
# Submission to the Senate Standing Committee on Legal and Constitutional Affairs

# Inquiry into the value of a justice reinvestment approach to criminal justice in Australia

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## NOFASARD – AN OVERVIEW

The National Organisation for Fetal Alcohol Spectrum and Related Disorders (NOFASARD) is an independent not-for-profit charitable organisation representing the interests of individuals and families who are living with Fetal Alcohol Spectrum Disorders (FASD). NOFASARD was established in 1999, is registered as an incorporated association in South Australia under the *Associations Incorporation Act 1985* and has held Health Promotion Charity status since 2007.

The Organisation has a small formal membership base with emphasis placed on the development of a large network of individuals and organisations interested and concerned with FASD and related issues. In July 2012 NOFASARD received a three year grant under the Australian Government Health System Capacity Development Fund which has enabled the expansion of activities to ensure FASD receives due recognition in both national public policy and in practice at a population-wide level.

NOFASARD is working towards ensuring FASD is formally recognised as a disability in Australia, promoting social inclusion by advancing the rights and interests of people living with FASD, and providing the necessary supports to individuals and families at a grassroots level. This work is fundamentally important in preventing the social, health, economic and justice consequences of this condition for all Australians.

## SUMMARY OF RECOMMENDATIONS

**Recommendation 1:**

All people entering prison and juvenile justice settings must be risk screened for FASD. Those at high risk should be assessed for executive functioning speech and language, developmental delays, memory impairment. The current reliance on IQ testing is insufficient as many individuals with FASD have an IQ in the normal range.

**Recommendation 2:**

FASD must be formally recognised as a disability in Australia enabling early intervention in childhood to ameliorate against the risk of undiagnosed and appropriate supports not being implemented to assist those with primary disabilities developing defensive behaviours and increasing the risk of entry into the criminal justice system.

**Recommendation 3:**

FASD must be recognised as a mitigating factor in sentencing. Recognition is emerging in some jurisdictions in American and Canadian case law.

**Recommendation 4:**

There needs to be consistency across all Australian jurisdictions regarding the impact of cognitive disability on culpability. A clear distinction must be drawn between intellectual disability and cognitive disability in order to ensure that individuals with cognitive impairment do not continue to fall through the cracks.

**Recommendation 5:**

FASD is a physical brain-based condition and interventions should focus on making environmental accommodations as would be the case with other physical disabilities. Current cognitive behavioural approaches used both in custodial settings and in the community are ineffective for individuals with FASD.

**Recommendation 6:**

A justice reinvestment model must address a range of human experiences identified as social determinants of health and will require cross-systems collaboration to implement early intervention. This will involve education, health, employment, financial support, child health, preventative health with criminal justice.

**Recommendation 7:**

The negative health impacts of incarceration must not continue to be ignored. Community based supervision options must be explored for individuals that do not represent a threat to community safety. This should include further funding for alcohol and other drug treatment facilities and other types of supported accommodation.

**Recommendation 8:**

Special consideration needs to be applied to the accommodation of prisoners who are vulnerable to exploitation and who do not respond to traditional cognitive-behavioural approaches. Individuals living with FASDs are able to learn however this will require the employment of specifically trained custodial personnel who are familiar with neurobehavioural interventions.

**Recommendation 9:**

NOFASARD supports the inclusion of cultural sensitivity in a justice reinvestment model recognising the influence of trauma and loss contributing to alcohol and other drug misuse and patterns of offending and the development and application of alternative community based custodial sentences.

**Recommendation 10:**

NOFASARD is of the strong opinion that the implementation of a justice reinvestment model must be inclusive of a significant investment in the prevention of alcohol and other drug use and in part in particular in preventing alcohol exposed pregnancies.

**Recommendation 11:**

NOFASARD strongly supports health-based interventions as opposed to justice-based interventions to address the root causes of criminal behaviour. A justice reinvestment approach must include significant investment in the health system to:

- Raise awareness about FASD;
- Provide improved treatment services for women with alcohol and other substance use problems; and
- Improve early intervention strategies for individuals living with FASD

**Recommendation 12:**

Case planning must be holistic and consider the physical brain-based condition, the developmental age of the individual and any post-birth life experience and reflect these characteristics in long term planning across the lifespan.

**Recommendation 13:**

To account for the range of accommodations necessary in respect to each individual and life transitions, participants in case planning should be inclusive of family and/or community members who have a significant relationship with the individual.

**Recommendation 14:** NOFASARD recommends more creative sentencing options are needed to provide an appropriate level of support to individuals living with FASDs to keep them engaged in the community and, where necessary, adopt the inclusion of 24/7 supervision for their own safety and the safety of others.

**Recommendation 15:**

Governments Governments must adequately fund court ordered FASD assessments. Funding should not be a barrier to diagnosis and the development of alternative sentencing options for individuals with cognitive disability, including FASD.

**Recommendation 16:**

Conditions in respect to non-custodial sentences must reflect the developmental age, skills and abilities of the individual living with FASD. Language must be concrete. Examples might include simple statements such as 'you will stay at your place at night time' or 'you will do what your probation office tells you to do.'

**Recommendation 17:**

To promote broad understanding of FASD, this condition must be included as a distinct policy area within all relevant policy documents across national, state and territory jurisdictions.

**Recommendation 18:**

Governments must invest in improving knowledge and understanding of the implications of prenatal alcohol exposure across all criminal jurisdictions on both offenders and victims of crime. Judges, legal practitioners and other justice workers must be provided with more information about cognitive impairment, including FASD.

