

APPENDIX 4

Inquiry into Indigenous youth in the criminal justice system

1.1 In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (Aboriginal and Torres Strait Islander Affairs Committee) tabled its report on the high level of involvement of Indigenous juveniles and young adults in the criminal justice system. The Aboriginal and Torres Strait Islander Affairs Committee commented:

It is clear from the evidence received that FASD is an issue poorly understood by governments. The significance and rate of FASD in youth across Australia is not known.

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.¹

1.2 The Aboriginal and Torres Strait Islander Affairs Committee highlighted the importance of access to accurate and timely assessment and diagnosis of FASD for children, their families and professionals working in the health and criminal justice systems:

Early diagnosis would also mitigate the secondary damages associated with FASD. Diagnosis and support for Indigenous youth with FASD already in contact with the criminal justice system is also important.²

1.3 The Aboriginal and Torres Strait Islander Affairs Committee recommended that the Commonwealth Government urgently address the high incidence of FASD in Indigenous Communities by:

- developing and implementing Foetal Alcohol Spectrum Disorder diagnostic tools and therapies, with a focus on working in partnership with Indigenous health organisations in remote and regional Australia where there is a recognised prevalence of the disorders, and
- recognising Foetal Alcohol Spectrum Disorder as a registered disability and as a condition eligible for support services in the health and education systems.³

1 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, p. 101.

2 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 101-102.

3 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 102-103.

1.4 The Aboriginal and Torres Strait Islander Affairs Committee also recommended a comprehensive inquiry into FASD prevalence, diagnosis, intervention and prevention by the House of Representatives Standing Committee on Social Policy and Legal Affairs.⁴

1.5 The Government response to the Aboriginal and Torres Strait Islander Affairs Committee accepted this recommendation in part.⁵ The Government response noted \$3.2 million investment in the area since 2010, including \$1.7 million for the initiation of the Lililwan Project. New investment on FASD included:

- the development and dissemination of brochures and posters highlighting the 2009 Australian Alcohol Guidelines (National Health and Medical Research Council) message that for women who are pregnant or breastfeeding, not drinking is the safest option;
- the development of screening tools for alcohol use during pregnancy;
- the development of a FASD diagnostic instrument to assist clinicians; and
- an Australian Institute of Health and Welfare scoping study on ways to improve FASD related data collection and reporting.

1.6 In addition, the Government response indicates that the House of Representatives Standing Committee on Social Policy and Legal Affairs will be pursuing an inquiry into FASD.

1.7 However, the Government response states:

The Government does not currently propose to recognise FASD as a registered disability. Access to specialist disability services is currently based on functional needs rather than diagnosis. However, many sufferers of FASD would meet the criteria for eligibility for support services on the basis of functional needs. Support for people with FASD, and their carers, is available through a range of specialist disability services, which are provided by State and Territory Governments under the National Disability Agreement.⁶

Inquiry into prevention, diagnosis and management of FASD

1.8 Following the Aboriginal and Torres Strait Islander Affairs Committee's recommendation, the House of Representatives Standing Committee on Social Policy

4 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, p. 103.

5 See Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report: *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, November 2011, pp 13-14.

6 See Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report: *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, November 2011, p. 14.

and Legal Affairs (Social Policy and Legal Affairs Committee) inquired into the prevention, diagnosis and management FASD and tabled its report in November 2012.

1.9 In relation to FASD and the criminal justice system, Social Policy and Legal Affairs Committee noted that individuals with FASD may not have their disabilities taken into account by judicial officers. Further:

Due to the broad spectrum of FASD, some people with FASD may fit within current definitions of disability for the purpose of sentencing that takes into account reduced culpability. Others, however, may not, despite having significant impairments that should be considered mitigating factors.⁷

1.10 The Social Policy and Legal Affairs Committee referred to the 'disproportionately frequent interactions' of people with FASD with the criminal justice system, and that 'the system is not designed for people with the type of impairments associated with FASD'.⁸

1.11 The Social Policy and Legal Affairs Committee expressed concern that:

[T]he reduced culpability of individuals with FASD may not be taken into account in judicial courts, resulting in such people being imprisoned instead of treated.

The Committee received compelling evidence that legislating a clear and inclusive definition of disability would remove the confusion around the eligibility of individuals with FASD for support services and ensure equity before the law for defendants with FASD.⁹

1.12 The Social Policy and Legal Affairs Committee made 19 broad ranging recommendations. Those recommendations went to: awareness raising and prevention; diagnosis; and management needs. Specifically in relation to the criminal justice system:

The Committee recommends that the Commonwealth Government recognise that people with Fetal Alcohol Spectrum Disorders have, amongst other disabilities, a cognitive impairment and therefore amend the eligibility criteria to enable access to support services and diversionary laws.¹⁰

7 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 136.

