



Response to Inquiry into Foetal Alcohol Spectrum Disorder

Submission on behalf of

Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) Limited

to the

**House of Representatives Standing Committee on
Social Policy and Legal Affairs**

Introduction

Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) Limited (the ALS) have prepared this joint submission to the Inquiry into Foetal Alcohol Spectrum Disorder (FASD), based on our respective experience working in the criminal justice, civil law, family and care jurisdictions in NSW.

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The ALS provides legal aid services to Aboriginal and Torres Strait Island people in the criminal and children's care and protection jurisdictions. The ALS assists Aboriginal and Torres Strait Islander men, women and children through representation in court, advice and information, and referral to further support services. It has 23 offices and 185 Aboriginal and non-Aboriginal staff across NSW and the ACT working towards achieving justice for Aboriginal people and their communities.

Legal Aid NSW and the ALS understand this Inquiry comes out of the findings of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the high levels of involvement of Aboriginal juveniles and young adults in the criminal justice system, and its Report, *'Doing Time - Time for Doing'* (the *Doing Time Report*). The *Doing Time Report* pointed to the link between poor health and the overrepresentation of young Indigenous people in the criminal justice system. It discussed

evidence about alcohol and substance abuse, alcohol reforms and the incidence of FASD in Indigenous communities; and the link between mental health and emotional wellbeing with overrepresentation in the criminal justice system. The *Doing Time Report* noted the benefits of early intervention and a holistic approach to health as a way of addressing health and social disadvantage caused by FASD.

The *Doing Time Report* also points to the need for dealing with diagnoses and treatment of FASD sensitively and the need for cross-agency collaboration with communities on culturally appropriate programs – all of which require time and resources. It also notes that the lack of FASD as a government registered disability means attracting resources and support has been compromised.

In this submission, we make no attempt to define FASD. However, we say that any definition should be one which is generally accepted having regard to the expertise and experience of relevant medical, disability support, legal and affiliated services that come into contact with people with FASD, in consultation with communities. We also say that any definition of FASD should take into account the practical operational considerations within which these sectors work on a day to day basis. In this regard, our submission focuses on how FASD impacts on disadvantaged people in NSW in the legal system (with particular emphasis on the criminal justice system).

The need for early assessment and diagnosis is clear and the need for FASD to be a registered disability is obvious. There is abundant academic medical research on FASD with ample evidence to support FASD as a disability.¹ Canadian research into FASD has shown high incidence of secondary disabilities associated with FASD which includes mental health problems, disruptive school experiences, employment problems and trouble with the law². Other research has found that, amongst the factors protecting against severity of outcomes of FASD, the age of diagnosis is important³. Early diagnosis leads to improved management of these children and, hence, decreases the burden of secondary disabilities.

What should be clear is that government support for early intervention and advocacy services for people with FASD must follow classification of FASD as a disability, including community engagement and education – and be appropriately resourced.

Pathways of people with mental health disorders and cognitive disabilities

Legal Aid NSW has been working with Professor Eileen Baldry at the Faculty of Arts and Social Sciences on an Australian Research Council Linkage Project on Indigenous people with mental health disorders and cognitive disabilities (MHDCD) in the criminal justice system.⁴ The research to date shows that, amongst other things, people with complex cognitive disorders (meaning dual diagnosis and multiple combinations of disorders and disabilities) have:

- significantly higher and earlier contact rates with police,
- higher rates of contact with Juvenile Justice,
- higher offences, convictions, imprisonments (particularly remand) from an earlier age than single diagnosis (and non-diagnosis) groups,
- low rates of mental health diversions⁵, and
- higher continuing lifelong criminal justice episodes.

¹ See references to medical research and diagnosis at <http://embryology.med.unsw.edu.au/Defect/page5a.htm>;

² See <http://www.ecmaj.ca/content/169/11/1181/T4.expansion.html>

³ See Coles CD, Kable JA, Drews-Botsch C, Falek A 'Early identification of risk for effects of prenatal alcohol exposure.' *J Stud Alcohol* 2000, 61(4) pp 607-16

⁴ See <https://research.unsw.edu.au/projects/indigenous-australians-mental-health-disorders-and-cognitive-disabilities-criminal-justice->

⁵ That is, s 32 *Mental Health (Forensic Provisions) Act*.

Interim findings also show that:

- pathways into the criminal justice system are marked by instability and lack of social structure,
- those who received disability service support fare much better than those who do not,
- persons in these groups come from highly disadvantaged places and start cycling in and out of the criminal justice system from an early stage, and
- Aboriginal women have the most complex and chaotic institutional life experiences.