## INTRODUCTION

Thank you for approaching the National Organisation for Fetal Alcohol Syndrome and Related Disorders (NOFASARD) to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the value of a justice reinvestment approach to criminal justice in Australia.

NOFASARD is of the opinion that increasing rates of incarceration can be attributed in large part to the over-representation in the criminal justice system of individuals with undiagnosed cognitive disability resulting from prenatal alcohol exposure, or Fetal Alcohol Spectrum Disorders (FASD). Individuals living with FASD are at high risk of coming into contact with the criminal justice system due to their cognitive deficits that can manifest in both behavioural symptoms and a range of tertiary conditions often associated with criminal behaviour, such as disrupted school experience, alcohol and other substance use, mental health problems, and unemployment.

There is no doubt that the root causes of offending behaviour must be addressed in order to reduce rates of incarceration and the ever increasing costs associated with the criminal justice system. The best way to do this is through a justice reinvestment approach that puts money into building communities and providing prevention strategies and early intervention services and programs for individuals at high risk of coming into contact with the criminal justice system.

NOFASARD strongly believes that a number of serious health issues are currently being criminalised through the justice system, resulting in serious breaches of human rights and raising questions about equity and fairness before the law. The over-representation of individuals with chronic mental health problems, alcohol and other substance use issues, comorbidity and cognitive disability is alarming both from a rights-based perspective and an economic and social costs perspective.

The implementation of a justice reinvestment model must invest significantly in health-based interventions to address alcohol and other substance abuse and in preventing alcohol exposed pregnancies. For those already living with FASD, adequate funding must be assigned to FASD-specific programs that provide alternatives to cognitive behavioural approaches both in custodial settings and in the general community. This recognises that individuals living with FASD do not respond well to justice-based concepts of deterrence and rehabilitation as they are generally unable to understand the consequences of their actions or link a punishment with a crime, they do not learn from their mistakes and are often unable to understand the link between cause and effect.

In this submission NOFASARD has addressed the questions that specifically relate to the impact of FASD on the criminal justice system and the importance of a justice reinvestment model in addressing the over-representation of individuals with FASD in increasing rates of incarceration.

## WHAT ARE FETAL ALCOHOL SPECTRUM DISORDERS?

The term Fetal Alcohol Spectrum Disorders (FASD) may be represented as a circle which surrounds a spectrum of conditions which are unique to an individual and which may be physical and/or neurobehavioural. These disorders are directly attributable to the dose-response relationship from prenatal alcohol exposure and are not always apparent at birth. Rather, fetal alcohol exposure is often noticed as behaviours which result in a disparity between individual abilities and environmental expectations which increase over time. Frequently undetected, FASD is referred to as the 'invisible disability'. This may be attributed to the current lack of a comprehensive understanding of FASD among many health professionals and service providers.

The medical diagnoses recognised in Australia within the FASD spectrum include: Fetal Alcohol Syndrome (FAS), partial Fetal Alcohol Syndrome (pFAS) and Neurodevelopmental Disorders-Alcohol Exposed (ND-AE). The Australian FASD Collaboration has developed a national diagnostic instrument for FASD and is awaiting government approval for its use.[1] Further funding will be required to develop clinical guidelines and to trial the instrument. Due to the status quo, FASD is chronically underdiagnosed in Australia.

The primary disabilities common to FASD last a lifetime and can lead to learning difficulties, impulsivity, consequential thinking (linking cause and effect), hyperactivity, social interaction and making and sustaining relationships with others. Typically, unrecognized primary disabilities result in misunderstanding by those with authority who cast individuals with FASD as defiant or lazy. In an effort to meet unrealistic expectations, the individual develops secondary defensive behaviours which are then paradoxically used to stereotype and label the individual according to the observed behaviour. This unfairness reinforces the invisibility of the brain-based condition and perpetuates the individual's sense of failure as they 'can't do', rather than 'won't do'.[2] Failure to meet expectations and the development of defensive behaviours leads to an increased risk of tertiary conditions including involvement in the criminal justice system. Alcohol and other drug use, family and economic dependence, poverty and homelessness, and sexual victimisation are other tertiary conditions noted by Streissguth and Kanter.[3] Early parenthood and subsequent risk for safe parenting are other concerns.

For adults with FASD, the ability of an individual to live independently often requires appropriate supports to build the capacity of the individual to engage in social and economic life. Therefore, 'interdependence' is a more realistic and supportive goal.[4] It is crucial that accommodations are

[1] Information about the Australian FASD Collaboration and the project to develop a national diagnostic instrument can be accessed at: http://alcoholpregnancy.childhealthresearch.org.au/projects/current-projects/development-of-a-diagnostic-instrument-for-fasd-in-australia-2010-2011.aspx
[2] Malbin, D (2013) *Trying Differently Rather Than Harder*, (2nd Edition) Tetrice Inc, Portland USA
[3] Streissguth AP & Kanter, J; "*The Challenge of Fetal Alcohol Syndrome:Overcoming Secondary Disabilities* University of Washington Press: Seattle (2002)
[4] Community Living British Columbia, *Supporting Success: for Adults with FASD*, Accessed at: http://www.communitylivingbc.ca/wp-content/uploads/Supporting-Success-for-Adults-with-FASD.pdf

developed in full consultation with the person living with FASD as the needs of every person are different. With a correct diagnosis and/or early neurobehavioural interventions based on physical brain difference, coupled with appropriate support for parents and carers during childhood, quality of life outcomes for people living with FASD can be vastly improved.

