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**Abstract** | This article reports on a study undertaken in three Indigenous communities in the West Kimberley region of Western Australia (WA) intended to develop diversionary strategies for young people with fetal alcohol spectrum disorder (FASD). Rates of FASD in the West Kimberley were comparable to those of high-risk populations internationally and there are concerns that youths with FASD are being enmeshed in the justice system. Further, under WA law they are at risk of being held in indefinite detention if found unfit to stand trial. Besides recommending legislative reform, the authors urge a 'decolonising' approach, meaning maximum diversion into community owned and managed structures and processes, able to offer a culturally secure environment for stabilising children with FASD. The study calls for reform of police diversionary mechanisms and the creation of mobile 'needs focused' courts, offering comprehensive screening and rapid entry into on-country programs with strong Aboriginal community involvement.

## Diversions pathways for Aboriginal youth with fetal alcohol spectrum disorder

Harry Blagg and Tamara Tulich

Attention in Australia has recently focused on the inter-generational impact of long-term alcohol use in the form of fetal alcohol spectrum disorder (FASD). FASD is a diagnostic umbrella term encompassing a collection of disorders resulting from exposure to alcohol in utero, including FASD with three sentinel features (a new diagnostic category replacing fetal alcohol syndrome (FAS)) and FASD without three sentinel features (replacing the previous categories of partial FAS (pFAS) and neurodevelopmental disorder–alcohol exposed) (Bower and Elliott 2016). The Australian Parliament's House Standing Committee on Social Policy and Legal Affairs (2012: 3) recently reported:

Australia currently lags behind other countries in recognising the prevalence of FASD and the impact on the individual as well as social and economic impact on families and society. It is clear that urgent measures must be taken to reduce the incidence of FASD and to better manage those diagnosed with FASD.



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There is also a growing awareness of the criminal justice system's inadequate accommodation of FASD-associated impairments (Roach & Bailey 2009: 3; Parliament of Australia 2015, 2012, 2011; Parliament of Western Australia 2012: 75). People with FASD may experience a range of cognitive, social and behavioural difficulties, including difficulties with memory, impulse control and linking actions to consequences (Douglas 2010). A person with FASD may therefore be disadvantaged in police interviews and unable, rather than unwilling, to comply with court orders. An inadequate legal response can also increase the likelihood of people with FASD developing secondary disabilities such as substance abuse which in turn increase their susceptibility to contact with the criminal justice system, as victims and offenders (Koren, Roifman & Nulman 2004: 4). International research indicates that 60 percent of individuals with FASD have been in trouble with the law (Streissguth et al. 2004), with young persons affected by FASD being over-represented in the juvenile justice system (Cox, Clairmont & Cox 2008).

While Australian data is limited, the prevalence of FASD in Indigenous communities is indicatively higher than in non-Indigenous communities (Parliament of Australia 2011). The issue of FASD in the West Kimberley was highlighted by campaigns initiated by Bunuba women June Oscar, Emily Carter (Marninwarntikura Women's Resource Centre) and Maureen Carter (Nindilingarri Cultural Health Services) as part of a broader campaign to reduce alcohol consumption in Fitzroy Crossing and publicise its catastrophic effects. In 2015, rates of FAS/pFAS of 12 per 100 children were reported in Fitzroy Crossing in the West Kimberley region of Western Australia (Fitzpatrick et al. 2015). This is the highest reported prevalence of FAS/pFAS in Australia and similar to rates reported in 'high-risk' populations internationally (Fitzpatrick et al. 2015: 450).

The need to divert Indigenous youth with FASD from contact with the justice system has been acknowledged by a number of official sources (Parliament of Australia 2015: para 5.84). The Western Australian Office of the Inspector of Custodial Services (OICS 2014: 10) has recommended 'community based alternatives to custody orders for people who are found unfit to stand trial but require some degree of supervision'.

Diversions alternatives are sorely needed. However, this research raises questions about the relevance of mainstream diversionary mechanisms to this task, particularly given the failure of existing community-based sanctions to stem the flood tide of Indigenous over-incarceration in Western Australia. FASD amplifies the chances of Indigenous youth being caught up in the justice system in Western Australia, including indefinite detention in prison if found unfit to stand trial. A fresh diversionary paradigm is required.

