



**The North Australian Aboriginal Justice  
Agency and the Central Australian Aboriginal  
Legal Aid Service's Joint Submission**

**to the**

**NT Parliamentary Inquiry into Foetal alcohol  
syndrome disorders (FASD)**

**May 2014**

# Introduction

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The North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service is pleased to have this opportunity to make a submission to the NT Parliamentary Inquiry into Foetal Alcohol Syndrome Disorders (FASD).

NAAJA and CAALAS share the Government's serious concern about the harm that alcohol is causing to Territorians, and in particular, to children and unborn children.

NAAJA and CAALAS are conscious that others will address the Inquiry on the prevalence in the Northern Territory of Foetal Alcohol Spectrum Disorder (FASD) and the nature of the injuries and effects of FASD on its sufferers.

As an Aboriginal justice agency, NAAJA and CAALAS's submission will focus of the interaction between Aboriginal persons with FASD and the justice system.

We note that many of the comments and recommendations we make in relation to FASD also extend equally to other forms of developmental delay and cognitive impairment.

## Summary of Recommendations

### Culturally safe, therapeutic programs

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Recommendation 1: That the Commonwealth and NT Governments develop a range of accessible and culturally safe therapeutic programs across the Northern Territory for expectant mothers and children at risk of developmental delays, and to support FASD-affected individuals.

Recommendation 2: That the Commonwealth and NT Governments expand the Central Australian Aboriginal Congress's Family Partnership Program (FPP) across the Northern Territory.

### Awareness of FASD among legal stakeholders

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Recommendation 3: Targeted training on FASD is urgently needed to increase awareness of FASD amongst judges, magistrates, lawyers, prosecutors, police and corrections officers. Stakeholders could be provided with a checklist or other basic screening instrument, and training in its use, to improve the early identification of defendants who might be FASD-affected and require a referral to an assessment service.

### Diagnosis

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Recommendation 4: Urgent steps are needed to improve diagnostic capacity within the justice system in the Northern Territory to enable routine screening of FASD-suspected defendants and their family members. This requires multi-disciplinary health professionals to undertake assessments and prepare treatment plans.

Recommendation 5: Expert neuropsychological assessment should be prepared with recommendations about the services and supports that should be provided to meet that person's needs where that person is suspected to be FASD-affected.

Recommendation 6: Access to FASD assessments should not be denied based on financial constraints or available resources.

## **Sentencing**

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Recommendation 7: The disproportionate impact of mandatory sentencing laws on FASD-affected defendants and defendants with other forms of cognitive impairment needs to be urgently addressed by specifically exempting those with FASD and cognitive impairment from mandatory sentencing laws.

Recommendation 8: The NT *Sentencing Act* should be amended to include a provision that deterrence, denunciation and punishment are not be the primary considerations in sentencing FASD-affected defendants; rather rehabilitation and community safety are to be the primary considerations.

Recommendation 9: That an urgent audit is conducted of all adult prisoners, juvenile detainees, and young people in the child protection system who are FASD-affected.

Recommendation 10: Court and parole orders for FASD-affected defendants must be tailored to the needs and capacity of the individual.

Recommendation 11: That the Commonwealth and NT Governments expand NAAJA's Throughcare project to provide intensive case management to FASD-affected defendants in the justice system and provide funding to CAALAS to enable it to operate a similar program in Central Australia.

## **Alternatives to incarceration**

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Recommendation 12: The negative impacts of incarceration on FASD-affected defendants need to be understood. Incarceration must be avoided wherever reasonably possible for FASD-affected defendants.

Recommendation 13: A range of non-custodial sentencing options are needed to meet the needs of FASD-affected defendants in the justice system. These include:

- a) Intensive, culturally safe and individually tailored support programs for FASD-affected individuals involved with the criminal justice system,
- b) special court processes for FASD-affected defendants,
- c) secure care facilities for those who do not have stable accommodation and who would otherwise be sent to prison.

## **Mental impairment and fitness to plea**

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Recommendation 14: The Northern Territory needs to develop a legislative scheme particular to the needs of cognitively impaired people proceeded against summarily which provides effective and flexible diversion and therapeutic intervention options to the court

Recommendation 15: Secure care facilities should be appropriately resourced in both the Top End and Central Australia to ensure that defendants found unfit to plea are only held in prison as an absolute last resort.

## **Child protection**

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Recommendation 16: FASD screening should take place for all young people coming into the care of the Department of Children and Families as part of their routine health checks.

Recommendation 17: Where there is evidence to suggest a parent is FASD-affected, the parent must be immediately referred to assessment for full diagnosis.

Recommendation 18: The Northern Territory Government should fund NT Legal Aid Commission, NAAJA and CAALAS to provide wrap-around legal services with social workers supporting lawyers for parents in the child protection system.

## **Prevention, early intervention and education**

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Recommendation 19: That the NT Government invest in funding whole-of-community FASD education programs, and particularly in programs targeting young women to prevent FASD.

Recommendation 20: That the Commonwealth and NT Governments resume funding to the FASD project operated by Anyinginyi Health Aboriginal Corporation which provides culturally safe education and support for Aboriginal women living in one of the most marginalised, service poor regions of the Northern Territory.

# **1. The NT needs a health-focused approach to FASD**

NAAJA and CAALAS are very concerned about the suggested resort to prosecution of women drinking in pregnancy.

We note comments made by Attorney-General John Elferink on *Lateline* on 13 March 2014 that the NT Government were 'currently exploring the antenatal rights of the unborn child', which 'could include prosecuting women who are drinking during pregnancy'<sup>1</sup>

We also note and appreciate the later clarification provided by the Attorney-General during Parliamentary debate on 27 March 2014 that:

The only reason I said this during the interview was because I would see it as a means to an end, if it was to be done at all. The means to an end is the nature of

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<sup>1</sup> ABC Radio, 'NT plans to punish heavy drinkers during pregnancy', *The World Today*, 14 March 2014.

restraint one might contemplate if at all, but it would only be a means to an end and if the commentary is any yardstick to go by, it would be a clumsy way to proceed.

The only reason I do not rule it out at this stage is I do not want to pre-empt anything the committee might look at, but I suspect already, on the basis of what I have heard today, it will be roundly dismissed by committee members on both sides of the argument as well as the Independent, which is fine. It does not bother me in the least that it will be roundly dismissed.

NAAJA and CAALAS reiterate that restraint and criminalisation are not approaches that this Inquiry should advocate. In our view, the Northern Territory should seek health-based and – above all – evidence-based approaches of ‘what works’ to prevent and address FASD. Criminalising pregnant women who drink will not work; it will only further marginalise these women.

The Consensus Statement on Legal Issues and FASD published in 2013 by the Institute of Health Economics in Alberta, Canada is arguably international best-practice in relation to how the justice system should respond to FASD-affected individuals.