At present, the dominance of cognitive behavioural intervention paradigms means those individuals living with FASD are unable to make required changes in their behaviour and rather than benefitting from such interventions, a sense of failure and futility is perpetuated. It is argued that FASD as a physical brain-based condition requires environmental accommodations as we would expect in the case of any other physical disability. It is in this area that NOFASARD believes a justice reinvestment model would be of most benefit, diverting individuals with FASD and other intellectual and cognitive disabilities away from the criminal justice system through investment in community based programs and interventions.

## FASD AND THE CRIMINAL JUSTICE SYSTEM

As discussed above, involvement in the criminal justice system is one of a number of tertiary outcomes that result from the physical changes to the brain caused by prenatal alcohol exposure. It is the cognitive deficits experienced by individuals with FASD and the interplay with other environmental factors that put these individuals at high risk of criminal behaviour. In particular, a range of life experiences including trauma can exacerbate the pre-birth alcohol exposure experience, including child abuse and neglect and exposure to parental alcohol and other drug misuse resulting in repeated short-term foster care placements.

Streissguth et al. estimated 60% of adolescents and adults diagnosed with FASD had been in trouble with the law and 50% had experienced a type of confinement whether in a prison, juvenile detention, or a psychiatric or alcohol and other drug inpatient treatment facility.[5] Key risk factors that are known to lead to involvement in the criminal justice system also featured prominently in this study, with 61% of individuals having a disrupted school experience including suspension, expulsion or school dropout, 35% experienced alcohol and other drug problems and 49% had displayed inappropriate sexual behaviours on multiple occasions.[6]

[5] Streissguth et al. *Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects*, Developmental and Behavioral Pediatrics, Vol. 25, No. 4, August 2004, p.228.
[6] Streissguth et al. *Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects*, Developmental and Behavioral Pediatrics, Vol. 25, No. 4, August 2004, p.228.

## RESPONSE TO QUESTIONS

### THE DRIVERS BEHIND THE PAST 30 YEARS OF GROWTH IN THE AUSTRALIAN IMPRISONMENT RATE

NOFASARD believes that there is a strong link between increased rates of imprisonment in Australia and increasing numbers of prisoners with intellectual and/ or cognitive disability which may be linked to the impact of prenatal alcohol exposure. The teratogenic effect of alcohol on the developing fetus results in structural anomalies in the brain and this physical brain-based condition persists across the lifespan.

Fetal Alcohol Syndrome (FAS) is estimated to affect 0.06 and 0.68 per 1,000 live births in Australia and due to the limited availability of trained clinicians underascertainment is likely. A range of 0.5 and 2 per 1,000 live births in the USA has been proposed where assessment and diagnosis is much more accessible. The full spectrum of FASD is estimated to affect 1 in every 100 live births in the USA. More recently, May *et al* (2009)[7] estimated that FASD may have a prevalence rate of between 5-7% in the overall population.

FASD is not just an issue for Aboriginal communities however prevalence rates of FAS only in Indigenous populations has been estimated at between 2.76 and 4.7 per 1,000 live births.[8] However, in some Indigenous communities estimates on the incidence of FASD are much higher. According to anecdotal evidence given to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquiry into Indigenous youth in the criminal justice system, 'more than 50 per cent of the children in Fitzroy Crossing are affected by FASD or early life trauma'.[9] This figure was estimated even higher by a teacher in Queensland who suspected 80% of his students as having symptoms of FASD.[10]

FASD is chronically underdiagnosed in Australia due to the lack of a national diagnostic tool, a lack of knowledge amongst health professionals and a possible reluctance to diagnose for fear of stigmatising the child and the family. This lack of data means that we have very little idea of the numbers of prisoners affected by fetal alcohol exposure in Australia. In Canada, research has found

[7] May, P. A., Gossage, J. P., Kalberg, W. O., Robinson, L. K., Buckley, D., Manning, M. & Hoyme, H. E. (2009). Prevalence and epidemiologic characteristics of FASD from various research methods with an emphasis on recent in-school studies. Developmental Disabilities Research Reviews, 15, 176-192.

[8] Peadon, E. et al. *International Survey of Diagnostic Services for Children with Fetal Alcohol Spectrum Disorders*, BMC Pediatrics 2008, 8:12.

[9] The Parliament of the Commonwealth of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, Canberra, page 96-7.

[10] The Parliament of the Commonwealth of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, Canberra, page 96-7.

that young people with FASD are nineteen times more likely to be incarcerated than young people without the disorder in a given year.[11]

**Recommendation 1:** All people entering prison and juvenile justice settings must be risk screened for FASD. Those at high risk should be assessed for executive functioning; speech and language, developmental delays, memory impairment. The current reliance on IQ testing is insufficient as many individuals with FASD have an IQ in the normal range.

**Recommendation 2:** FASD must be formally recognised as a disability in Australia enabling early intervention in childhood to ameliorate against the risk of undiagnosed and appropriate supports not being implemented to assist those with primary disabilities developing defensive behaviours and increasing the risk of entry into the criminal justice system.

