

PLACING COUNTRY AT THE CENTRE: DECOLONISING JUSTICE FOR INDIGENOUS YOUNG PEOPLE WITH FOETAL ALCOHOL SPECTRUM DISORDERS (FASD)

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I Introduction

The problematic consumption of alcohol that has resulted in children being born suffering from the permanent effects of FASD often finds its roots in the systemic discrimination of First Nations peoples, and resultant alienation they experience from their ancestry, culture and their families.

R v Quash [2009] YKTC 54, [62] (Cozens J).

After decades of neglect, attention in Australia has recently focused on the inter-generational impact of long-term alcohol use in the form of Foetal Alcohol Spectrum Disorders ('FASD'), and the lack of responsiveness of the justice system to the needs of persons with FASD.¹ FASD is a non-diagnostic umbrella term encompassing a spectrum of disorders caused by prenatal alcohol exposure,² including Foetal Alcohol Syndrome ('FAS'), Partial FAS ('pFAS') and alcohol-related neurodevelopmental disorder. While Australian data is limited, the prevalence of FASD in Indigenous communities is indicatively greater than non-Indigenous communities.³ In 2015, rates of FAS/pFAS of 12 per 100 children were reported in Fitzroy Crossing in the West Kimberley region of Western Australia.⁴ This is the highest reported prevalence in Australia and on par with the highest rates internationally.⁵

People with FASD may experience a range of cognitive, social and behavioural difficulties, including difficulties with memory, impulse control and linking actions to consequences.⁶ A person with FASD may therefore be disadvantaged in police interviews and unable, rather than wilfully unwilling, to comply with court orders.⁷ An inadequate legal response can also increase the likelihood of young people with FASD developing secondary disabilities, such as substance abuse and mental health

issues, which, in turn, increases their susceptibility to contact with the criminal justice system (as both victims and offenders).⁸ Research in the United States suggests that over half of persons with FASD will interact with the criminal justice system: around 60% will be arrested, charged or convicted of a criminal offence, and about half will have spent time in juvenile detention, prison, inpatient treatment or mental health detention.⁹ Canadian research also indicates that young people with FASD are 19 times more likely to be arrested than their peers.¹⁰ The cycle is particularly concerning in the context of the worsening over-incarceration of Indigenous youth in Western Australia.¹¹

Our research focuses on the West Kimberley region of Western Australia and considers how justice interventions can be targeted and improved to better meet the needs of Indigenous young people with FASD.¹² Our starting point is that FASD is both a symptom and legacy of colonisation, and a significant barrier to Indigenous young people receiving fair treatment at all stages in the criminal justice process. We argue that the criminal justice response must embody a 'decolonising' approach;¹³ in particular, prioritising diversion into community-owned and managed structures and processes, as opposed to just government owned and controlled, if community-based or 'situated', systems. By placing country in the centre and exploring the potential for hybrid initiatives in the complex liminal spaces between Indigenous and non-Indigenous domains, the justice system might begin to address the needs of Indigenous young people with FASD.

This paper begins by outlining the prevalence, 'primary' impairments and 'secondary' disabilities associated with FASD. The paper then outlines how young people with FASD are disadvantaged at each stage in the criminal justice

process. We focus, in particular, on the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('Act'), which may result in young people with FASD being indefinitely detained without trial in a custodial setting. Justice professionals and community members in the West Kimberley are concerned about the potential for the attention on FASD to lead to greater use of the Act. Justice professionals and community members have called for less intrusive, less costly and more diversionary alternatives to the criminal justice process. The paper concludes by exploring how a Mobile 'needs focused' Court, embodying a 'decolonising' approach, might improve the responsiveness of the justice system to young people with FASD, and other cognitive impairments, by enabling targeted intervention and diversion. We argue that such a court could serve as a testing ground to assess the feasibility of 'therapeutic' and 'trauma informed' modes of adjudication and service delivery partnered with Indigenous community-led initiatives, such as 'on-country' and cultural healing programs.