The Marulu Project

The 2010 *Social Justice Report* of the Australian Human Rights Commission contained a case study of a community-led initiative in Fitzroy Valley (WA) to address the issues behind and support for prevention, diagnosis, support, capacity building and resources to address the prevalence of FASD in the predominantly Aboriginal communities in the Fitzroy Valley⁶. The strategy behind the *Marulu Project* was developed by community leaders, partnering with government and university-based institutes and health professionals. Intrinsic to the project is comprehensive and culturally sensitive community engagement to create support for research and advocacy for prevention and support of FASD.

FASD Inquiry and the criminal justice system

We have included the above summary of the interim findings of Professor Baldry's research and reference to the processes engaged in the *Marulu Project* in this submission as they point to the benefits of identification of disadvantage and meaningful community engagement with an identified social problem; and the role early intervention could play in the prevention of entrenching disadvantaged people in the criminal justice system.

Following on from the *Doing Time Report*, this Inquiry presents Parliament with an opportunity to address how FASD as a disability can play out in communities (all kinds of communities) – and how sustained government support for coordinated and consultative community-controlled initiatives can lead to real community-buy in and positive outcomes.

Legal Aid NSW and the ALS together constitute the largest criminal law practices in NSW representing the most disadvantaged people in NSW. This submission draws on our combined experience and expertise to present how particular indices of disadvantage (disability) play out in the criminal justice system to further entrench disadvantage. Legal Aid NSW and the ALS are pleased that the Committee is looking into the FASD from a prevention, intervention and management perspective. However, we are mindful that this Inquiry stems from the *Doing Time Report* – the focus of which was on the over-representation of Aboriginal people in the criminal justice system.

This submission will not focus on the important prevention, intervention issues and management issues from a health services perspective, but will focus on these issues from a criminal justice perspective which raises the following issues:

- The pathways of people with disabilities in the criminal justice system,
- The consequences of the increasing "criminalisation of care", and the role of bail,
- The need to look at policing practices in relation to people with FASD (and other disabilities),

⁶ See Human Rights Commission of Australia, *Social Justice Report 2010* at http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html

- The need for diversions from the criminal justice system for people with disabilities, including those with FASD, and
- The need for FASD to be included in State/Territory and Commonwealth criminal laws as a disability.

Criminalisation of care

Many users of Legal Aid NSW, the ALS and also Community Legal Centres have cognitive or mental health impairment. Clients with FASD may display similar behaviours to those users. Managing clients with disabilities has an impact on these organisations and staff do not necessarily have the expertise or resources to work effectively with these clients with complex needs.

In our view, the criminal justice system is increasingly and inappropriately being used to "deal with" people with cognitive and mental health disabilities or issues because of a lack of resources within the public health and welfare systems. In the case of FASD, where there is, as yet, no accepted clinical assessment tool and FASD is not classified as a registered disability entitling a person to support services – direct intersections with the criminal justice system are exacerbated. For example, it is our experience that inappropriate bail and apprehended violence order (AVO) conditions may be imposed on young people to control a young person's problematic behaviour associated with FASD, rather than for the proper purpose of ensuring community safety or court attendance.

Our legal services (and the non-legal agency partners we work with) are also reporting increased incidences of AVOs being used to control behavioural issues by schools, care workers and parents – rather than referring people displaying difficult behaviours to more appropriate health and welfare support services. Thus behavioural issues associated with disabilities or impairment are diverted to the criminal justice systems rather than being appropriately dealt with (and resourced) as health, care and welfare issues.

Case example

John is a 16 year old who was living with his mother and father. He was diagnosed with Oppositional Defiant Disorder (ODD) and Attention Deficit Hyperactivity Disorder (ADHD) and intellectual limitations however does not have an intellectual disability. Aspergers has also been queried but not substantiated by any professionals. Formal testing has not been completed for autism. His paediatrician believes that John suffers from a mood disorder. However, when he was referred to the Adolescent Mental Health Team psychiatrists within the service, they found no evidence of mental illness.

John was attending a standard high school four days a week and on the other day a behavioural school, until he was suspended from school for behavioural issues. John has a tendency to be violent towards his parents. John was charged with common assault and breaching an AVO that his parents had been granted against him. The court made an order for a treatment plan under s 32 of the Mental Health (Forensic Provisions) Act 1990. The treatment plan was that:

- *John return to school once the suspension ended;*
- *John and his family engage in therapeutic and behavioural intervention with a social worker at the Mental Health Adolescent Team;*
- *John continue to take his prescribed medication; and*
- *John visit his paediatrician for regular reviews.*

At court, John was discharged officially into the care of the social worker.

Not long after the s 32 order was made, John began to breach the terms of the order. He was running away from home, failing to attend school and failing to honour appointments with the Mental Health Adolescent Health Team.