Consistent with the views of experts in other jurisdictions, experts in Australia have stated that punitive responses to drinking by pregnant women will be ineffective and could have other unintended adverse consequences.<sup>2</sup> The Foundation for Alcohol Research and Education (FARE) responded to the *Lateline* story on 14 March 2014 by noting that the proposal to criminalise those who drink while pregnant would not be successful.<sup>3</sup> FARE states that punitive approaches will deter women who need help from trying to access it, which will, in turn, cause even greater levels of harm in the future.

FARE called for Australia to follow countries like Canada in dealing with FASD, emphasising that education and awareness are the key:

What we need to do is focus on prevention and encouraging health professionals to talk to pregnant women about their alcohol consumption and we need to ensure there are adequate treatment and rehabilitation for women who are pregnant and alcohol dependent.

NAAJA and CAALAS consider that in the unique context of the Northern Territory, it is even more critical that culturally safe, therapeutic treatment and rehabilitation options be implemented.

In a context where so many Aboriginal people do not have the same level of access to health services as non-Aboriginal people, caution should be exercised in relation to policy drivers that could lead to further barriers to Aboriginal women seeking assistance from health services.

If there are pregnant women who continue to drink despite education and supports, NAAJA and CAALAS are concerned that criminalising alcohol dependence or coercive methods of requiring women to undertake treatment may have a ‘net-widening’ effect, such that people could be mandated into treatment on a precautionary or preventative basis. This will further marginalise already vulnerable women.

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<sup>2</sup> See also Ian Binnie and Marguerite Trussler, *Legal Issues of Fetal Alcohol Spectrum Disorder (FASD)* (Consensus Statement, Institute of Health Economics, 2013) 34.

<sup>3</sup> ABC, ‘N.T. alcohol experts oppose criminalisation of pregnant drinkers’, *Lateline*, 14 March 2014.

We also wish to highlight that unlike most other jurisdictions, the Northern Territory has a range of mechanisms in place to address the situation where pregnant women are drinking at unsafe levels. These include not just criminal charges, but also the Alcohol Mandatory Treatment regime triggered by protective custody admissions, and Alcohol Protection Orders.

Rather than seeking to introduce punitive, criminal justice measures to address FASD and other harmful consequences of alcohol use in our communities, the government must commit to implementing evidence-based policies and programs to reduce the misuse and abuse of alcohol and its consequences.

In addition to the recommendations we make in this submission, we refer the Inquiry to the submissions bodies and organisations such as the Aboriginal Peak Organisations Northern Territory (APONT) made to the Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities. We also refer the Inquiry to the final reports on the Grog Summits held by APONT in the Top End and Central Australia. There are extensive evidence-based recommendations in these submissions on mechanism to reduce the harm alcohol causes in the Northern Territory, including recommendations outlining the benefits of whole of community supply reduction measures. We urge the government to show strong and principled leadership and the ‘turn down the tap’ on grog.

## **2. Culturally safe, therapeutic programs**

Unfortunately, most jurisdictions in Australia do not have appropriate services to support expectant mothers, children at risk of developmental delays, and FASD affected individuals. The Northern Territory is no exception.

It needs to be clearly understood that standard programs may not be appropriate for a FASD-affected individual. FASD-affected defendants have cognitive impairments which may, for example, impact on their ability to participate in and successfully complete programs relating to substance abuse or anger management.<sup>4</sup>

NAAJA and CAALAS are strongly of the view that Commonwealth, State and Territory Governments must ensure that culturally safe, therapeutic programs and services are accessible to expectant mothers who are at risk of drinking during pregnancy, children at risk of developmental delays, and and to FASD-affected individuals.

NAAJA and CAALAS are aware of some excellent programs that have been in operation in the NT. We wish to highlight one of these as an example of a culturally safe, strengths-based program that the Inquiry may seek to champion as a best-practice example of an effective program to address FASD in the NT.

### **Family Partnership Program (FPP)**

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<sup>4</sup> Heather Douglas, ‘Sentencing and Fetal Alcohol Spectrum Disorder’ (Program Research Paper, National Judicial College of Australia, 2010) 13.

The Family Partnership Program (FPP) run by the Central Australian Aboriginal Congress has been operating since 2009. It is an evidence-based home visiting program and has achieved positive outcomes for Aboriginal women and their families.

The FPP provides ongoing education and support to women and their families, from pregnancy until the child is two years old. The program has been evaluated as a successful model and offers a framework for assisting pregnant women by providing education, support and early intervention assistance to effectively deal with FASD.

NAAJA endorses comments made by Professor Elizabeth Elliott at the 2013 APO NT Central Australian Grog Summit:

FASD is 100 per cent preventable. We need to support expectant mothers to stop drinking.<sup>5</sup>

NAAJA and CAALAS consider that the FPP is an outstanding example of a culturally safe therapeutic program effectively supporting expectant mothers. It should be expanded to all regions of the Northern Territory.

**Recommendation 1:** That the Commonwealth and NT Governments develop a range of accessible and culturally safe therapeutic programs across the Northern Territory for expectant mothers and children at risk of developmental delays and to support FASD-affected individuals.

**Recommendation 2:** That the Commonwealth and NT Governments expand the Central Australian Aboriginal Congress's Family Partnership Program (FPP) across the Northern Territory.

### 3. Awareness of FASD among legal stakeholders

FASD-affected defendants are in a position of unique disadvantage within the justice system. They are more susceptible to agreeing with any propositions put to them, may have a poor understanding of time and sequence, and may have increased difficulty following and being actively involved in court proceedings.<sup>6</sup>

It is the responsibility of all legal stakeholders to identify suspected FASD-affected and facilitate referrals to assessment services, and to respond appropriately to the needs of those identified as FASD-affected. This includes defence lawyers, prosecutors, police, corrections officers and the judiciary.

Yet despite the importance of legal stakeholders having a strong understanding of FASD, an Australian study found the contrary - one fifth of legal practitioner respondents had not heard

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<sup>5</sup> Vicki Gillick, Alyson Wright and Sarah Stoller, 'Grog in the Territory: Central Australian summit on alcohol policy and its impact on Aboriginal people and communities' (Report, Aboriginal Peak Organisations NT, August 2013) 20.

<sup>6</sup> Douglas, above n 5.

of FASD. Around half of those who had heard of the disorder were unclear as to its effects.<sup>7</sup> Similar findings could be expected amongst prosecutors, police, corrections officers and the judiciary.

Other jurisdictions have taken strong steps to address this chronic lack of awareness of FASD. For example, the Consensus Statement on Legal Issues and FASD published in 2013 by the Institute of Health Economics in Alberta, Canada,<sup>8</sup> provides a blueprint for how a justice system can improve the way it identifies and deals with FASD-affected defendants.

There is an urgent need to address the lack of awareness of FASD and its implications in the justice system amongst Northern Territory legal stakeholders. The first step is to increase awareness and understanding of FASD in the justice system. Targeted training for all professionals working in the legal system is needed. Legal practitioners armed with sufficient knowledge of the characteristics of FASD will be more likely to identify FASD as a possible issue and make referrals to specialist clinicians when suspicions of FASD arise.