II Prevalence, Primary and Secondary Effects of FASD

FASD was first identified in the 1960s in France in the respective works of a doctoral researcher, Jaqueline Roquette, and French paediatrician, Professor Lemoine.¹⁴ Professor Lemoine published the first article on the subject in 1968,¹⁵ and was followed, in 1973, by North American academics.¹⁶ Over the past four decades, significant progress has been made in understanding and awareness of FASD. Diagnostic challenges nonetheless remain, with ongoing debate regarding 'the specific assessment techniques used to make the definitive diagnosis, particularly for alcohol-related neurodevelopmental disorder'.¹⁷

The difficulty of obtaining accurate rates of FASD is well documented.¹⁸ The low reported rates in Australia are frequently attributed to under-diagnosis, under-reporting, lack of information regarding prenatal alcohol exposure, inconsistent diagnostic criteria, and under-representation of high-risk populations.¹⁹ Most existing prevalence studies report only FAS. Existing Australian estimates of FAS in non-Indigenous populations have ranged from 0.14 to 1.7 per 100 children.²⁰ Consistently with prevalence studies internationally,²¹ FASD is disproportionately diagnosed amongst Australia's Indigenous peoples.²² Australian estimates in Indigenous populations have ranged from 0.14 to 4.7 per 100 children.²³ In 2015, Australia's first population-

based study on the prevalence of FAS/pFAS, reported rates of 12 per 100 children in the remote Indigenous town of Fitzroy Crossing in Western Australia.²⁴ This is the highest reported prevalence of FAS/pFAS in Australia and similar to rates reported in 'high-risk' populations internationally.²⁵

The 'primary' effects of FASD are the physical and mental impairments that directly result from prenatal exposure to alcohol. Physical effects may include pre-natal and/or post-natal retardation of growth in weight and/or height below the tenth percentile,²⁶ visual impairments, hearing impairments, and structural abnormalities of the heart, kidneys and skeleton.²⁷ FAS, the most severe end of the FASD spectrum, often results in craniofacial dysmorphism, such as a head size below the third percentile, small eyes, an under-developed filtrum (the groove between the upper lip and nose),²⁸ a thin upper lip, and a flattening of the upper jaw.²⁹

Prenatal alcohol exposure may also cause damage to the frontal lobe of the foetal brain, resulting in cognitive deficiencies.³⁰ Deficiencies may include impairments in learning, attention, memory, sensory perception, and language. Damage may also be caused to the limbic system, risking impairments in social judgment, impulse control, and emotional regulation.³¹ Difficulty with abstract reasoning often manifests as a failure to learn from experience, and link consequences with actions.³² People with FASD may also experience difficulty seeing 'the big picture', in the sense of imagining a future, thinking about others, explaining actions, or restraining impulses.³³ The primary effects of FASD also affect a person's ability to engage in school and employment.³⁴ Consequently, 60 per cent of people with FASD have disrupted or curtailed school attendance that may exacerbate existing cognitive deficiencies.³⁵

The 'secondary' effects of FASD are those developed as a result of FASD's primary effects. Secondary disabilities are a cluster of social and psychological problems that develop as a result of FASD's primary effects being exacerbated by repeated negative contact with the criminal justice and related systems; inadequate support and misdiagnosis; existence on the margins of society; and institutionalisation.³⁶ Research indicates that over 90 per cent of people with FASD will be diagnosed with a psychiatric disorder during their lifetime,³⁷ with 30% developing substance abuse problems.³⁸ These secondary effects increase the susceptibility of persons with FASD to contact with the criminal justice system,³⁹

fuelling concerns of lifelong enmeshment in the criminal justice system. In this way, the criminal justice system is a disabling influence on people with FASD, intensifying their disablement through their interactions with the criminal justice system.⁴⁰