## INCREASING ALCOHOL USE IN THE AUSTRALIAN POPULATION AND IMPRISONMENT RATES

It is no coincidence that in the last 30 years as imprisonment rates have increased so too has the rate of alcohol use by girls and women and not just in terms of problematic alcohol use, or alcohol addiction, but also in terms of short term harm, or binge drinking. During this same timeframe awareness and research on Fetal Alcohol Syndrome and, more broadly, Fetal Alcohol Spectrum Disorders has developed. However, the paucity of information on FASD in Australia as experienced by adults is still not advanced and legal practitioners, courts and correctional staff are ill-equipped to deal with this issue. Prevention messages remain confused even though the Australian Alcohol Guidelines recommend no alcohol as the safest choice in pregnancy.[12] NOFASARD suggests that the increase in alcohol use by women means an increased risk of fetal alcohol exposure. Patterns of drinking which are risky in the short term may result in adverse fetal harms which may not be easily diagnosed.

Between 1995 and 2004/2005, the proportion of people drinking at risky or high risk levels for long-term harm increased from 8.2% in 1995 to 10.8% in 2001 and 13.4% in 2004-05. The increase in Australian's drinking at risky or high risk levels was higher for women than for men with the proportion of females drinking at risky/ high risk levels increasing from 6.2% to 11.7% whilst men increased from 10.3% to 15.2% of the population.[13] These figures were about the same in the 2007/08 National Health Survey.

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[11] Bonnie, R. et al. Reforming Juvenile Justice: A Developmental Approach, Committee on Assessing Juvenile Justice Reform, National Research Council of the National Academies, Washington D.C., p. 8-9. Accessed at: http://www.prisonpolicy.org/scans/14685.pdf

[12] NHMRC (2009) *Australian Guidelines to Reduce Health Risks from Drinking Alcohol*: Recommend no more than two standard drinks on a single occasion to reduce long-term harm and no more than four standard drinks to reduce risk of injury.

[13] Australian Bureau of Statistics, *4832.0.55.001 – Alcohol Consumption in Australia: A Snapshot, 2004-05*. Accessed at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/9C513A3DB275E740CA257A0100135A89?opendocument

In terms of short-term single occasion harm, or 'binge drinking', the increase in alcohol consumption for young women is again concerning. The 2010 National Drug Strategy Household Survey found that 29.8% of young women over the age of 14 were drinking at risky levels for short term harm (meaning they had consumed more than four standard drinks in one sitting at least once in the previous year). This was a significant increase from 17.3% in the 2004 survey.[14] According to the National Health Survey 2004/05, young people aged 18-24 years are most likely to drink at this level of risk at least once a week with 19% of males (one in five) and 11% of females (one in ten) drinking at risky/ high risk levels of short term harm on a weekly basis.[15] These percentages will likely increase as the 2011-13 Australian Health Survey will include survey questions based on the updated 2009 NHMRC *Australian Guidelines to Reduce Health Risks from Drinking Alcohol* which reduce the recommended guidelines for men to bring them into line with guidelines for women.[16]

Risky levels of alcohol consumption and other drug misuse have multiple impacts upon the criminal justice system. FASD is linked with offending behaviour and secondly, individuals living with FASD are at high risk of developing alcohol and other drug problems.

According to the National Indigenous Drug and Alcohol Committee report, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, 73% of Indigenous prison entrants reported consuming alcohol at high risk levels, and 48% of non-Indigenous prison entrants reported the same.[17] The plight of Indigenous female prisoners is particularly concerning as their rates of incarceration have increased by '343 per cent between 1993 and 2003, from 111 to 381 women'.[18] This increase can be directly linked to 'increased mental health issues and more extensive harmful substance use histories than male prisoners, and many enter prison following a history of sexual and physical abuse'.[19]

## PATTERNS OF OFFENDING AND THE LINK TO FASD

In the absence of prevalence data on numbers of offenders with FASD, it is possible to identify distinct behaviours within prison and detention populations that directly correlate with behaviours recognised in individuals with FAS and, more broadly, FASD. For example, high rates of recidivism

[14] Foundation for Alcohol Research and Education, Fact Sheet: Young women, alcohol and obesity. Accessed at: http://www.fare.org.au/wp-content/uploads/2013/02/FS-YoungWomenAlcoholObesity-LR.pdf
[15] Australian Bureau of Statistics, *4832.0.55.001 – Alcohol Consumption in Australia: A Snapshot, 2004-05*. Accessed at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/9C513A3DB275E740CA257A0100135A89?opendocument
[16] NHMRC (2009) *Australian Guidelines to Reduce Health Risks from Drinking Alcohol*: Recommend no more than two standard drinks on a single occasion to reduce long-term harm and no more than four standard drinks to reduce risk of injury.
[17] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 6.
[18] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 4.
[19] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 4.

can be linked to the cognitive deficits of individuals with FASD and post-birth acquired brain injury. According to the National Prisoner Census, 55 per cent of prisoners had served a previous sentence in an adult prison, with 74 per cent of Indigenous prisoners reoffending and 48 per cent of non-Indigenous prisoners. The figures for juveniles are also high with one third being reconvicted before they turn 18 years old.[20]

Individuals with FASD are highly vulnerable to manipulation and are often highly suggestible, meaning that they will easily submit to peer pressure, eager to please others and will say what they think people want to hear without really understanding the meaning or the consequences of what they are saying. This suggestibility puts these individuals at an immediate disadvantage in criminal justice system processes.[21] Strong expressive language and poor receptive language skills compounds the problem as professionals often make the misguided assumption that these individuals are able to make choices and understand their decisions. For example, under police questioning individuals with FASD are at risk of making a false confession[22] and are likely to have difficulties in understanding cautions and the meaning of giving consent.[23] The credibility of an individual with FASD as a witness must also be called into question. Difficulties with understanding court processes and sentencing orders is also an issue, along with 'establishing fitness to plead and intention and the role of diminished responsibility and provocation'.[24]

**Recommendation 3:** FASD must be recognised as a mitigating factor in sentencing. Recognition is emerging in some jurisdictions in American and Canadian case law.