## Methodology

This research responds to specific concerns raised by Indigenous women in Fitzroy Crossing, in particular, about the numbers of children with FASD who were vulnerable to enmeshment in the justice system—concerns amplified by a range of professionals working in the justice system, from lawyers to police prosecutors. This project explores diversionary methods and law reform options that will equip courts and multi-agency teams, partnered with community owned and managed services, to construct alternative pathways into treatment and support. The research was conducted in three locations in remote Western Australia: Broome, Derby and Fitzroy Crossing.

To ensure the research was in line with the aspirations of Indigenous people in the West Kimberley, the researchers 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 Professor Blagg, and because each was engaged in work that brought them into contact with youths and families affected by FASD.

The research had the support of the Magistrates Court and various court user groups (including police prosecutors, the Aboriginal Legal Service, Legal Aid and Regional Youth Justice Services) and the researchers were able to accompany the West Kimberley Magistrate on circuit, including court sittings in Broome, Derby and Fitzroy Crossing.

The research design involved a mix of comparative legal analysis, a review of the extant police and practice literature around FASD, an examination of the literature on the Western Australian justice system in relation to Aboriginal youth, and a qualitative research phase. Extensive interviews and focus groups were undertaken with key stakeholders in the West Kimberley region. The field work was initiated by staging a workshop co-hosted with respective research partners in each research site. In Broome, the largest of the three sites and the regional services hub, there were 19 attendees at the workshop; there were eight in Derby. These were mainly representatives from key mainstream agencies (police, health, justice, education) but also included Indigenous service providers and youth agencies. The Fitzroy Crossing workshop included senior lawmen from Kimberley Aboriginal Law and Culture Centre, as well as Nindilingarri Cultural Health Services and Marninwarntikura Women's Resource Centre and the police (10 people).

The process then snowballed, picking up potential recruits suggested by attendees; an estimated 25 more subjects were contacted in this way—19 in the Broome area and the remainder in Derby and Fitzroy Crossing. Travelling on circuit with the magistrate allowed researchers to interview not only the magistrate but also the Legal Aid and Aboriginal Legal Service lawyers and police prosecutors who accompanied the magistrate. It also afforded an opportunity to meet with approximately 20 more subjects from court user groups (drug and alcohol services, Indigenous community organisations, bail support workers, juvenile justice workers, mental health and disability support services, domestic and family violence workers) whose work brings them into contact with FASD issues.

This place-based research was supplemented with discussions in metropolitan Perth. For example, a roundtable with key agencies (police, judiciary, disability services, legal services and Indigenous organisations) attracted 30 participants. These were followed by individual interviews with senior personnel including executive level police (superintendent and above), the Chief Justice of Western Australia and the President of the Children's Court, senior counsel with the Aboriginal Legal Service, and prominent health and disability advocates. Approximately 10 subjects were in this group. In all, approximately 122 people were interviewed.

The field work methodology in relation to Indigenous participants was based upon a participatory model of research that respects and integrates Indigenous perspectives into the research process. To this end the research adopted a stance fitting broadly into the Appreciative Inquiry paradigm, in that it is concerned with identifying strengths (or potential sources of strength) rather than continuously focusing on deficits and weaknesses (Robinson et al. 2013). Appreciative Inquiry validates a 'yarning' style involving deep conversations with Indigenous people that do not set out from a position of preconceived intellectual certainty and implicit superiority.

## Why is FASD a justice issue?

The range of cognitive, social and behavioural difficulties a person with FASD may experience can render them more susceptible to contact with the criminal justice system, and pose challenges at each stage of the criminal justice process. Difficulties with memory and suggestibility mean that a person with FASD is more likely than those without the disorder to agree with propositions put to them, and may therefore be disadvantaged in police interviews (Parliament of Western Australia 2012: 75). Difficulties with memory may make it harder for people with FASD to explain their behaviour, to instruct lawyers and to give evidence in court (Parliament of Western Australia 2012: 75). Difficulties with memory and linking actions to consequences are likely to render diversionary alternatives such as fines, community-based orders and good behaviour bonds futile (Douglas 2010: 228; Parliament of Western Australia 2012: 76).