III FASD and the Criminal Justice System

There is a growing awareness of the criminal justice system's inadequate accommodation of FASD-associated impairments.⁴¹ The assumptions of free will and individual responsibility that underpin Australian criminal law are largely incompatible with the impairments associated with FASD.⁴² The difficulties people with FASD may have learning from experience, linking actions with consequences, and restraining impulses, may render them more susceptible to engage in criminal behaviour.⁴³ This is exacerbated by suggestibility, which, research indicates, often results in secondary participation in the commission of criminal offences by more sophisticated offenders.⁴⁴ Consequently, international research indicates that 60 per cent of individuals with FASD have been in trouble with the law,⁴⁵ with young persons affected by FASD being disproportionately represented in the juvenile justice system.⁴⁶

The impairments associated with FASD pose unique challenges at each stage of the criminal justice process. The suggestibility of a person with FASD means they are more likely to agree with propositions put to them by police in interviews.⁴⁷ For example, recent media reports in Western Australia have raised concerns about the validity of the confession made by an Indigenous man, Gene Gibson, who is suspected of having FASD, to the manslaughter of Broome man, Joshua Warneke.⁴⁸ Difficulties with memory place persons with FASD at a disadvantage when trying to explain behaviour, give instructions to lawyers, or give evidence.⁴⁹

Once defendants, the difficulties that persons with FASD experience with memory and linking actions with consequences are likely to render diversionary alternatives such as fines, community-based orders, and good behaviour bonds, futile.⁵⁰ The imposition of community-based orders on persons affected by FASD was recently criticised as 'unrealistic' by the Court of Appeal of the Supreme Court of Western Australia.⁵¹ In light of their inability to comply with such orders, these alternatives set people with FASD up for failure and further embroil them in the criminal justice system. These concerns are mirrored in prison,

wherein persons with FASD are unlikely to be able to comply with prison rules, and may be victimised due to their suggestibility.⁵² This may consequently result in a worsening of the effects associated with FASD.⁵³

The identification of the impairments associated with FASD is essential to alert justice professionals to the reasons for an individual's responses, and to allow these impairments to be appropriately accommodated. A failure to do so increases the risk of persons affected by FASD coming into, and maintaining, contact with the criminal justice system.⁵⁴ Given the increased prevalence of FASD in Indigenous populations, this may only exacerbate the over-incarceration of Indigenous youth in Western Australia: despite only constituting 6.4 per cent of youth in Western Australia, Indigenous youth account for 78.3 per cent of youth in juvenile detention,⁵⁵ and are 53 times more likely to be detained than their non-Indigenous peers.⁵⁶

Given the importance of identification, Australian research has, to date, focused on the awareness of lawyers and justice professionals of FASD,⁵⁷ and/or sentencing issues.⁵⁸ Western Australian research, in particular, has concentrated on the awareness of justice professionals of FASD and the perceived impact of FASD on attitudes and practice within the justice system.⁵⁹ In a recent study by Mutch et al, 1873 West Australian justice professionals were surveyed, including judicial officers, police and lawyers; 23% responded. This study found 'deficits in the treatment of individuals with FASD within the [Western Australian] justice system' on par with studies conducted in Queensland and Canada.⁶⁰ The study identified a number of challenges to the effective management of persons with FASD within the justice system, and that there existed a need for:⁶¹

1. training and education to improve awareness of the specific impairments associated with FASD that impact on the treatment of individuals with FASD across the justice system of WA [Western Australia];
2. training and education to describe how individuals with FASD should be managed;
3. improved methods for the identification of individuals with FASD and referral for specialist assessment;
4. identified specialist diagnostic services for FASD;
5. information to enable the appropriate recognition and management of an individual's neurocognitive and behavioural impairments within the justice system;
6. effective alternative sentencing options;

7. programs and resources to provide appropriate treatment for the underlying fixed brain injury; and
 8. management and supportive environments specific to the needs of individuals with FASD.
2. the availability of only two disposals ‘at one extreme or the other’;⁷¹ and
 3. the unlimited duration of a custody order.