Individuals with FASD often act on impulse with an inability to control their own actions or to understand and connect their behaviours with consequences (cause and effect reasoning). Individuals living with FASD may also exhibit poor judgment across different settings. As a result, individuals with FASD can display a perceived lack of remorse because they do not understand the seriousness of the crime.[25] Many people with FASD experience problems with memory which can often result in breaches of court orders (conditions of probation and good behaviour). Cognitive deficits also manifest in difficulties in understanding abstract concepts such as time and money which can also lead to breaches, including failure to pay fines. This behaviour is cast as insubordinate, wilful and disrespectful when appearing before the court, thus highlighting the need for increased understanding and recognition of FASD in the criminal justice system.

[20] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 12.
[21] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 222.
[22] Connor, P. (2004) *Prison: A Warehouse for Individuals with FASD*, accessed at: http://www.eaglesnestcenter.org/FASD_and_Prison.htm
[23] Rasmussen et al. *Neurobehavioural Outcomes of Children with Fetal Alcohol Spectrum Disorders: A Canadian Perspective*, Paediatric Child Health, Vol. 13, No. 3, March 2008, p. 188.
[24] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 222.
[25] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p.231.

**Recommendation 4:**
There needs to be consistency across all Australian jurisdictions regarding the impact of cognitive disability on culpability. A clear distinction must be drawn between intellectual disability and cognitive disability in order to ensure that individuals with cognitive impairment do not continue to fall through the cracks.

NOFASARD recognises there is a population group of individuals exposed to alcohol *in utero* for whom there are no visible biomarkers which might prompt a FASD risk assessment or diagnosis. For this group, a diagnosis of Alcohol Related Neurodevelopmental Disorder (ARND) or the alternatively proposed diagnostic criteria of ND-AE for Australia might be made. In the absence of knowledge and skills to identify and support this group, the majority of fetal alcohol affected individuals are noticed only for their behaviours. These behaviours lead to -labels, their defensive behaviours develop in response to the failure to meet societal expectations for people of the same age and failure to meet these expectations in turn perpetuates engagement with the criminal justice system. Primary conditions of fetal alcohol exposure which equate to individual brain difference often lead to the very anti-social behaviours which result in criminal behaviour.

**Recommendation 5:**
FASD is a physical brain-based condition and interventions should focus on making environmental accommodations as would be the case with other physical disabilities. Current cognitive behavioural approaches used both in custodial settings and in the community are ineffective for individuals with FASD.

In Australia, there is a lack of case law that specifically identifies the issue of FASD as a mitigating factor in sentencing, or a basis for reduced culpability. There are a growing number of cases that deal with this issue in Canada and the United States of America and Australian courts should follow suit. Courts in Australia have identified intellectual disability, defined as 'below average intelligence', as a factor that can reduce the defendant's culpability.[26] However, this is of limited consequence for individuals with FASD as many people with FASD have an IQ within the normal range and it is their level of cognitive impairment that needs to be assessed, not their intellectual capacity per se.

NOFASARD supports the submission made by Ashurst Australia to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders, regarding the need for consistency in Australian criminal law codes. The defence of 'mental impairment' is recognised in both the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth). However, the definition of mental impairment only covers brain damage under the *Criminal Code Act 1995* (Cth), whereas the definition is limited to mental illness and intellectual disability under the *Crimes Act 1914* (Cth).[27] This has significant implications

[26] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 231.
[27] House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm*, Report of the inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders, November 2012, p. 140. Accessed at:

for individuals with FASD and highlights the need for courts to recognise FASD in sentencing judgements in order to develop Australian case law.

NOFASARD strongly believes that all individuals that come into contact with the criminal justice system should be screened to determine whether they are at high risk of fetal alcohol exposure with further assessment required for those deemed to be high risk. Executive functioning and adaptive behaviour tests should be used by police and courts to improve the way in which courts deal with individuals with FASD as both witnesses and defendants and to assist in determining sentencing options. In addition, all Australian States and Territories should follow the precedent set by the Western Australian Bar Association *Equality Before the Law Bench Book* which provides legal practitioners with information about FASD.[28]

**DEINSTITUTIONALISATION & MENTAL HEALTH**

A contributing factor to increased imprisonment rates has also tracked from the social justice and economies of deinstitutionalisation and the lack of appropriate supports for those with mental health issues which seem never to have been planned for. This is a concern that has been voiced by the Human Rights and Equal Opportunity Commission's Joint Standing Committee on Mental Health and Human Rights. A recent study found that 43 per cent of prisoners had suffered from a mental health disorder within the previous year, and 55 per cent had a substance use disorder in the previous year, and that there was 29 per cent prevalence of comorbidity.[29]

Health issues, as mental health, alcohol and other drug misuse or disability, must not continue to be criminalised due to a lack of resources in the relevant sectors. Mental health can be a tertiary condition arising from a lack of understanding of FASD as a physical brain-based condition. Continued failure to meet expectations and the emergence of an individual's defensive behaviours over time can result in an impoverishment within the range of social health determinants known to be the target areas for early intervention.

**Recommendation 6:** A justice reinvestment model must address a range of human experiences identified as social determinants of health and will require cross-systems collaboration to implement early intervention. This will involve education, health, employment, financial support, child health, preventative health with criminal justice.