Research undertaken in the United States suggests that over half of persons with FASD will interact with the criminal justice system: around 60 percent will be arrested, charged or convicted of a criminal offence, and about half will spend time in juvenile detention, prison, inpatient treatment or mental health detention (Streissguth et al. 2004: 238). In relation to young people, Canadian research indicates that young people with FASD are 19 times more likely to be arrested than their peers (Brown et al. 2015: 144). These statistics are particularly troubling in light of the reported prevalence of FASD among Indigenous youth in Western Australia, and the worsening over-incarceration of Indigenous youth in that state (Amnesty International 2015; Loh et al. 2005; Parliament of Australia 2011). Despite constituting only 6.4 percent of youth in Western Australia (AIHW 2014), Indigenous youth account for 77 percent of youth in juvenile detention, and are 53 times more likely to be detained than their non-Indigenous peers (Amnesty International 2015; Department of Corrective Services 2015a, 2015b). It is unsurprising, then, that Indigenous community members and justice professionals are worried that increasing numbers of Indigenous youth are displaying symptoms of FASD and becoming enmeshed in the criminal justice system.

It is not simply that young people with FASD are more likely to interact with the justice system. An inadequate criminal justice response, as noted, can increase the likelihood of people with FASD developing a secondary impairment, such as substance abuse or mental illness, which increases their susceptibility to further contact with the criminal justice system (Douglas 2010: 225; Koren, Roifman & Nulman 2004: 4). Secondary impairments are social and psychological problems that develop as a result of FASD's primary effects being exacerbated by repeated negative contact with the criminal justice system and related systems, inadequate support and misdiagnosis, existence on the margins of society, racism, and institutionalisation (Streissguth & Kanter 1997). Research indicates that over 90 percent of people with FASD will be diagnosed with a psychiatric disorder during their lifetime (O'Malley 2007: 11), with 30 percent developing substance abuse problems (Boland et al. 1992: para 2).

Importantly, however, secondary impairments can be prevented or the impact reduced by appropriate interventions: by improving the responsiveness of the justice system and support services to young people with FASD. It is crucial that the identification of FASD does not itself, however, become the source of greater harm (Roach & Bailey 2009: 5). Criminological research warns that even well-intended intervention can have the unintended consequence of widening the carceral net by drawing young people deeper into judicial and correctional systems in order for them to receive treatment and support (see, for example, Cunneen & White 2007). Currently, however, the greatest fear is that a diagnosis of FASD will lead to a child being detained indefinitely under Western Australia's law relating to mentally impaired accused.

### **Mentally impaired accused legislation**

An accused's fitness to stand trial is central to the fairness of the trial process. If a person is unfit to stand trial, he or she cannot be tried without unfairness and injustice to him or her (*R v Presser* [1958] VR 45; *Eastman v The Queen* (2000) 203 CLR 1). Each jurisdiction in Australia has separate legislation governing fitness to stand trial. However, the Western Australian regime is controversial because it provides for indefinite detention in a custodial setting without trial of a person found unfit to stand trial under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the CLMIA Act). An individual can therefore spend a longer time in detention than if he or she plead guilty and was sentenced to imprisonment for the offence. The CLMIA Act does not contain special procedures for persons who are 17 years of age or younger.

The inadequacies of Western Australia's regime with regard to accused persons found unfit have been raised in a number of contexts (Crawford 2010, 2014; Martin 2015; Parliament of Western Australia 2012; *State of Western Australia v BB (A Child)* [2015] WACC 2; *State of Western Australia v Tax* [2010] WASC 208). Particular concern has been expressed about:

- the absence of a trial or special hearing process to determine the accused's guilt or innocence (in contrast to regimes in the Australian Capital Territory, New South Wales (District and Supreme Court proceedings), Northern Territory, South Australia and Victoria);
- the limited options available when a court finds a person unfit to stand trial: unconditional release or a custody order (where imprisonment is a sentencing option);
- the unlimited duration of a custody order and place of detention for persons who do not have a treatable mental illness (such as persons with cognitive impairments); and
- the pressure the regime places on legal representatives.