Researchers at the Telethon Kids Institute are currently undertaking research into the prevalence of FASD amongst detainees in Western Australia’s juvenile detention centre, ‘Banksia Hill’, in Perth, with a view to developing management plans and through care support.⁶²

It is crucial that the identification of FASD triggers appropriate responses, and does not itself cause greater harm.⁶³ Criminological research warns that even well-intentioned intervention can have the unintended consequence of drawing young people deeper into judicial and correctional systems in order for them to receive treatment and support.⁶⁴ The inadequacy of existing solutions is well illustrated by the case of *AH v Western Australia*.⁶⁵ This case concerned a 21-year-old Indigenous woman from the Pilbara, suspected to be affected by FASD.⁶⁶ Despite numerous reports and assessments identifying the accused’s impairments, the recommended support and assistance was never implemented. Consequently, the accused’s criminal behaviour escalated after the commission of her first offence at the age of 16. The Court considered this ‘conspicuous failure of the justice system’ not only failed the accused, but also failed to protect the communities in which she lived.⁶⁷ While sentencing responses to FASD are criticised as inadequate,⁶⁸ its identification risks much graver consequences in the context of fitness to stand trial.

A Fitness to Stand Trial

In Western Australia, a diagnosis of FASD can trigger indefinite detention under the Act if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. Unlike the *Young Offenders’ Act 1994* (WA), the Act does not contain special procedures for persons who are 17 years of age or younger.⁶⁹ Commonwealth and State Parliamentary Committees, members of Western Australia’s judiciary, and academics have noted the inadequacies of Western Australia’s regime with regards to unfit accused affected by FASD.⁷⁰ Particular concern has been expressed about:

1. the absence of a trial or special hearing process to determine the accused’s guilt or innocence;

The Act is controversial because it can lead to indefinite detention in a custodial setting *without* trial. The Western Australian Attorney General’s Department recently reviewed the Act. The recommendations of the 2016 Review would, if implemented, overcome some of the deficiencies of the regime (namely the limited options available to a judicial officer on a finding of unfitness). However, the recommendations do not address many of the deficiencies of the regime, such as the unlimited duration of custody orders.

The common law ‘presumption’ of fitness to stand trial is enshrined in s 10 of the Act. The presumption is displaced by proof, on the balance of probabilities, that the accused is unfit to stand trial.⁷² The issue of fitness may be raised at any stage of the proceedings by the defence, prosecution, or the court.⁷³ The presiding judicial officer determines whether an accused is unfit to stand trial after conducting inquiries and informing himself or herself in any way the judicial officer thinks fit.⁷⁴

The test for mental fitness is contained in s 9 of the Act:⁷⁵

an accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —

- a) unable to understand the nature of the charge;
- b) unable to understand the requirement to plead to the charge or the effect of a plea;
- c) unable to understand the purpose of a trial;
- d) unable to understand or exercise the right to challenge jurors;
- e) unable to follow the course of the trial;
- f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- g) unable to properly defend the charge.

If a court finds a young person is unfit, and ‘will not become mentally fit to stand trial within 6 months’, the court has two options: release the accused; or make a custody order (where imprisonment is a sentencing option). It is for this reason that the regime has been criticised by Reynolds J for allowing only ‘one extreme or the other.’⁷⁶

In deciding whether or not to make a custody order, the court must be satisfied such an order 'is appropriate having regard to':

- a) the strength of the evidence against the accused;
- b) the nature of the alleged offence and the alleged circumstances of its commission;
- c) the accused's character, antecedents, age, health and mental condition; and
- d) the public interest.

While the judicial officer does consider these factors, unlike most Australian jurisdictions, the regime does not involve a special hearing as to guilt or innocence.⁷⁷ This was recently highlighted by the case of Marlon Noble, an Indigenous man imprisoned for 10 years upon a finding of unfitness. The Australian Law Reform Commission reported:⁷⁸

Marlon Noble was charged in 2001 with sexual assault offences that were never proven. A decade after he was charged, the allegations were clearly shown to have no substance. Marlon spent most of that decade in prison, because he was found unfit to stand trial because of his intellectual disability.

The 2016 Review considered whether to introduce a special hearing process. The Review noted the criticisms of special hearings, including that a special hearing would subject an unfit accused to a trial process, and instead recommended that the Act be amended to:⁷⁹

require a judicial officer to have regard to whether there is a case to answer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.