**CONSERVATIVE JUSTICE POLICY**

A conservative political climate and the complexity of circumstances underpinning criminal offending has led to a lack of critical thinking about how individuals should be dealt with. 'Tough on crime' policies adopted by State and Territory governments have led to sharp increases in prisoner

http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/fasd/report.htm

[28] WA Equality Before the Law Bench Book - People with Disabilities chapter.

[29] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 2.

numbers. American Judge Peggy Hora stated in her report on the South Australian criminal justice system that incarceration is overused as a sentencing option and that it does not lead to increased safety in the community given the one third of offenders are reoffending.[30]

It is clear that governments need to support other alternatives to incarceration and that this needs to begin with consideration of the causal factors in criminal behaviour including trauma, substance abuse (often as a result of trauma), mental health issues, lack of education, and physical and sexual abuse. When the relevant skills of prisoners are examined, we see high rates of illiteracy and innumeracy, incomplete schooling, brain injury and cognitive disability. There is no doubt that there is a lack of community based early intervention programs and appropriate rehabilitation programs both in prisons and in the community to divert offenders away from the criminal justice system. Continued funding to expand correctional facilities will not address the reasons why so many disadvantaged individuals come into contact with the criminal justice system in the first place.

**Recommendation 7:** The negative health impacts of incarceration must not continue to be ignored. Community based supervision options must be explored for individuals that do not represent a threat to community safety. This should include further funding for alcohol and other drug treatment facilities and other types of supported accommodation.

## THE ECONOMIC AND SOCIAL COSTS OF IMPRISONMENT

The economic cost of incarceration is astronomical, in particular for juvenile offenders. Whilst the average cost in 2009-10 to keep an adult in prison was $275 or $100,375 per year, the average cost for a juvenile in detention was $652 per day in NSW, $905 in Tasmania and $408-$500 in Victoria.[31]

An indication of the proportion of economic cost of imprisonment attributable to prenatal alcohol exposure can be deduced from American research on the overall cost to the community of FASD. Fetal Alcohol Syndrome costs the USA $3.6 billion per annum with a total lifetime cost per individual estimated at $2.9 million. Much of this cost is a direct result of tertiary conditions experienced by individuals with FASD, including involvement in the criminal justice system, alcohol and other drug use and mental health problems. These costs cover a range of services including healthcare, special education, developmental disability services, residential and support services, welfare services, adult vocational services and productivity losses.[32] When we consider that FASD is estimated to affect 1 in 1000 live births the cost to the community of FASD is extremely high. In Australia in 2011, there was

[30] Hora, P., Smart Justice: Building Safer Communities, Increasing Access to the Courts, and Elevating Trust and Confidence in the Justice System, Adelaide Thinkers in Residence, 2009-2010, Government of South Australia. Accessed at: http://www.thinkers.sa.gov.au/thinkers/hora/
[31] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 12
[32] Peadon, E. et al. *International Survey of Diagnostic Services for Children with Fetal Alcohol Spectrum Disorders*, BMC Pediatrics 2008, 8:12.

301,617 births[33], so based on this figure an estimated 300 children are born with FASD each year. These figures highlight the need for prevention and early intervention to reduce the burden on the community, including the cost of the criminal justice system.

The social costs of imprisonment are also a serious concern. This not only relates to the impact on the incarcerated individual and their family, but also the wider community. For individuals, the long-term health impacts of incarceration are substantial. These include high rates of serious mental illness and substance abuse and increased risk of physical and sexual abuse, isolation and blood-borne virus transmission whilst in a custodial setting. The health and social impacts experienced upon release are also extensive as offenders experience cultural and social exclusion, difficulty in accessing services and support networks, long-term difficulties with employment, and they and their families are often subjected to stigmatisation.[34] It is easy to see how a vicious cycle of repeat offending can ensue as incarceration serves to perpetuate social disadvantage. High recidivism rates are symptomatic of a system that is not addressing the root causes of criminal behaviour and the support needs of incarcerated individuals.

The negative health impacts of incarceration are exacerbated for individuals with FASD given their vulnerability to victimisation in custodial settings.[35] People with FASD in particular thrive on the support of their family and other support networks that help them to function on a day to day basis and to minimise inappropriate behaviour. To take this support network away through incarceration can have catastrophic consequences.[36] Some alternatives to prison can be residential secure care facilities, or placements in halfway houses or group homes, electronic monitoring at home or therapeutic treatment centres, depending upon the needs of the individual and the level of crime committed. The main aim should be to ensure that the individual with FASD has a well-structured and predictable environment in which to live with the support of family and/or positive peer influences.[37] Paradoxically, there is an accepted albeit counter intuitive benefit for those living with FASD in detention environments, that is structure and routine, concrete language for instruction and direction and environments where mimicry of tasks undertaken by the group means less individual failure.

In cases where there is no alternative to incarceration because of the seriousness of the crime, the impact of incarceration on the individual must be carefully considered. For individuals with FASD, due to memory impairment and difficulty in understanding the link between cause and effect, they

[33] Australian Bureau of Statistics, *Births, Summary Statistics for Australia*. Accessed at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/3301.0
[34] NIDAC, *Bridges and Barriers: Addressing Indigenous Incarceration and Health*, Revised Edition, Australian National Council on Drugs, 2009, p. 1.
[35] Connor, P. (2004) *Prison: A Warehouse for Individuals with FASD*, accessed at: http://www.eaglesnestcenter.org/FASD_and_Prison.htm
[36] Connor, P. (2004) *Prison: A Warehouse for Individuals with FASD*, accessed at: http://www.eaglesnestcenter.org/FASD_and_Prison.htm
[37] Connor, P. (2004) *Prison: A Warehouse for Individuals with FASD*, accessed at: http://www.eaglesnestcenter.org/FASD_and_Prison.htm

may easily forget why they are in prison or find it difficult to understand their punishment. This merely causes further dysfunction and makes reintegrating back into the community more difficult.[38]

**Recommendation 8:**
Special consideration needs to be applied to the accommodation of prisoners who are vulnerable to exploitation and who do not respond to traditional cognitive-behavioural approaches. Individuals living with FASDs are able to learn however this will require the employment of specifically trained custodial personnel who are familiar with neurobehavioural interventions.