Justice professionals and community members in the West Kimberley have raised concerns, in focus groups and interviews, about the potential for the attention on FASD to lead to greater use of the CLMIA Act. The Western Australian Department of the Attorney General recently undertook a review of the CLMIA Act. On 7 April 2016, the final report of the review was tabled in parliament (Department of the Attorney General 2016). When tabling the report, the Attorney General indicated his intention to 'take to cabinet a package of reforms based on the recommendations of the report' (Mischin 2016). 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 problems that have been identified with the regime.

### **Better practice: Lessons from comparable jurisdictions**

Comparative work has identified a number of legislative schemes that could be drawn upon, and adapted to local context, to improve the WA regime to better meet the needs of Indigenous young people with FASD. In Australia, the Victorian model offers a more child focused approach, being the only Australian jurisdiction with separate provisions for young people found unfit to stand trial, and prohibiting the placing of children in custody unless there are no practicable alternatives (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ss 38J(1), 38ZH(7)). The Victorian regime also has a strong focus on treatment and support. New South Wales provides an example of a diversionary option, before fitness is raised, for persons with mental impairment in s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Internationally, New Zealand provides a best practice model for young people with FASD. Fitness is governed by the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) (IDCCR Act) and the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ). Both pieces of legislation apply to adults and children. The IDCCR Act, in keeping with the approach to managing young people enshrined in the *Children's and Young People's Well-being Act 1989* (NZ), mandates that wherever possible a young person's family must be fully engaged in decision making. It also provides for a needs assessment process, which includes a cultural assessment if the person is Māori.

Each regime involves its own challenges and dilemmas, and caution is necessary in recommending one jurisdiction model its laws on another's. These better practice examples are presented as options from comparable regimes that might be drawn upon, and adapted to local context, to improve the Western Australian regime so it better meets the needs of Indigenous young people with FASD. Further research into how these features might be adapted to the Western Australian context is indicated.

### **A new diversionary paradigm: A decolonising model**

Discussions with Indigenous stakeholders confirmed the premise that the question of FASD and Indigenous youth in Western Australia cannot be uncoupled from the history of colonial settlement and the multiple traumas resulting from dispossession. The solution cannot be isolated from the broader task of decolonising relationships between Indigenous people and the non-Indigenous mainstream.

The reform agenda proposed here takes into account a number of innovative initiatives already in existence: from diversion at the point of first contact with the justice system, through to court innovations such as Aboriginal courts and Neighbourhood Justice Centres. However, the priority is to employ these systems as points of ‘cultural interface’ (Nakata 2002: 5) with emerging Indigenous owned and place-based practices and philosophies. This could be called a ‘decolonising’ approach.

This paradigm shift would involve support for ‘community owned’ rather than ‘community based’ diversionary options. ‘Community owned’ refers to processes led and managed by Indigenous communities, whereas ‘community based’ means programs designed and managed by mainstream bodies but situated in the community. Many have recommended the CLMIA Act be reformed by introducing community-based orders to increase the options available to a magistrate. While this is undoubtedly an improvement on the two options available under the current regime (indefinite detention or unconditional release), the problematic nature of community-based orders has been noted in the context of Indigenous youth who are fit to stand trial (Blagg 2008a: 183). 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).

Developing strategies to end the cycle of Indigenous incarceration necessitates decolonising the justice system, not simply reforming it. This means engaging with the question of Indigenous sovereignty, particularly in the form of demands for the return of land, and the devolution of the care and control of young people to community owned and place-based Indigenous organisations. This decolonising model moves ‘place’, or ‘country’, from the periphery to the centre of intervention.