Courts in Western Australia already have the power to determine, as a matter of law, that the accused has a case to answer. If implemented, *requiring* the court to consider whether there is a case to answer and the matter ought to be dismissed would be an improvement, if slight improvement, on the current regime.

Where a court makes a custody order, a young person with FASD can only be detained in a juvenile detention centre or a declared place designed to house and support accused young persons with cognitive impairments who are detained under the Act. The young person cannot

be detained in a mental health facility unless they are also diagnosed with a treatable mental illness. Western Australia's only 'declared place' for the purposes of the Act, the Bennett Brook Disability Justice Centre, opened in Perth in August 2015. This is a welcome development; however, the Centre can accommodate a maximum of 10 people and does not cater for children under 16 years of age.

The 2016 Review did not recommend the abolition of prison as a placement option for detention of mentally impaired accused subject to custody orders. The Review noted that in regional areas, prison may provide the only secure facility proximate to family and community.⁸⁰ Instead the Review found that a 'constructive response to concerns' was to focus on improving the provision and coordination of services to mentally impaired accused detained in prison, and the training of custodial staff.⁸¹

Crucially, a custody order is of unlimited duration. A person will be detained under a custody order, until released by an order of the Governor (in practice, on the recommendation of the Mentally Impaired Accused Board (the Board)).⁸² The only protection against an accused's indefinite detention is the Board's reporting requirements under ss 33 and 34 of the Act. After the initial report made within 8 weeks of a custody order being imposed, the Board must provide annual written reports to the Minister, in addition to any reports the Minister may request, or that the Board considers justified by special circumstances.⁸³ Reports must recommend whether or not the Governor should be advised to release the accused, and report on the factors in s 33(5) of the Act:⁸⁴ namely, the likelihood of compliance; the risk the accused presents to the community; and imposing the least restriction on the accused's freedom that is consistent with the health and safety of the accused and any other person.⁸⁵ If the Board recommends the Governor to be advised to release the accused, it must also recommend any appropriate conditions.⁸⁶ On the advice of the Board and Minister, the Governor may order an accused's conditional or unconditional release.⁸⁷ Chief Justice Martin of the Western Australian Supreme Court has expressed the effect of a custody order for a person with FASD as essentially 'indefinite imprisonment without significant prospect of treatment of the conditions which have made ... [the accused] unfit to plead or which might have precipitated the offending which the State alleges.'⁸⁸

The 2016 Review recommended the retention of indefinite custody orders for unfit accused, emphasising that the preventive, protective and therapeutic purposes of detention under the Act are inconsistent with fixed terms.⁸⁹ The Review did, however, recommend the establishment of a working group to review the operation of indefinite custody orders.⁹⁰ Importantly, the Review recommended that further consideration be given to ‘developing juvenile-specific considerations in close consultation with relevant stakeholders’ to be applied by the Board in deciding whether or not to recommend release.⁹¹

This regime, as it currently stands, places lawyers representing unfit young persons with FASD in a precarious position. Lawyers are faced with the dilemma of raising unfitness, which could result in their client being indefinitely detained without trial, or advising their client to plead guilty to the charged offences, as any custodial sentence imposed will be limited and shorter.⁹² This is only further complicated by mandatory sentencing provisions in Western Australia. Reynolds J articulated the problem in *The State of Western Australia v BB (A CHILD)*:⁹³

The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed ... The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.

The introduction of ‘community-based’ orders has been suggested in order to alleviate the extremity of an accused’s indefinite detention or unconditional release.⁹⁴ For example, the Western Australian Inspector of Custodial Services has recommended ‘community-based alternatives to custody orders for people who are found unfit to stand trial but require some degree of supervision.’⁹⁵ The 2016 Review recommended that the options available to a court be

expanded to include the range of orders ‘available under the Sentencing Act 1995, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence’.⁹⁶ The Review further recommended that ‘a broader range of options to be made available for juveniles found mentally unfit to stand trial, modelled on the sentencing options under Part 7 of the Young Offenders Act 1994.’⁹⁷ For young persons, Part 7 of the *Young Offenders’ Act 1994* (WA) includes the options of an intensive youth supervision order, a youth community based order or a conditional release order.