## THE OVER-REPRESENTATION OF DISADVANTAGED GROUPS WITHIN AUSTRALIAN PRISONS, INCLUDING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, AND PEOPLE EXPERIENCING MENTAL ILL-HEALTH, COGNITIVE DISABILITY AND HEARING LOSS

Justice reinvestment presents an opportunity to address the over-representation of disadvantaged groups in the criminal justice system by investing in community based programs.

The level of incarceration of Aboriginal and Torres Strait Islander people is a social injustice that must not be allowed to continue. Indigenous Australians are chronically overrepresented in Australian prison settings, making up 26% of the Australian prisoner population in 2011 whilst only representing 2.5% of the overall Australian population.[39] As discussed, alcohol and other substance abuse is a serious problem in a number of Aboriginal communities and FASD has also been identified as a significant issue. The root causes of criminal behaviour must be addressed in order to reduce imprisonment rates and in Aboriginal and Torres Strait Islander communities it is crucial that a culturally sensitive and community driven approach is supported. This includes addressing the root causes of trauma and loss that continue to persist as a result of colonisation.[40]

The over-representation of disadvantaged groups in the criminal justice system is a fundamental human rights issue. The treatment of individuals with impairments, including mental health issues, comorbidity and cognitive disability, is so often compromised and raises serious questions about equity and fairness before the law.

**Recommendation 9:**
NOFASARD supports the inclusion of cultural sensitivity in a justice reinvestment model recognising the influence of trauma and loss contributing to alcohol and other drug misuse and patterns of offending and the development and application of alternative community based custodial sentences.

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[38] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 236.

[39] Deloitte Access Economics, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment*, A report prepared for the National Indigenous Drug and Alcohol Committee, Australian National Council on Drugs, (August 2012), page vii. Accessed at: http://www.nidac.org.au/images/PDFs/NIDACIpublications/prison_vs_residential_treatment.pdf

[40] The Parliament of the Commonwealth of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, June 2011, Canberra, p. 99.

**THE COST, AVAILABILITY AND EFFECTIVENESS OF ALTERNATIVES TO IMPRISONMENT, INCLUDING PREVENTION, EARLY INTERVENTION, DIVERSIONARY AND REHABILITATION MEASURES;**

NOFASARD believes that investment in alternatives to imprisonment through community based initiatives is integral to reducing rates of incarceration and the associated economic and social impacts. NOFASARD is of the strong opinion that the implementation of a justice reinvestment model must invest significantly in addressing alcohol and other substance abuse and in preventing alcohol exposed pregnancies. Implemented strategies require a cross systems approach involving health, education and justice.

## Prevention

Primary prevention public messages about the causal factors which increase risk must be adequately funded and supported by the media. Communities where risk of prenatal alcohol exposure is higher due to deficits to social determinants of health need a community development approach to problem solving. Alcohol use is intergenerational and this can mean that parents of individuals living with FASD may also be affected. Women experiencing alcohol and other drug misuse must be supported through the elimination of barriers to help-seeking including improved access to treatment services (which welcome birth children) and other therapeutic and/or neurobehavioural based alternatives.

**Recommendation 10:**
NOFASARD is of the strong opinion that the implementation of a justice reinvestment model must be inclusive of a significant investment in the prevention of alcohol and other drug use and in part in particular in preventing alcohol exposed pregnancies.

**Recommendation 11:**
NOFASARD strongly supports health-based interventions as opposed to justice-based interventions to address the root causes of criminal behaviour. A justice reinvestment approach must include significant investment in the health system to:

- Raise awareness about FASD;
- Reduce barriers to help-seeking for parents;
- Provide improved treatment services for women with alcohol and other substance use problems; and
- Improve early intervention strategies for individuals living with FASD

Early intervention is critical for those who live with a brain injury, be it pre-birth, post-birth or both. The target group is known to be at high risk of coming into contact with the criminal justice system and protective factors are not in place. Governments should invest significantly in identifying children at risk and brain functionality should be screened for as part of the child's overall health so that appropriate supports can be put in place. Schools should be appropriately resourced to fulfill this role. Research shows that diagnosis of FASD prior to the age of six is a strong protective factor as

it enables the mobilisation of systems interventions at a critical age.[41] Governments should also use a justice reinvestment model to develop social inclusion programs including options for non-traditional education for those with learning difficulties, participatory learning opportunities in juvenile justice settings.

NOFASARD is concerned that governments continue to invest in reintegrating children with birth parents who may well have brain function impairment which, although morally sound, requires investment in building family supports so that children's trauma is not continually revisited when parents fail. These parents fail not because they will not adequately and safely care for their child, but because they cannot. The absence of a sense of personal safety in the family home combined with the quest to belong and be loved by one's family is a most profound influence on longer term outcomes for children, adolescents and adults who come into contact with criminal justice.[42]

**Recommendation 12:**
Case planning be holistic and consider the physical brain-based condition, the developmental age of the individual and any post-birth life experience and reflect these characteristics in long term planning across the lifespan.