Providing training to Police on FASD is also critical as it will assist in facilitating the early referral of defendants presenting with characteristics of FASD. As Police are generally the first point of contact in the system, they are in a unique position to identify a potential FASD diagnosis and should seek a diagnosis at the earliest possible time. Furthermore, it is imperative that police are aware of the dangers of interviewing FASD-affected defendants, given the susceptibility of FASD-affected individuals to agree with propositions put to them.

Other initiatives, such as the Canadian initiative of using a 'medic alert type bracelet' for FASD-affected young people, could also be implemented to improve police awareness of FASD. This would mean that when police pick up a FASD-affected individual, they will be immediately aware of their FASD status and will be able to take this into account in detaining, cautioning and interviewing the individual. It is imperative that initiatives such as 'medic alert type bracelets' be entirely voluntarily, and not prejudice the welfare or interests of the wearer.

Magistrates and judges should also receive training on FASD and its symptoms, so that they can ensure that court processes do not operate to disadvantage FASD-affected persons. Training on FASD and its symptoms may also increase the use of court ordered reports in appropriate circumstances to determine whether a defendant has a FASD and special needs related to his or her FASD.

With targeted training of legal stakeholders working in the criminal justice system, we anticipate there would be an increase in referrals of individuals with suspected FASD for formal assessment and diagnosis, and an improved response to the special needs of FASD-affected defendants in the justice system.<sup>9</sup>

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<sup>7</sup> Heather Douglas et al, 'The importance of foetal alcohol spectrum disorder for criminal law in practice: Views of Queensland lawyers' (2012) 32 *Qld Lawyer* 153, 163.

<sup>8</sup> See Ian Binnie and Marguerite Trussler, *Legal Issues of Fetal Alcohol Spectrum Disorder (FASD)* (Consensus Statement, Institute of Health Economics, 2013).

<sup>9</sup> Douglas, above n 5, 20-21.

**Recommendation 3:** Targeted training on FASD is urgently needed to increase awareness of FASD amongst judges, magistrates, lawyers, prosecutors, police and corrections officers.

## 4. Screening and assessment

We are concerned that, because FASD often goes unidentified, many defendants in the criminal justice system and parents and children in the child protection system do not receive the support they need to find a way out of the system.

We agree with the recommendation in the *Consensus Statement on Legal Issues and FASD* 2013 that research is needed to gain a clear picture of the number of FASD-affected people in the correctional, youth justice, and child protection systems. We also recognise that obtaining this data is complicated by the challenges involved in diagnosing FASD. These challenges include:

- obstacles in obtaining information about the mother's drinking patterns during pregnancy;<sup>10</sup>
- a general lack of medical expertise in diagnosing the disorder;<sup>11</sup>
- sufferers may have been diagnosed with other disorders which may mask the existence of FASD;<sup>12</sup>
- there are frequently no physical characteristics to assist in its diagnosis;<sup>13</sup>
- diagnosis can require the involvement of a multi-disciplinary team (psychologists, neuropsychologists, psychiatrists and paediatricians).<sup>14</sup>

As the two largest legal practices in the Northern Territory, our extensive experience confirms that whilst a number of our clients may be suspected of having a FASD, confirmed diagnoses are seldom made in the NT justice system. This reflects some of the challenges outlined above.

### The need for routine screening and the appointment of specialist court-based clinicians

Magistrate Catherine Crawford of the Western Australian Children's Court suggested that the prevalence of FASD in youth engaged with the criminal justice system is sufficiently high to warrant routine screening.<sup>15</sup>

NAAJA and CAALAS are also concerned that far too many children and young people involved in the criminal justice system are likely to have an unidentified cognitive impairment. There is currently a dearth of resources available in the NT youth justice system to undertake cognitive assessments of young people, which means that even when a cognitive impairment is suspected, it can be very difficult to obtain a cognitive impairment assessment.

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<sup>10</sup> Douglas, above n 5, 8.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid, 9.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid, 8.

<sup>15</sup> Crawford, above n 11, 7.

Without a diagnosis, the justice system is ill-equipped to meet the complex needs of the child or young person. Increased diagnosis would enable fairer justice processes to be put in place for FASD-affected defendants that recognise their reduced cognitive capacity. It would allow treatment plans to be developed so that FASD-affected defendants can be provided with therapeutic interventions and supports that in all likelihood they have never before been able to access. This would lead to positive health outcomes and would reduce their risk of reoffending.

Diagnosis of FASD will reduce the number of FASD-affected defendants who 'cycle' through the justice system with little, if any, systemic consideration of their cognitive capacity and their therapeutic needs.

It would also provide an opportunity to identify family members who may also be FASD-affected and where they are FASD-affected, to put supports in place for them as well.<sup>16</sup>

In our view, urgent steps are needed to improve diagnostic capacity within the justice system in the Northern Territory to enable routine screening of FASD-suspected defendants in custody.

In addition, the NT does not have medical professionals based at Magistrates Courts, as is the case with some other jurisdictions. This limits the ability of stakeholders in the justice system in the NT to access assessments and reports on FASD and other forms of cognitive impairment efficiently and effectively, and therefore impacts on the ability of stakeholders to tailor processes and sentencing outcomes to meet the needs of FASD-affected individuals. The need for specialist court-based clinicians is particularly acute in the Youth Justice Court, where defendants often present with particularly complex needs and where early intervention is crucial.

Court-based mental health and complex needs services which exist in other jurisdictions could be used as a model. In Victoria, for example, a Mental Health Court Liaison Service (MHCLS) has been based at Victorian Magistrates Courts since 1994. Their role includes identification and assessment of people coming before the court who may suffer from a mental illness, and making linkages to an appropriate mental health facility in the community or prison system, for treatment and support. The MHCLS model could provide a platform by which FASD-affected defendants may also be identified and appropriately treated. The absence of this sort of service in the NT elevates the need for dedicated clinicians to be based at Northern Territory Magistrates Courts.

### The cost of *not* screening for FASD

Resourcing FASD screening services may be considered an unjustifiable expenditure in a tight fiscal context. In our view, the cost of not investing in these services is much greater.

The Northern Territory simply cannot afford to continue to incarcerate people at its current rate. The real net operating expenditure on prisons and community corrections per head of population per year is almost \$500 in the Northern Territory. This is more than double the next highest jurisdiction, Western Australia (just over \$200 per person per year). The

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<sup>16</sup> Douglas, above n 3, 13.

national real net operating expenditure is \$139 per person per year.<sup>17</sup> Taxpayers in the Northern Territory are bearing the unsustainable burden of our jurisdiction's very high incarceration rate.

The enormous expenditure has not resulted in improved community safety. The NT has by far the highest recidivism rate in Australia. Whereas the national recidivism rate is around 40%,<sup>18</sup> the Attorney-General recently stated that the recidivism rate in the NT is an outrageous 57%.<sup>19</sup>

In our view, these figures suggest that the prison and community corrections system in the Northern Territory is systemically failing to address the causes of offending (criminogenic needs) of Territorians in the justice system.

Whilst the need for change is critical for all Territorians, it is especially the case for FASD-affected defendants in the justice system.