John's mother has over the last few months repeatedly phoned Legal Aid NSW seeking assistance from us to report to the court that John has breached his s 32 order. The request appears to stem from her view that the criminal justice system is the only means left for her to get appropriate assistance for her son. She is concerned that he cannot be compelled to comply with the treatment. Our solicitors have had to explain to her that, given that John is a Legal Aid client it is inappropriate for Legal Aid NSW to report his breaches to the court, and that it is not the role of the criminal justice system to provide therapeutic assistance to John.

Bail issues

It is our experience that young people may be released on bail subject to onerous conditions including curfews, requirement to be in the company of parents and place restrictions. In NSW we are also experiencing increased attention to bail compliance. People with cognitive and mental health impairments are more likely to have difficulty understanding bail conditions, and consequently more likely to breach conditions inadvertently. One consequence of bail breaches is that the person will end up in remand. Young people with a lengthy history of bail compliance issues will be less likely to be granted bail in the adult criminal justice system. The link between juvenile justice issues and long term engagement with the adult criminal justice system is well-known.

Further, the onerous conditions being imposed by police sometimes have little to do with the legislative purpose and criteria to be considered in bail applications. This points to a dysfunction in the management of what is clearly a health and welfare issue. In the case of FASD, where there is as yet no accepted diagnostic tool and an absence of FASD as a registered disability – the chances are that a person with FASD is more likely to come to the attention of law enforcement authorities and the disabilities associated with FASD are only "treated" by their engagement with the criminal justice system.

Case example

A client was charged with committing affray. In the experience of our solicitors it is standard practice at Bidura Court for magistrates in such cases to impose a place restriction encompassing a 2km radius from Sydney Town Hall. The magistrate accordingly imposed this condition, giving no consideration to the fact that the defendant would breach the condition every time she travelled to school, visited the Department of Juvenile Justice in accordance with another bail condition, or visited her sister, who lived in Redfern.

Mental health and cognitive impairment and bail

In its August 2009 report *Why are Indigenous Imprisonment Rates Rising?* The Bureau of Crime Statistics and Research found that one quarter of the increase in the Aboriginal imprisonment rate in New South Wales between 2001 and 2008 was the result of a greater

proportion of indigenous offenders being refused bail and an increase in the time spent on remand⁷.

The 2009 Juvenile Justice and Justice Health survey of young people in custody found that of those sampled, 14% had a possible intellectual disability (IQ 69 and under), 32% scored in the borderline intellectual disability range (IQ 70 to 79) and 18% had a mild to moderate hearing loss⁸. The percentages in each three categories were higher still when the sample was limited to Aboriginal youth. Such mental and physical factors can have a significant impact on the capacity of a defendant to understand bail conditions.

A bail condition should not be imposed unless the bail-making authority is satisfied it is appropriate having regard to the capacity of the person to understand and comply with that condition. Indeed, the legislation should go so far as to require the bail authority to satisfy itself that the accused has in fact understood the requirements, or that somebody else understands the requirements and undertakes to do their best to ensure that the person complies; for example a parent, guardian or member of the person's community. This is particularly important in the case of young people, Aboriginal people, people of a non-English speaking background, and people with a mental illness, cognitive impairment or physical disability.

In relation to people with FASD, it is our experience that people who are exhibiting bad behaviour issues and suffering the kind of trauma associated with impairment and a damaged family background are being unfairly and unnecessarily put through the criminal justice system rather than having their health and welfare needs met.

Stringent bail conditions based on inappropriate considerations are also having a disproportionate impact on Aboriginal people because there is inadequate consideration by the bail authority of community ties and kinship systems. Non-association orders can be especially problematic for Aboriginal people. For people with FASD, there is sometimes insufficient consideration of extended family and kinship relationships in Aboriginal families in determining bail and accommodation issues. For example, our practitioners have experienced Magistrates querying the whereabouts of a defendant's parent in Court - when a carer aunty or grandparent is attending the Court with the defendant.

Further, welfare-related conditions imposed upon Aboriginal young people such as "attend school" also regularly lead to breaches that escalate a person's involvement in the criminal justice system. The lack of appropriate accommodation available for Aboriginal young people when awaiting sentencing is a particular problem in rural and remote areas where there are fewer accommodation options and treatment services.

Further issues relating to bail are set out in the July 2011 Legal Aid NSW and ALS submissions to the NSW Law Reform Commission review of Bail⁹.

Policing

The above issues lead to obvious questions about policing, over-policing and discretion – and the role of policing in the over-representation of people with disabilities in the criminal justice system.