**Recommendation 13:**
To account for the range of accommodations necessary in respect to each individual and life transitions, participants in case planning should be inclusive of family and/or community members who have a significant relationship with the individual.

## DIVERSION AND REHABILITATION – THE NEED FOR ALTERNATIVE SENTENCING OPTIONS

NOFASARD has particular concerns relating to sentencing and the incarceration of individuals that would be much better placed in a non-custodial, community based setting with an appropriate level of supervision.

It is clear that the Bench needs options other than the current legislative alternatives that exist if high recidivism rates are to decrease. Standard sentencing options aimed at deterrence and/ or rehabilitation are generally ineffective for people with FASD as they are unable to learn from their mistakes. Due to their inability to understand cause and effect, individuals with FASD have difficulty in linking the sentence or punishment with the crime.[43] It is clear that alternative or more creative sentencing options are needed to provide an appropriate level of support to individual's with FASD to keep them engaged in the community and, where necessary, supervised for their own safety and the safety of others.

[41] Streissguth AP & Kanter, J., (2002). "*The Challenge of Fetal Alcohol Syndrome:Overcoming Secondary Disabilities* University of Washington Press: Seattle.
[42] Russell, V. CEO NOFASARD - personal communication based on experience working with at risk groups in a juvenile detention setting 2008-11.
[43] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 232.

**Recommendation 14:**
NOFASARD recommends more creative sentencing options are needed to provide an appropriate level of support to individuals living with FASDs to keep them engaged in the community and, where necessary, adopt the inclusion of 24/7 supervision for their own safety and the safety of others.

Any referrals to community services for the purposes of rehabilitation must take into consideration that individuals with FASD do not fit into the normed expectations for adolescents and adults upon which the criminal justice system is based. These individuals do not have the same capacity to care for oneself, to make plans or to make choices, follow through and understand the consequences of their actions. It is for this reason that standard programs that the court uses in conjunction with probation orders are often ineffective for people with FASD, including anger management, susbtance use, vocational training or sexual behaviour programs. Individuals with FASD require a different set of responses outside of traditional cognitive behavioural approaches that recognise the needs of those with learning difficulties and memory impairment.[44] A judge from Barrow, Alaska who has much experience in FASD speaks about calling family and/or community to court hearings to talk about options instead of incarceration, including community gardening or providing support to the elderly for offenders who present no risk to communities.[45] Individuals living with FASD generally respond well to structure, routine and supervision and the support of positive role models and family.

The Canadian Justice Reform Commission has recommended that a therapeutic court be established to deal specifically with FAS cases, something which Douglas supports trialling in Australia.[46] This system would recognise the need for long-term supervision of FASD offenders to prevent re-offending and improve life outcomes. In order to put alternative sentencing options in place it is ideal that an assessment for FASD takes place prior to sentencing, as opposed to being part of sentencing orders, to enable the judge to design an appropriate sentencing outcome. However, until such a time as this becomes common place, NOFASARD encourages Australian judges to follow the example of Canadian and American judges and take the lead by giving consideration to the possibility of FASD in relevant cases and to ask questions of counsel or parole officers if need be.[47] This does raise issues of cost in terms of who pays for FASD assessments and NOFASARD strongly supports Government investment in this area, particularly given that the majority of defendants are represented by Legal Aid services.[48]

[44] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 229.
[45] Russell, V., Personal communication on a presentation by Judge Michael Jeffrey, Alaska. The FASD Conference for Adolescents and Adults, Vancouver 2012.
[46] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 238.
[47] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 229.
[48] Douglas, H. *The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder*, (2010) 34 Crim LJ 221, p. 230.

**Recommendation 15:**
Governments must adequately fund court ordered FASD assessments. Funding should not be a barrier to diagnosis and the development of alternative sentencing options for individuals with cognitive disability, including FASD.

**Recommendation 16:**
Conditions in respect to non-custodial sentences must reflect the developmental age, skills and abilities of the individual living with FASD. Language must be concrete. Examples might include simple statements such as 'you will stay at your place at night time' or 'you will do what your probation office tells you to do.'

## THE SCOPE FOR FEDERAL GOVERNMENT ACTION WHICH WOULD ENCOURAGE THE ADOPTION OF JUSTICE REINVESTMENT POLICIES BY STATE AND TERRITORY GOVERNMENTS

NOFASARD recognises that a justice reinvestment model will have implications across state and territory jurisdictions. Federal government action to formally recognise FASD as a disability and funding a national FASD diagnostic tool will add weight to the need for justice reinvestment policies to address the root causes of criminal behaviour.

To ensure adoption and working towards acknowledgement and understanding of criminal justice client groups with cognitive, developmental and behavioural issues caused by prenatal exposure to alcohol, government policies which emerge within a justice reinvestment framework and which address risk screening and assessment for FASD be included in all national, state and territory strategic policies. At a national level this would include alcohol strategies; drug strategies, the National Preventative Health Strategy; early childhood policies, education strategies.

**Recommendation 17:** To promote broad understanding of FASD, this condition must be included as a distinct policy area within all relevant policy documents across national, state and territory jurisdictions.

**Recommendation 18:** Governments must invest in improving knowledge and understanding of the implications of prenatal alcohol exposure across all criminal jurisdictions on both offenders and victims of crime. Judges, legal practitioners and other justice workers must be provided with more information about cognitive impairment, including FASD.