In considering this, it must be borne in mind that the NT faces greater challenges compared to other jurisdictions in relation to the diagnosis of FASD outside the justice system – without a shadow of a doubt, the health, mental health and disability support services in the NT are woefully inadequate to meet the needs of Territorians, particularly for Aboriginal people in regional towns and remote communities.

In addition, the NT does not have medical professionals based at magistrates courts, as is the case with some other jurisdictions. In Victoria, for example, a Mental Health Court Liaison Service (MHCLS) has been based at Victorian Magistrates Courts since 1994. Their role includes identification and assessment of people coming before the court who may suffer from a mental illness, and making linkages to an appropriate mental health facility in the community or prison system, for treatment and support.

Court-based services such as the MHCLS provide a platform by which FASD-affected defendants may also be identified and appropriately treated. The absence of this sort of service in the NT elevates the need for dedicated clinicians to be based at Northern Territory Magistrates Courts.

The cost of carrying out routine screening in our prisons and employing clinicians based at courts would quickly pay for itself. We consider that it would result in much more appropriate, targeted and rehabilitation focused justice processes and sentencing outcomes, including a reduction in inappropriate custodial sentences and, conversely, an increase in tailored community-based orders. Placing FASD-affected adult and juvenile defendants in custody is both an ineffective and expensive punitive justice response. On an individual level, the cost

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<sup>17</sup> Steering Committee for the Review of Government Service Provision (SCRGSP), Volume 1 to the Productivity Commission, *Report on Government Services 2013*, 2013, C.10.

<sup>18</sup> SCRGSP, above n 21, C.21.

<sup>19</sup> Published data usually records the Northern Territory recidivism rate at around 48%. However, the Attorney-General stated on 23 May 2014 that it is actually 57%: John Elferink, 'Indigenous Elders Offer Leadership and Advice to Prisoners' (Media Release, 23 May 2014).

of remanding a young person in custody is about \$700 per person per day, whereas community-based supervision costs about \$90 per person per day.<sup>20</sup>

Specialist clinicians would enable a large number of FASD-affected people who are currently remanded in custody or sentenced to short terms of detention or imprisonment to be placed under community-based supervision. This would not only mean that the health needs of FASD-affected defendants would be met, but would also lead to significant financial savings.

It is essential that the Youth Justice Court have access to expert cognitive assessments that can specifically consider whether a young person before the court is FASD-affected.

**Recommendation 4:** Urgent steps are needed to improve diagnostic capacity within the justice system in the Northern Territory to enable routine screening of FASD-suspected defendants and their family members. This requires multi-disciplinary health professionals to undertake assessments and prepare treatment plans.

**Recommendation 5:** Expert neuropsychological assessment should be prepared with recommendations about the services and supports that should be provided to meet that person's needs where that person is suspected to be FASD-affected.

**Recommendation 6:** Access to FASD assessments should not be denied based on financial constraints or available resources.

## 5. Sentencing

A FASD diagnosis is critical to ensure that defence and prosecutions are able to make appropriate and meaningful sentencing submissions, and that judges and magistrates can put in place sentencing orders that meets the needs of the defendant.

In the absence of a FASD diagnosis, there is a danger that some characteristics of a FASD defendant could be wrongly interpreted as an 'aggravating factor' to the offending. These characteristics include the individuals' limited capacity to think about others<sup>21</sup>, low empathy<sup>22</sup>, a lack of insight into their offending, a lack of remorse and behaviour in court that could be interpreted as being disrespectful (for example, "nonchalance or inappropriate smiling").<sup>23</sup> Such behaviour, considered in isolation, could result in the imposition of a harsher sentence.

There are also secondary disabilities that need to be taken into account in determining an appropriate sentence which, without a diagnosis, may not be identified or properly understood. For example, FASD impacts on many sufferers' ability to successfully complete school or attain employment, and increases the likelihood of alcohol abuse.<sup>24</sup> Studies have

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<sup>20</sup> Productivity Commission (2014), *Report on Government Services 2014*, 16.37-16.38; see also Peter Murphy, Anthony McGinness and Tom McDermott (Noetic Solutions), Report for the Minister for Juvenile Justice NSW, *Review of Effective Practice in Juvenile Justice*, January 2010, 46, which discusses the cost difference in the NSW context.

<sup>21</sup> Douglas, above n 5, 4.

<sup>22</sup> Crawford, above n 11, 11.

<sup>23</sup> Douglas, above n 5, 15.

<sup>24</sup> Douglas, above n 5, 6.

also shown that over 90% of people diagnosed with FASD also suffer from mental health diagnoses, such as anxiety and depression.<sup>25</sup>

### Sentencing considerations

The effect of a FASD on a defendant and his or her offending behaviour means that it would generally be inappropriate to take into account the principles of denunciation and punishment as primary considerations in sentencing. Indeed, sentencing jurisprudence already recognises that impaired cognitive functioning may decrease an individual's level of culpability and may constitute a mitigating factor. More emphasis should be placed on rehabilitation and community safety. In addition, more flexible approaches must be taken to tailoring sentences to the needs and capacity of the individual, including sentence length and capacity to strictly comply with conditions in sentencing orders.

Impaired executive functioning of a FASD-affected defendant can result in poor judgment and impulse control, and may limit their ability to learn from experiences.<sup>26</sup> The inability of FASD-affected defendants to connect cause and effect may severely impact on their ability to appreciate that the sentence they receive in court is a result of the crime they committed.<sup>27</sup> It is critical that these issues are taken into account as mitigating circumstances, and that sentencing orders are tailored in response to these issues.

Further, past 'failures' to engage with community-based sentencing options must be considered in light of the offender's cognitive deficiencies, rather than ascribing past failures to the offender's unwillingness to take advantage of the support offered<sup>28</sup>.

It is also vital that sentencing considerations enable courts to apply a trauma-informed approach to sentencing FASD-affected defendants. A FASD-affected defendant whose FASD has contributed to their offending has acquired FASD in circumstances that they have had entirely no control over<sup>29</sup>. A Canadian judge has observed that in sentencing a FASD offender, "the failings of the greater society are denounced as well."<sup>30</sup> Canadian jurisprudence has also drawn specific links between the experience of First Nations people and FASD:

FASD often finds its roots in the systemic discrimination of First Nations people and the resultant alienation they experience from their ancestry, their culture and their families."<sup>31</sup>

The issue of rehabilitation is a complex one for FASD-affected defendants. It has been suggested that, "rehabilitation in the deeper sense of internal attitudinal reform will be impossible in many cases".<sup>32</sup> However, we submit that rehabilitation should be understood more broadly to encompass the principle of reducing the risk of reoffending. Indeed, for FASD-affected offenders, improved support in the community can minimise the risk of

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<sup>25</sup> Ibid, 5.

<sup>26</sup> Ibid, 3.

<sup>27</sup> Douglas, above n 5, 16.

<sup>28</sup> Ibid, 23-24.

<sup>29</sup> Ibid, 17.

<sup>30</sup> Ibid.

<sup>31</sup> Douglas, above n 5, 7.

<sup>32</sup> Ibid, 18.

reoffending. This can include improved access to medical, education and training support, as well as family and community support and improved life skills.