People with FASD and other disabilities may exhibit behaviours such as lack of impulse control and comparative lack of judgement which may attract the attention of police. This

⁷ See www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/.../BB41.pdf

⁸ See www.justicehealth.nsw.gov.au/publications/YPICHS_full.pdf

⁹ See at http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref129sub

behaviour is not necessarily criminal behaviour – but is treated as if it is. And this behaviour, which is not criminal, may incorrectly form the basis of bail decisions, which in the case of people with mental or cognitive impairments is more likely to lead to bail breaches, remand and entrenchment in the criminal justice system.

Police have little training in and are not skilled in diagnosing disabilities. In our experience, the distinction between their role as bail decision-makers and their role as crime preventers and investigators can sometimes be unclear. Some police are using reasons to justify refusing bail that are not warranted under the bail laws – that is, police are using welfare considerations and making inappropriate or onerous bail conditions that do not reflect the purpose of bail. This is relevant as people with behavioural disabilities including FASD are more likely to come into contact with police, bail and the criminal justice system.

These observations call out for better support and remedial diversionary services for people with disabilities coming before institutions within and associated with the criminal justice system.

Diversions

Other issues arise in relation to diversions under mental health legislative instruments¹⁰. The intention of these provisions is remedial: to divert people out of the criminal justice system and into appropriate support services.

As there are currently no diagnostic criteria for FASD, people with FASD fall between the cracks in terms of diversion into treatment. Within the criminal justice system, people with FASD unwittingly come to the attention of police because of particular physical attributes including awkward language use and gait. In this respect, people with FASD are more likely to end up in detention rather than treatment. As stated in the *Doing Time Report*:

*"It would appear that a significant number of Indigenous people who end up in detention centres and prisons are there partly as a result of the failure of governments to identify FASD as an issue underpinning their offending behaviour. As a result, punitive rather than remedial responses have prevailed."*¹¹

Regrettably, in regional, rural and remote NSW the option of diverting people out of the criminal justice system to rehabilitation, support and welfare services is more apparent than real due to the critical lack of services in regional areas. This is particularly the case in communities with high proportions of Aboriginal people.

There has been some discussion as to whether section 22 of the *Mental Health Act 2007 (NSW)* applies to cognitive impairment. However, legislative amendment to include cognitive impairment within the diversionary, remedial legislation will have no effect on its own without the concomitant resourcing of diversionary services to assist people.

We also believe that the remedial benefits of using section 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)* are not well utilised. There have also been discussions in other forums and inquiries about whether cognitive and mental health impairments (which could include FASD) should be usefully included as issues of special consideration within legislation such as the *Bail Act 1978 (NSW)*.

Young Offenders Act

¹⁰ Section 22 *Mental Health Act 2007* and section 32 *Mental Health (Forensic Provisions) Act 1990*.

¹¹ *Doing Time Report*, at para 4.49

The intention of dealing with a young offender under the *Young Offender's Act 1997* (NSW) (the YOA) is to divert them from the criminal justice system. However, our practitioners report that Aboriginal young people are diverted less under YOA than non-Aboriginal people, and that young people with a disability are diverted less than people without disabilities.

A further flaw in the YOA is that young people are limited to 3 diversions until 18. As younger Aboriginal people (as well as people with FASD) are more likely to have contact with police from an earlier age, they will have "exhausted" the utility of accessing diversions at a very early age.

Amendment of laws

Including FASD as a disability must be accompanied by amendment to relevant State/Territory and Commonwealth criminal (and other) laws to ensure equitable access to any relevant remedial provisions.

Concluding remarks and recommendations

In light of the above findings, it is clear that a combination of preventative, early intervention and management issues must be implemented to avoid a new cohort of people with FASD from becoming entrenched in the criminal justice system.

Of critical importance, Legal Aid NSW and the ALS recommend:

- the availability of diagnostic and assessment tools, accompanied by appropriately qualified and resourced early intervention and support services,
- amendment to relevant legislation to recognise FASD as a registered disability,
- amendment to bail legislative frameworks and a review of policing and court practices in relation to bail and bail compliance in the States and Territories to ensure people with FASD and other impairments are not further disadvantaged by the criminal justice system,
- the resourcing of institutional capacity to provide a realistic pathway to divert people with FASD out of the criminal justice system and into appropriate care and support,
- ensuring that people with FASD are not "treated" by being dealt with by the criminal justice system and that appropriate diversionary support services to assist people with FASD are resourced,
- support to meaningful community engagement and consultation and support and resourcing of community-controlled initiatives to address FASD, and
- special consideration be given to the particular needs of Aboriginal women and young people with complex disabilities.

Legal Aid NSW and the ALS welcome the opportunity to provide these comments. Should you require further information, please contact Jenny Lovric at [REDACTED] or John McKenzie at [REDACTED]