8 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, pp 137-142.

9 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 147.

10 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 148 (Recommendation 19).

1.13 Other recommendations of the Social Policy and Legal Affairs Committee included:

- that the actions set out in the Social Policy and Legal Affairs Committee's report constitute the Commonwealth Government's National Plan of Action for the prevention, diagnosis and management of FASD (Recommendation 1);
- the establishment of an ongoing FASD Reference Group to oversee and advise on the FASD National Action Plan. The Reference Group would consist of a select group of practitioners, professionals and stakeholders who are experts in the prevention and management of FASD and report to the relevant Commonwealth Government Ministers (Recommendation 2); and
- the Commonwealth Government report publicly:
 - within 12 months on the progress of the implementation of a national FASD diagnostic and management services strategy; and
 - within five years on the progress towards eliminating FASD in Australia (Recommendation 3).¹¹

1.14 In July 2014, the Government response to the Social Policy and Legal Affairs Committee's report was tabled. The Assistant Minister for Health, Senator the Hon Fiona Nash, in responding to the report provided the following summary of the Government's position on FASD:

The Government remains very aware of the adverse health impacts FASD has in the Australian community and as such, I was pleased to announce on 25 June 2014 funding of \$9.2 million for the National FASD Action Plan.

This Plan provides \$3.1 million for grants to drug and alcohol services to support alcohol dependant women. It provides \$1.5 million in targeted grants to undertake further research to develop best practice guidelines. The New Directions: Mothers and Babies programme will receive \$4 million. The contract to finalise and disseminate the FASD Diagnostic Tool is now in place and the tool will become available in 2015. The establishment of the FASD Technical Network is nearing completion and I am pleased the Professor Elizabeth Elliott AM has agreed to Chair the Network.¹²

Inquiry into the value of a justice reinvestment approach

1.15 The Senate Legal and Constitutional Affairs References Committee considered FASD as an issue contributing to the high incarceration rate of Indigenous Australians in the course of its inquiry into the value of a justice reinvestment

11 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. xvii. Recommendation 16 of the report recommends the development and implementation of a national FASD diagnostic and management services strategy.

12 Government Response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: *FASD: the Hidden Harm: Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorder*, July 2015, p. 1.

approach to criminal justice in Australia.¹³ The recommendations of the Legal and Constitutional Affairs Committee went specifically to justice reinvestment initiatives.¹⁴

Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities

1.16 In June 2015, the House of Representatives Standing Committee on Indigenous Affairs (Indigenous Affairs Committee) tabled the report from its inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities, *Alcohol, hurting people and harming communities*.

1.17 The Indigenous Affairs Committee acknowledged the launch of the FASD Action Plan in 2014 as 'a good first step', however:

[T]he committee is concerned that the Action Plan does not address all the key recommendations of the 2012 report *FASD: The Hidden Harm - Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders* by the House Standing Committee on Social Policy and Legal Affairs, in particular the need for prevention strategies that will provide information and education programs and support for pregnant women with drinking problems.¹⁵

1.18 While there had been some progress with the Australian diagnostic tool for FASD, the Indigenous Affairs Committee noted its concern:

[T]hat the rollout and evaluation has been subject to ongoing delays which has meant that [the diagnostic tool] is still not available for health professionals to use.¹⁶

1.19 In relation to FASD and the criminal justice system, the Indigenous Affairs Committee observed:

There was evidence that when the education and criminal justice systems cannot take FASD into account because there is no official diagnosis of a recognised disability, the individual is severely disadvantaged. The requirements for FASD to be considered in the courts are quite stringent and without a diagnosis, FASD cannot be seen to be a mitigating factor in the persons defence.¹⁷

13 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 36-37.

14 See Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp xi-xii.

15 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 106.

16 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 106.

17 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 119.

1.20 The Indigenous Affairs Committee made six recommendations in relation to FASD and Foetal Alcohol Syndrome (FAS), including:

- that the Commonwealth, as a matter of urgency, increase its efforts to ensure that consistent messages:
 - about the risks of consuming any alcohol during pregnancy, and
 - about the importance of supporting women to abstain from alcohol when planning pregnancy, when pregnant or breastfeedingto reduce the risk of FAS and FASD are provided to the whole community (Recommendation 16).
- That the Commonwealth, as a priority, ensure that the National FASD Diagnostic Tool and accompanying resource are released without any further delays (Recommendation 17).
- That the Commonwealth, in consultation with the FASD Technical Network, and relevant organisations from the criminal justice system:
 - develop a model definition for cognitive impairment, and
 - conduct a review of Commonwealth law and policy to identify where eligibility criteria need to change to ensure that people with FAS and FASD and other cognitive impairments can be included (Recommendation 21).¹⁸

18 See House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, pp xxii-xxiii.