In NAAJA and CAALAS' experience, strong rehabilitative supports can substantially reduce a FASD-affected defendant's prospects of reoffending<sup>33</sup>. NAAJA's Throughcare project is an example of an intensive case management program that could be expanded to specifically support FASD-affected defendants. The project has demonstrated successful outcomes for many individuals who have participated in the program, with only 13% of persons participating in the project reoffending or being returned to prison while they are part of the project.<sup>34</sup>

CAALAS' Youth Justice Advocacy Project is another example of a rehabilitation-focused program which assists young people with complex needs, including young people with cognitive impairments, to link in with strong family and appropriate services to receive the support they need to live safely in the community. This program's funding situation is extremely precarious. It will cease operating on 30 June 2014 unless further funding is secured.

#### Mandatory sentencing and its impact on FASD-affected defendants

NAAJA and CAALAS are concerned that current mandatory sentencing laws for violent offending make it difficult to avoid sentences of imprisonment for FASD-affected defendants. As the Canadian Consensus Statement on Legal Issues and FASD (2013) stated, mandatory sentencing "will have a disproportionate and harmful impact on offenders with FASD. The courts cannot generally issue exemptions from mandatory sentences."<sup>35</sup>

Although there is provision for NT courts to avoid imposing mandatory minimum sentences where "exceptional circumstances" exist, one problem that arises is that "exceptional circumstances" is not defined. It therefore leaves open the situation that currently exists where FASD-affected defendants are not identified. The capacity of courts to find "exceptional circumstances" is severely constrained by the fact that in the absence of a FASD diagnosis, courts do not have sufficient evidentiary bases to find "exceptional circumstances". NAAJA and CAALAS are concerned that a significant cohort of defendants are being sentenced to terms of imprisonment where additional diagnostic information may have caused "exceptional circumstances" to be found.

In addition, it leads to the situation where one judge or magistrate will consider FASD to be an "exceptional circumstance," but in others they will not.

NAAJA and CAALAS urges the inclusion of reference to cognitive impairment in the definition of "exceptional circumstances" in all mandatory sentencing legislation so that where courts are alerted to the possibility that a defendant is FASD-affected, they will be more like to probe this possibility, and seek a formal assessment and diagnosis. This will

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<sup>33</sup> Crawford, above n 11, 13.

<sup>34</sup> NAAJA, *Throughcare Project* (2014) North Australian Aboriginal Justice Agency <<http://www.naaja.org.au/our-services/indigenous-throughcare-project/>>.

<sup>35</sup> Binnie and Trussler, above n 2, 22.

also assist in ensuring that all judges and magistrates adopt a consistent approach in dealing with defendants who may be FASD-affected.

### Court and Parole Orders: appropriate conditions

Court orders<sup>36</sup> and parole orders for FASD-affected defendants need to be tailored to the needs and capacity of the individual.

In the Northern Territory, many Aboriginal people are placed on orders that 'set them up to fail.' Many face conditions that are unrealistic or excessively rigid - for example, to reside at a particular address when they are in chronic housing stress or to report to Corrections on a particular day at a particular time when they do not have a sense of time that allows them to comply. Many of NAAJA's clients are subsequently returned to, or re-sentenced to prison, because they breach conditions of court and parole orders.

By way of context, 89% of parolees who breached their parole in 2011 resulting in their reimprisonment, breached conditions of their parole as opposed to reoffending.<sup>37</sup>

It must also be appreciated that for many of NAAJA and CAALAS' clients, non-compliance with and breaches of court and parole orders sometimes occurs because of their (often undiagnosed) disorder, rather than by that client's lack of respect for, or outright refusal to engage with, court processes<sup>38</sup>.

By contrast, court and parole orders that are tailored such that conditions are not overly restrictive and include appropriate supports can significantly enhance a defendant's prospects of successfully complying with an order.

For FASD-affected defendants, the risks of conditional breaches of court orders are even more pronounced. It is therefore important to ensure that the conditions imposed on a FASD-affected defendant are as minimal as possible and are appropriate, having regard to the defendant's needs.<sup>39</sup>

In tailoring an appropriate bail or sentencing order for a FASD-affected defendant, a court should use plain and clear language than can be easily understood. Conditions imposed as part of a court order should also take into account a FASD-affected defendant's poor memory, limited ability to link cause and effect<sup>40</sup>, poor ability to plan for the future, short attention span,<sup>41</sup> and difficulty telling the time and date and keeping appointments.<sup>42</sup>

The Canadian Consensus Statement suggests that "conditions should not be 'designed to fail', but be appropriate to the circumstances to the offence and offender."<sup>43</sup>

A creative innovation in the United States and Canada that seeks to address this issue is for bail conditions or probation orders to be provided to a FASD-affected defendant in picture form rather than written form.<sup>44</sup> This initiative could be adopted in the NT prison system.

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<sup>36</sup> 'Court orders' refers to bail and sentencing orders.

<sup>37</sup> Stephen Southwood, 'Annual Report 2011' (Report, Parole Board of the Northern Territory, 2012) 16.

<sup>38</sup> Douglas, above n 5, 16.

<sup>39</sup> *R V Elias* [2009] YKTC 59 [35] per Cozens TCJ.

<sup>40</sup> Douglas, above n 5, 4.

<sup>41</sup> Crawford, above n 11, 5.

<sup>42</sup> Douglas, above n 5, 5.

<sup>43</sup> Binnie and Trussler, above n 2, 23.

To ensure that defendants affected by FASD are better able to understand and comply with any conditions of release, family members and caregivers should be involved in the court process and should be involved in the formulation of appropriate conditions. Family members and caregivers can also provide extra support to help the defendant comply with the conditions. The Canadian Consensus Statement recommends that supports be put in place to support FASD-affected defendants. This might include “a circle of support that could include family and social service workers.”<sup>45</sup>

### Impact of Incarceration

There will be some FASD-affected defendants for whom a term of imprisonment is unavoidable. There are instances where the seriousness of the offending and protection of the community necessitates a custodial term being imposed.

As discussed above, NAAJA and CAALAS are extremely concerned that Northern Territory correctional institutions are not screening prisoners and juvenile detainees for FASD and other forms of cognitive impairment. We acknowledge that the NT is not alone in this regard, but we seek to highlight this as an area of urgent need.

We are very concerned that if this is not taking place, already vulnerable FASD-affected prisoners are at increased risk. They may, for example be physically or sexually victimised by other prisoners or socially ostracised.<sup>46</sup> FASD-affected offenders are at greater risk of suicide<sup>47</sup>, and also face challenges complying with prison rules and accessing treatment programs in prison (which also impacts access to parole).<sup>48</sup>

It is imperative that FASD-affected prisoners and prisoners with other forms of cognitive impairment (some of whom will not even understand why they are in prison, or forget over time) are properly supported whilst incarcerated and receive appropriate support post-release Unless FASD is identified, this is unlikely to occur.