While this is an important recommendation, the problematic nature of such orders has been noted in the context of Indigenous youth who are fit to stand trial.⁹⁸ Indeed, the over-representation of Indigenous youth in Western Australia’s justice system has only worsened since the introduction of ‘community-based’ orders in the *Young Offenders’ Act 1994* (WA).⁹⁹ This is only exacerbated by the difficulties that persons with FASD experience in complying with such orders, as discussed above.¹⁰⁰

Fundamentally, these ‘community-based’ orders are inadequate because they are ‘community-based’ rather than ‘community-owned’ solutions.¹⁰¹ The former are created by government agencies to operate in community settings, while the latter are determined by communities themselves.¹⁰² As a mere annex of Western Australia’s existing criminal justice system, ‘community-based solutions’ fail to reformulate the system’s fundamental principles.¹⁰³ We argue that a ‘decolonising’ approach¹⁰⁴ that prioritises and enables diversion into community-owned and managed structures and processes, as opposed to government owned and controlled, if community-based or ‘situated’, systems has the potential to more adequately address the needs of Indigenous young people with FASD.

IV Decolonising Justice

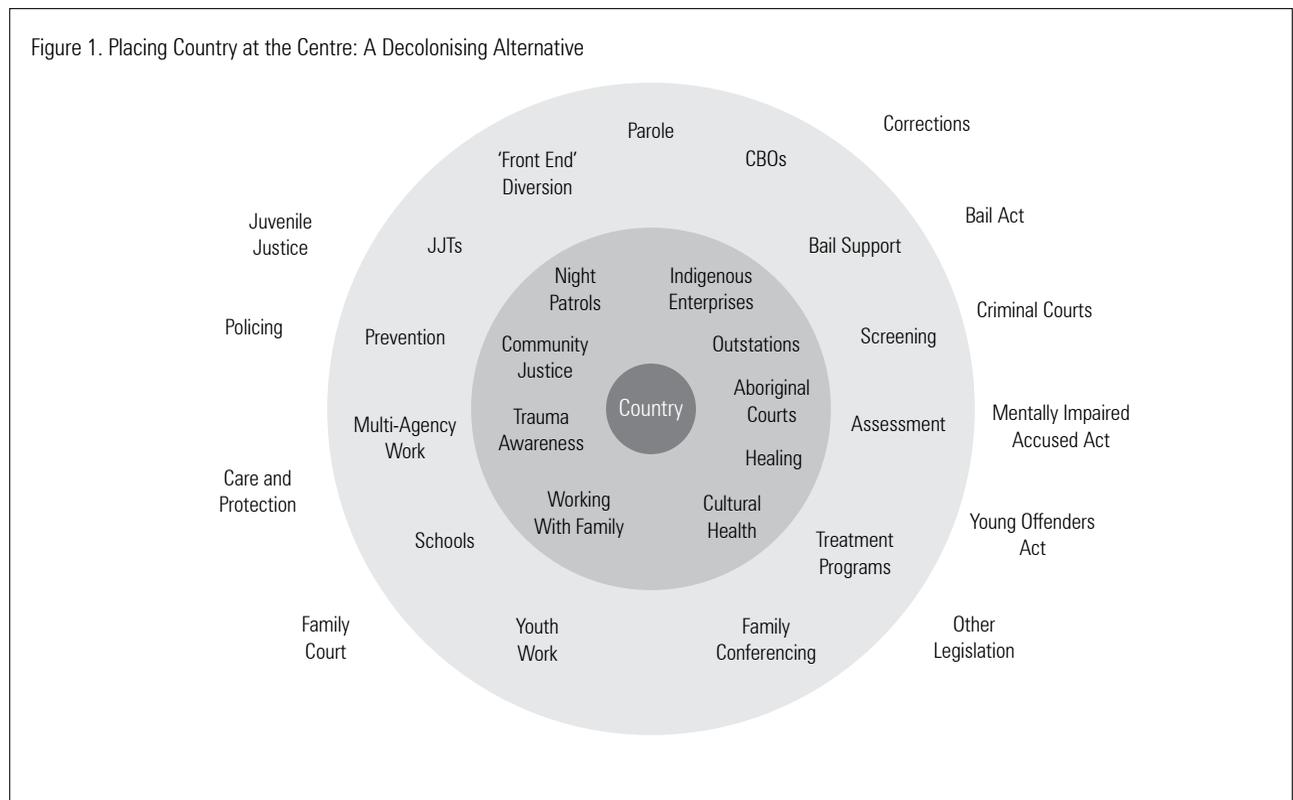
Our research with community members and justice professionals in the West Kimberley region has identified the need to create culturally secure initiatives that draw on the authority of Elders and devolve the care and management of young people with FASD to Indigenous communities. To achieve this, we argue for a Mobile ‘needs focused’ Court that takes elements from the ‘Koori Court’ model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre

model, which has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into, preferably 'on-country', support. We argue that this will require placing country at the centre, rather than on the periphery, of intervention. By this we mean that FASD should be viewed as a social as well as a clinical and/or legal matter.

The consultation process for the research took place in 2015 and 2016, and involved a range of interviews and focus groups with community members, justice professionals, and key individuals and groups in Broome, Fitzroy Crossing and Derby. Focus groups with community members were 'non-intrusive' and based on 'a two-way exchange exercise', rather than the traditional Western research practice of 'intensive direct questioning'. The focus groups aimed to illicit family, community, legal and government perspectives and understandings of FASD and related conditions, and the challenges facing these communities, such as interviewing vulnerable young people, diversionary mechanisms and their relevance, fitness to stand trial fitness to plea and how to make the justice process 'problem solving'.

To ensure our research aligns with the aspirations of Indigenous people in the West Kimberley, we formed partnerships with three prominent Indigenous led and managed agencies: *Nindilingarri Cultural Health Services* in Fitzroy Crossing; *Garl Garl Walbu Alcohol Association Aboriginal Corporation* in Derby; and *Life Without Barriers* in Broome. These organisations were identified on the basis of existing relationships of trust with these bodies, formed over several decades of research in the Kimberley by Harry Blagg, and because each was engaged in work that brought them into contact with youths and families where FASD was an issue.

The research is supported by the Magistrates Court and various court user groups (including police prosecutors, the Aboriginal Legal Service, Legal Aid and Regional Youth Justice Services) and we were able to accompany the West Kimberley Magistrate on circuit, including court sittings in Broome, Derby and Fitzroy Crossing. There have been extensive interviews and focus groups with key stakeholders in the West Kimberley region. We have supplemented this place-based research with discussions in Metropolitan Perth, having hosted a roundtable at UWA



with key agencies and participated in a number of forums, including a FASD Symposium at UWA.

Our research to date has uncovered strong support amongst Indigenous, and non-Indigenous stakeholders for what might call a 'country-centric' response to FASD. As set out in Figure 1, the criminal justice response to FASD should increasingly defer to Indigenous organisations and Indigenous practices, placing them at the centre of intervention. Such an approach recognises the enduring legacy of colonisation manifest in the disproportionately high prevalence of FASD in Indigenous communities. The outer rim of the diagram describes the array of mainstream colonial structures that alienate Indigenous people. The next indicates attempts to bridge the divide between Indigenous people and mainstream justice systems through the creation of top down community based services. Closer to the centre it is possible to identify a range of what we have called community owned initiatives that draw on Indigenous cultural authority, rather than mainstream governmentality, for legitimacy and status, they include a range of practices from Aboriginal courts through to Aboriginal Night Patrols. These initiatives are generally 'place-based' and situated on, or close to, country: the latter being the source of Indigenous law and culture.

