impairment, or a combination of any of those impairments; and</li> <li>(b) that is, or is likely to be, permanent; and</li> <li>(c) that results in the person having— <ul style="list-style-type: none"> <li>(i) a reduced capacity for social interaction, communication, learning, mobility, decision making or self care; and</li> <li>(ii) a need for continuing support services,</li> </ul> </li> </ul> <p>and includes such a disability notwithstanding that it is of an episodic nature;</p>
Western Australia	<p>The <i>Disability Services Act 1993</i> (WA) s 3 defines a disability as a disability:</p> <ul style="list-style-type: none"> <li>(a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments;</li> <li>(b) which is permanent or likely to be permanent;</li> <li>(c) which may or may not be of a chronic or episodic nature; and</li> <li>(d) which results in--- <ul style="list-style-type: none"> <li>(i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and</li> <li>(ii) a need for continuing support services</li> </ul> </li> </ul>