**Recommendation 7:** The disproportionate impact of mandatory sentencing laws on FASD-affected defendants and defendants with other forms of cognitive impairment needs to be urgently addressed by specifically exempting those with FASD from mandatory sentencing laws.

**Recommendation 8:** The NT *Sentencing Act* should be amended to include a provision that deterrence, denunciation and punishment are not be the primary considerations in sentencing FASD-affected defendants; rather rehabilitation and community safety are to be the primary considerations.

**Recommendation 9:** That an urgent audit is conducted of all adult prisoners, juvenile detainees, and young people in the child protection system who are FASD-affected.

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<sup>44</sup> ABC Radio National, ‘Justice system failing to deal with Fetal Alcohol Spectrum Disorder’, *Law Report*, 10 December 2013 (Tony Fitzgerald).

<sup>45</sup> Binnie and Trussler, above n 2, 7.

<sup>46</sup> Douglas, above n 5, 11.

<sup>47</sup> *Ibid*, 5.

<sup>48</sup> Education and Health Standing Committee, Parliament of Western Australia, Foetal Alcohol Spectrum Disorder: the invisible disability, Report no. 15 (2012), 74-75.

**Recommendation 10:** Court and parole orders for FASD-affected defendants must be tailored to the needs and capacity of the individual.

**Recommendation 11:** That the Commonwealth and NT Governments expand NAAJA's Throughcare project to provide intensive case management to FASD-affected defendants in the justice system and provide funding to CAALAS to enable it to operate a similar program in Central Australia.

## 6. Alternatives to incarceration

In the context of a shamefully high incarceration rate in the Northern Territory, it is crucial that alternatives to incarceration be made available for FASD-affected defendants. NAAJA and CAALAS's experience is that many defendants (including FASD-affected defendants) would not have received a custodial sentence if appropriate non-custodial sentencing alternatives were available to the courts at the time of sentencing.

With respect to FASD-affected defendants, the need for alternatives to imprisonment is even more urgent. In NAAJA and CAALAS's experience, the lack of diagnosis of FASD-affected defendants means that many defendants are presently receiving a sentence of imprisonment which they would have been unlikely to receive had a FASD diagnosis been available to the court.

NAAJA and CAALAS urges the Inquiry to consider programs both in other jurisdictions and that could be developed specific to the Northern Territory context to meet the needs of FASD-affected defendants.

### Community-based non-custodial options: Lessons from Canada

Canada is the leading jurisdiction in terms of implementing programs for FASD-affected defendants. Several Canadian jurisdictions have developed intensive support programs for FASD-affected individuals involved with the criminal justice system.<sup>49</sup> As of June 2008, eight programs (six for youth, two for adults) were operating and four had sustainable funding.<sup>50</sup>

As just one example, the FASD Youth Justice Program in Winnipeg (which comes within the ambit of the Healthy Child Manitoba initiative),<sup>51</sup> includes a range of FASD-related preventative, diagnostic and support services.<sup>52</sup> It aims to ensure that FASD-affected youth who are in conflict with the law receive a multidisciplinary assessment, diagnosis, appropriate judicial disposition and improved access to appropriate services.

### Special court processes

Conventional court processes do not always meet with needs of court users. This is especially the case with FASD-affected defendants, who face increased challenges in being able to understand complex legal concepts and actively participate in court processes that affect them.

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<sup>51</sup> Government of Manitoba, *FASD* (2014) Manitoba <<http://www.gov.mb.ca/healthychild/fasd/index.html>>.

<sup>52</sup> *Ibid.*

NAAJA and CAALAS urge the Northern Territory government to consider establishing special court processes for FASD-affected defendants in the Northern Territory. Several Australian jurisdictions have dedicated mental health court lists as part of their Magistrates Courts and Children’s Court. In Western Australia, for example they have established a mental health court diversion and support program.<sup>53</sup>

A process could be established within existing NT court structures to “bring to bear the combined expertise and training of judges, prosecutors and defence counsel knowledgeable about FASD.” This would “serve the interests of fairness as well as efficiency,”<sup>54</sup> and would facilitate the exploration of appropriate community-based orders for FASD-affected defendants.

Legislative amendments to facilitate the diversion of offenders with a cognitive impairment would assist in enabling this to occur. This is discussed further below.

#### Secure care facility

It is critical that secure care facilities are available in both the Top End and Central Australia. This is discussed further below at [7].

#### Holistic, Health-based treatment model

NAAJA and CAALAS also urge the Inquiry to consider NT-specific, innovative options that could be developed to better meet the needs of FASD-affected defendants.

NAAJA and CAALAS wish to highlight a possible treatment model that could be implemented to meet the needs of FASD-affected Aboriginal people in the justice system. This model seeks to build on the examples of Aboriginal legal and medical services in Canada that are providing wrap-around services for FASD affected young people and adults.<sup>55</sup>

NAAJA and the Danila Dilba Aboriginal Medical Service (DDHS) are considering a collaborative project to provide alternative options for clients whose offending is intrinsically linked to their drug and alcohol issues.

The NAAJA and DDHS pilot project would select clients who had criminal charges before the court, and would seek to put in place a holistic therapeutic treatment plan for the court’s consideration. A plan may include a range of interventions including counselling for mental health issues, AOD counselling, support to address social determinants of health (for example, linking a person with housing, vocational or employment agencies) and assisting them to re-establish positive links with the community, such as working with Elders.

The pilot would target defendants who are at risk of being sentenced to a term of imprisonment. The court would be asked to consider whether, as an alternative to prison, a defendant be placed on a supervised and supported treatment plan for a period of time prior

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<sup>53</sup> Government of Western Australia, Mental health court diversion and support program (2014) <[http://www.mentalhealth.wa.gov.au/mentalhealth\\_changes/Mental\\_Health\\_Court\\_Diversion.aspx](http://www.mentalhealth.wa.gov.au/mentalhealth_changes/Mental_Health_Court_Diversion.aspx)>.

<sup>54</sup> Binnie and Trussler, above n 2, 17.

<sup>55</sup> Crawford, above n 11, 17.

to being sentenced. The defendant would appear before the court on a regular basis to assess their progress.

Critical ingredients of this model include cultural safety, the organisational trust and confidence that an Aboriginal person may have with NAAJA and Danila Dilba, and the presence of support persons at both NAAJA and Danila Dilba to support the person to attend appointments and stay motivated.

**Recommendation 12:** The negative impacts of incarceration on FASD-affected defendants need to be understood. Incarceration must be avoided wherever reasonably possible for FASD-affected defendants.

**Recommendation 13:** A range of non-custodial sentencing options are needed to meet the needs of FASD-affected defendants in the justice system. These include:

- a) Intensive, culturally safe and individually tailored support programs for FASD-affected individuals involved with the criminal justice system,
- b) special court processes for FASD-affected defendants,
- c) secure care facilities for those who do not have stable accommodation and who would otherwise be sent to prison.