A A Mobile 'Needs Focused' Court

Our proposed model draws on the techniques employed by 'problem oriented courts', to promote better outcomes for young people with FASD. These techniques attempt to collectively resolve issues through: problem-solving meetings involving relevant agencies and court workers, with a view to presenting solutions to the Magistrate; and a non-adversarial approach, which commits prosecution and defence to focus on resolving a young person's underlying issues.¹⁰⁵ These processes are generally found in metropolitan areas but, we believe, may be suited to the bush, due to closer relations between agencies and all court users—the Magistrate, prosecution, the Aboriginal Legal Service and Legal Aid—travelling on circuit. Furthermore, there is a single Magistrate who has continuous contact with offenders and communities, which is an essential element of 'judicial monitoring'.¹⁰⁶

We envisage the hybrid 'Koori Court' and Neighbourhood Justice Centre model facilitating greater Indigenous involvement in community-based alternatives for those found unfit to stand trial. There are successful community-owned

initiatives that could provide a basis for a new model of Indigenous youth justice. For example, the Yiriman project, representing the four language groups in the Fitzroy Valley (Nyikina, Mangala, Karajarri and Walmajarri), takes young people at risk onto remote desert country to 'build stories in young people'.¹⁰⁷ A three-year review of the Yiriman project found that:¹⁰⁸

One ought not expect that the project can be a panacea for the range of difficulties confronting communities in the Kimberley. However, there is good evidence that taking young people and other generations on country is important for their health. There are definitely immediate healthy effects of taking young people away from their poor diets and living conditions that create depression and despair. There is also evidence that Yiriman has assisted in the campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that Yiriman is more capable in this regard than most other diversionary and sentencing options.

Interviews with 'Cultural Bosses' who govern the Kimberley Aboriginal Law and Culture Centre, reveal that the rhythms of life 'on-country' are beneficial for young people with FASD and other cognitive impairments because they are not being bombarded with stimuli and are able to work within Indigenous notions of time. Children with FASD are already being taken 'on-country' and, with support, are undertaking culturally based activities, from making spears to assisting local Indigenous Ranger Programs to 'care for country'. Immersion in 'on-country' programs may be vital in terms of preventing the emergence of secondary disabilities.¹⁰⁹ Through facilitating culturally secure and community-owned alternatives, a mobile 'needs focused' court may lead to better outcomes for Indigenous young people with FASD.

V Conclusion

Australia's recognition of, and response to, FASD 'lags behind other countries'.¹¹⁰ The House of Representative's Standing Committee on Social Policy and Legal Affairs reported, '[i]t is clear that urgent measures must be taken to reduce the incidence of FASD and to better manage those diagnosed with FASD'.¹¹¹ In 2015, the House of Representative's Standing Committee on Indigenous Affairs found '[t]here is also a great need for diversion programs which redirect individuals [with FASD] who come in contact with the criminal justice system'.¹¹² An appropriate response requires decolonising

the justice system in order to break down the barriers that prevent Indigenous young people from participating in the system on an equal basis.

Our research with Indigenous stakeholders, thus far, strongly endorses an approach to the FASD issue that places Indigenous organisations and Indigenous practices at the centre of intervention, as set out in Figure 1. Much discussion of FASD has, unsurprisingly, focused on the need for better screening and diagnostic services, as well as increasing the awareness of police and judicial officers regarding the nature of the condition and its implications for the administration of justice. Yet, there is also a need to build the capacity of community-owned and -managed services to provide for the day to day care and support of young people with FASD and their families. Once a diagnosis has been presented, the main issue becomes one of quotidian stabilisation and support, and erecting ‘external scaffolding’ around the child. Indigenous organisations should be funded to provide mentoring and family support services, interlaced with ‘on-country’ camps that help to stabilise young people and help to heal families, thereby reducing the likelihood of further generations being lost to FASD. Such arrangements may also reduce the tendency for misdirected intervention by the justice system to create secondary disabilities.

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1 See e.g. ABC, ‘Hidden Harm’, *Four Corners*, 2 November 2015 (Deb Whitmont) <<http://www.abc.net.au/4corners/stories/2015/11/02/4341366.htm>>; House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm Inquiry into the Prevention, Diagnosis and Management of Fetal Alcohol Spectrum Disorders*

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