## 7. Mental impairment and fitness

Questions of mental impairment and fitness to plea can arise where a defendant is severely affected by a FASD. Unfortunately, the current legislative framework for dealing with issues of mental impairment and fitness to plea fails to provide appropriate diversion options for low level offences, and has resulted in a number of offenders with a serious cognitive impairment receiving an indefinite custodial supervision order. Because of the absence of appropriate facilities, these defendants have been held in the prison. This is very concerning. We are strongly of the view that prison should only be a last resort for defendants with a cognitive impairment, and is inappropriate where the defendant is found unfit to plea. This should be made clear in the legislative framework. The legislation should also provide for a range of diversion options, and resources should be committed to ensuring that there are appropriate secure care facilities available as an alternative to prison in both Central Australia and the Top End.

### *Part IIA of the Criminal Code*

The legislative regime for dealing with questions of fitness is found under Part IIA of the Criminal Code (NT). It only applies to matters brought before the Supreme Court, and therefore generally only applies to more serious matters. Part IIA provide that where a person is found unfit to stand trial and is unlikely to become fit within the following twelve months, the matter must go to a special hearing within three months. The purpose of the special hearing is for a jury to determine whether the person is not guilty of the offence, not guilty because of mental impairment, or committed the offence charged. Where a jury at a

special hearing finds that the accused person is not guilty of the offence due to mental impairment, or that the person committed the offence, the Court must either declare the accused person liable to supervision under Division 5 of the Act or release the accused person unconditionally.

A supervision order may involve custodial supervision, in a prison or another place the Court considers appropriate, or non-custodial supervision. Recently, the Disability Services Act and the Criminal Code have been amended to provide that an “appropriate place” for the purposes of a custodial supervision order includes secure care facilities, which have recently been opened in the Northern Territory.

A supervision order is for an indefinite term,<sup>56</sup> although a “term” is set on the order and a major review occurs near the end of the “term”. On review, the Court may order the continuation of the supervision order. The Criminal Code also provides for periodic reviews.<sup>57</sup>

The Criminal Code states that “the court must not make a custodial supervision order committing the accused person to custody in a prison unless it is satisfied that there is no practicable alternative given the circumstances of the person”.<sup>58</sup> Unfortunately, it has been NAAJA and CAALAS’ experience that many clients who were found unfit were subject to custodial supervision orders committing them to prison, in the absence of appropriate alternative facilities.

In the case of *R v Doolan; R v Leo* [2012] NTSC 46, for example, the court reviewed the custodial supervision orders imposed under Part IIA on two individuals, Mr Leo and Mr Dooley, both of whom suffered from significant mental impairments. Both had been committed to prison because no alternative options were available. The secure care facilities were near completion, but not yet ready. His Honour commented at [62]:

“As noted by Martin (BR) CJ both persons have spent more time in custody, and at times in a high security unit of the prison, than their crimes would ordinarily merit. Each at times becomes significantly frustrated and desperate. It is of significant concern that during some periods Mr Leo may have deteriorated, thus making it more difficult for him to pass through the planned stages to alternative arrangements. Mr Murdock, who closely monitors each of the supervised persons, emphasizes the prison environment is not appropriate. Plans need to be implemented to see that the goal of alternative appropriate arrangements, consistent also with the requirements of the Criminal Code can be achieved as soon as possible, respecting the need for incremental change.”

Similarly, in a 2011 paper written by our North Australian Aboriginal Justice Agency (NAAJA) colleagues, Jonathon Hunyor and Michelle Swift, ‘A Judge Short of a full bench: mental impairment and fitness to plead in the NT criminal legal system’<sup>59</sup>, Hunyor and Swift observed that “[t]he practical operation of the regime of supervision orders in the NT is that

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<sup>56</sup> *Criminal Code* (NT), s. 43ZC.

<sup>57</sup> *Criminal Code* (NT), ss. 43ZG, 43ZH, 43ZK

<sup>58</sup> *Criminal Code* (NT), s. 43ZA(2).

<sup>59</sup> Jonathon Hunyor and Michelle Swift, ‘A Judge Short of a full bench: mental impairment and fitness to plead in the NT criminal legal system’ (paper delivered at the 2011 CLANT conference, Bali, 30 June 2011), 13.

'custody' means 'jail' because at that time, the government had not made another "appropriate place" available. Further, they stated:

"Jail is clearly an inappropriate place for detaining people who are unfit to be tried and/or not guilty by reason of their mental illness. On a purely practical level, it makes treatment and ultimate re-integration much more difficult. It is also difficult to justify incarceration of person whom we deem not subject to criminal penalty in a facility intended to punish."<sup>60</sup>

Compounding this issue is that the fact that some people have spent longer in prison under a supervision order than they would have had they been dealt with through the normal criminal justice process, and that therapeutic and support services specific to an individual's high and complex needs are often not provided in prison.<sup>61</sup>

### *Secure care*

There is no secure care facility in the Top End, which means that too many people with a cognitive impairment are being held in our prisons. CAALAS hopes that the new secure care facility opened in Alice Springs last year will result in fewer people with a mental impairment, including a mental health problem and/or a cognitive impairment, being committed to an indefinite term of detention under a supervision order in Central Australia. However, in a very recent case CAALAS acted in, *The Queen v Madrill (No 2)* [2013] NTSC 42, the Court made a custodial supervision order committing a person found not guilty because of mental impairment to Alice Springs prison because it was satisfied that, in all of the circumstances, there was "no practicable alternative", and "[m]oreover, there is no available 'appropriate place' to which he might be committed and in respect of which a certificate has been provided by the CEO (Health) pursuant to s 43ZA(4) Criminal Code."

Where a person is committed to a secure care facility under a supervision order, it is important that the secure care option is not used as a mere custodial substitute for prison.<sup>62</sup> In such circumstances, secure care should only be used as a therapeutic and temporary measure designed to support a person with high-risk behaviours to manage the behaviours and successfully reintegrate back into the community, not as a de facto prison.<sup>63</sup> CAALAS will continue to monitor the secure care facility in Alice Springs to ensure that this is occurring.

Prisoners affected by FASD, or another form of cognitive impairment, who were fit to plea but struggle in the prison environment because of their cognitive impairment, should also be placed in a secure care facility. Because of the absence of a facility in the Top End, this option is not presently available to prisoners serving time in Don Dale.

### *People with cognitive impairment in the lower courts*

One big issue in the Northern Territory is the absence of a specific legislative regime aimed at diverting people with a cognitive impairment prosecuted with relatively low-level offences

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<sup>60</sup> Ibid.

<sup>61</sup> Ibid, 17-18.

<sup>62</sup> Ibid,14.

<sup>63</sup> Ibid.

from the Court of Summary Jurisdiction (the lower criminal court in the Northern Territory).<sup>64</sup> The absence of such a scheme means that defendants with a mental impairment, whether because of a FASD or otherwise, who might be unfit to plea, risk facing an onerous and lengthy fitness to plea inquiry under Part IIA. They also risk receiving an indefinite custodial supervision order under this scheme, notwithstanding that their level of offending might be very low. This presents ethical dilemmas to defence lawyers, and is not in the interests of the defendant or the community.

We strongly believe that, in appropriate cases, where a person with a cognitive impairment is charged with summary offence, the court should have the option of diverting the person from the criminal justice system to facilitate a therapeutic response to the offending behaviour, rather than a law and order response. In our view, the lack of options available to the Court of Summary Jurisdiction when it is dealing with a person with a cognitive impairment, including the lack of assessment and diversion options available under a specific legislative framework, means that many people with a cognitive impairment receive inappropriate custodial sentences.

<b>Recommendation 14:</b>	The Northern Territory needs to develop a legislative scheme particular to the needs of cognitively impaired people proceeded against summarily which provides effective and flexible diversion and therapeutic intervention options to the court
<b>Recommendation 15:</b>	Secure care facilities should be appropriately resourced in both the Top End and Central Australia to ensure that defendants found unfit to plea are only held in prison as an absolute last resort.

## 8. Child Protection

Magistrate Catherine Crawford of the Western Australia Children’s Court has noted that just as with the youth justice jurisdiction, awareness and diagnosis of FASD in the child protection system is extremely low. Her Honour notes that the WA equivalent to DCF “very rarely mentions FASD.”<sup>65</sup>

Studies have shown that children with FASD are at high risk of being placed in state care. Douglas suggests this can lead to “a kind of double victimisation as, not only does the child have FASD, they are deprived of their mother’s care and nurturing.”<sup>66</sup>

Crawford raises serious concerns about the non-diagnosis of FASD of children and their parents involved in the WA child protection system. Crawford points to the “limited

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<sup>64</sup> Whilst the Court has some limited diversion powers available to it in relation to people with a mental illness or mental disturbance, there are a number of problems with the scheme, which are outlined in a [paper](#) written by our North Australian Aboriginal Justice Agency (NAAJA) colleagues, Jonathon Hunyor and Michelle Swift, ‘A Judge Short of a full bench: mental impairment and fitness to plead in the NT criminal legal system’ (paper delivered at the 2011 CLANT conference, Bali, 30 June 2011).

<sup>65</sup> Crawford, above n11, 3.

<sup>66</sup> Douglas et al, above n 9, 161.

knowledge amongst (department) caseworkers” and that on an organizational level, “little priority is being given to addressing the issue among children in care.”<sup>67</sup>

Early detection is critical in the child protection system. Just as Police have a crucial early opportunity to consider whether an alleged offender may have FASD and to then tailor their response (and that of others in the justice system) to the needs of that person, child protection workers are in a unique position to screen young people coming into department care for FASD.

But in WA, this is not taking place. Crawford points out that:

Lawyers acting for parents and children cannot rely upon (the department) to initiate screening, assessment, diagnosis or planning for dealing with the needs of a FASD affected child.<sup>68</sup>

NAAJA and CAALAS’ experience is that this is also not taking place in the Northern Territory child protection system. This affects not just children involved in the child protection system, but also their parents. It is a sad reality that undiagnosed FASD-affected parents, who have substance abuse problems, can face child protection alleging neglect of their children.

Crawford highlights a range of ways in which a FASD-affected parent may be disadvantaged in the child protection system. These include:

- Their ability to understand their legal rights and options;
- Being susceptible to suggestion, and agreeing to unachievable goals/tasks in order to secure the return of their children;
- Difficulties with organizational skills, impaired reasoning and social judgment, impulsivity, not understanding the requirements of the child protection authority;
- Not being able to deal with child protection staff who are trained and appreciate the limitations a FASD-affected parent faces.

The significance of these disadvantages must be addressed as a matter of urgency. If the best interests of young people in the child protection system is our key focus, steps must be put in place to improve the way FASD-affected young people and parents are dealt with.

The Consensus Statement on Legal Issues and FASD published in 2013 by the Institute of Health Economics in Alberta, Canada makes a number of recommendations that bear consideration in the Northern Territory context.

One of these is that as part of health checks of young people, coming into state care, that they also be screened for FASD. If this screening were to take place, the report would assist in guiding how that young person is dealt with throughout their involvement in the child protection system.

Where the screening suggests a young person may be FASD-affected, an expert neuropsychological assessment should be prepared with recommendations about the services and supports that should be provided to meet that young person’s needs;

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<sup>67</sup> Crawford, above n 11, 3.

<sup>68</sup> Ibid.

The Consensus Statement also highlights that where there is evidence to suggest a parent is FASD-affected, that an full diagnosis of the parent be immediately made. In our view, this has particular relevance in the Northern Territory context.

The Statements also points to the importance of wrap-around legal services in Alberta, where lawyers are supported by social workers. The social worker attends with and advocates for parents in their meetings with child protection authorities, connects them to resources, and supports them to address issues such as housing, drug and alcohol issues, employment, mental health needs and ensures the legal process is understood by the parent.

**Recommendation 16:** FASD screening should take place for all young people coming into the care of the Department of Children and Families as part of their routine health checks.

**Recommendation 17:** Where there is evidence to suggest a parent is FASD-affected, that an assessment and full diagnosis for parents must immediately be made.

**Recommendation 18:** The Northern Territory Government should fund NT Legal Aid Commission, NAAJA and CAALAS to provide wrap-around legal services with social workers supporting lawyers for parents in the child protection system.

## **8. Prevention, early intervention and education**

As noted at the outset of this submission, there is an urgent need to invest in raising awareness about FASD. This should include a strong emphasis on prevention, by encouraging health professionals to talk to pregnant women about their alcohol consumption.

Rather than approaches that can inadvertently undermine the relationship of trust between health services and women drinking while pregnant, more needs to be done to encourage women who are pregnant and engaging in unsafe behaviours to seek and obtain the assistance they need. They will simply not do this if they fear that might lose their unborn child, or face other adverse consequences.

NAAJA and CAALAS wish to highlight an example of a prevention and early intervention program that until recently has been operating in Tennant Creek.

### Anyinginyi Health Aboriginal Corporation FASD project

Anyinginyi Health Aboriginal Corporation (AHAC) commenced a FASD project in 2011 to raise awareness, educate, prevent and support people with FASD.

AHAC has undertaken a range of activities including the development of Pregnancy Pamper Packs distributed by health professionals to all pregnant women in the Tennant Creek region. The packs provide information and support to encourage women not to drink alcohol.

The AHAC has also advocated for the adoption of signs in licensed premises warning of the dangers of drinking whilst pregnant and has conducted education sessions with different community groups.

NAAJA and CAALAS are concerned that funding for this important program in one of the highest need regions of Australia has been removed by the Federal Government and urges the Northern Territory Government to invest in programs designed to raise awareness about FASD and that enable appropriate supports to be put in place at the earliest possible time.<sup>69</sup>

**Recommendation 19:** That the NT Government invest in funding whole-of-community FASD education programs, and particularly in programs targeting young women to prevent FASD.

**Recommendation 20:** That the Commonwealth and NT Governments resume funding to the FASD project operated by Anyinginyi Health Aboriginal Corporation which provides culturally safe education and support for Aboriginal women living in one of the most marginalised, service poor regions of the Northern Territory.

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<sup>69</sup> Sasha Petrova, 'Funding blow for sobriety program', *NT News* (Darwin), 25 March 2014.