## **Diversion at the court stage: A mobile ‘needs based’ court**

Consultations with community members and justice professionals revealed support for law reform and the creation of culturally secure initiatives that draw on the authority of Elders and devolve the care and management of young people with FASD to the Indigenous community, particularly ‘on-country’. To achieve this, a mobile ‘needs focused’ court could draw on the techniques employed by ‘problem oriented courts’ to promote better outcomes for young people with FASD. The preferred model is a hybrid: it takes elements from the Koori Court model used in Victoria, with its focus on the involvement of Elders in the court process, and the same state’s Neighbourhood Justice Centre model, which has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into support programs, preferably on-country. It is envisaged that this hybrid approach would allow greater Indigenous involvement in community based alternatives for those found unfit to stand trial and, through culturally secure and community owned alternatives, lead to better outcomes for Indigenous young people with FASD.

Discussions with Indigenous organisations also stressed that mainstream courts are alien environments for Indigenous people in the West Kimberley. For many people English is a second, third or fourth language. There is glaring need for interpreters able to assist Indigenous people to understand and participate in the process; this is fundamental to the fair administration of justice. A further source of alienation lies in the absence of recognisable Indigenous cultural processes and symbols, and recognition of Indigenous people’s own forms of cultural and legal authority, represented by Indigenous Elders and other people of significance.

Aboriginal courts are a relatively new development in Australia's court landscape, emerging in the late 1990s alongside the introduction of specialist courts to deal with particular types of offenders, such as drug offenders (Bennett 2015: 2). While not uniform, Australian Aboriginal courts tend to share the following features: involvement of Elders and respected persons in the court process; a non-adversarial, informal, and collaborative approach; awareness of the social context of the offender and offending; provision of culturally appropriate options; and a focus on rehabilitative outcomes and links to support services (Bennett 2015; King et al. 2014). Western Australia has a patchwork of arrangements for Indigenous offenders: a specialist Indigenous family violence court—the Barndimalgu Family Violence Court—established in 2007 in Geraldton, as well as a handful of communities that allow Indigenous participation in sentencing (Bennett 2015: 3). An Aboriginal court was established in 2006, the Kalgoorlie Community Court, applying to both children and adults. However, it has since been closed.

Australia has one Neighbourhood Justice Centre, located in Collingwood in Victoria. The centre opened in January 2007 and has a single magistrate who has a strong understanding of the community and local issues (Murray 2014, 2009). The magistrate is appointed with regard to his or her awareness and experience in therapeutic jurisprudence and restorative justice principles. The centre adopts a non-adversarial approach, statutorily prescribed to proceed with as little formality and technicality as is appropriate (s 4M(6), *Magistrates' Court Act 1989* (Vic)). The centre has a co-location of services, combining court with treatment and support services including mediation, legal advice, employment and housing support, family violence support, Indigenous support services, counselling, mental health and drug and alcohol services (Ross 2015). One of the most notable and successful aspects of the centre is the quality of the needs assessment done by the clinical services team when an individual arrives at court. Such an approach is critical to a successful, FASD-aware triage process in this model court.

This needs focused approach shifts the emphasis from processing offenders to identifying solutions. It places emphasis on the co-location of services (sorely needed in remote communities), a trauma informed practice, a 'no wrong door' approach to treatment, and respect for Indigenous knowledge. The West Kimberley may be an ideal place to pilot a mobile needs focused court, as it already has a single magistrate with a deep understanding of local communities able to take on a judicial monitoring role (Blagg 2008b; King et al. 2014), and a range of Indigenous services. This magistrate would be able, with the right support, to work with affected youth and their families, including by referring them to community owned support programs, preferably on-country. Examples of suitable programs include the Murulu Strategy run by Marninwarntikura in Fitzroy Crossing and the cultural health programs run by Nindilingarri. There is no reason why such services should not accompany the magistrate in the West Kimberley circuit.

## Placing country at the centre

These proposed reforms take a number of mainstream initiatives, such as Neighbourhood Justice Centres, front-end diversion, family conferencing, Aboriginal courts, therapeutic jurisprudence, triage, judicial management, and so on, and blends them to create a fresh engagement space with Indigenous knowledge and practice. The focus here is on creating engagement spaces between Indigenous and non-Indigenous domains. There are already a number of options, including the Yiriman Project, a community owned initiative in the Fitzroy Valley which takes young people at risk of offending onto remote desert country to 'build stories in young people' (Blagg 2012: 481–9).

Aboriginal Elders at the Kimberley Aboriginal Law and Culture Centre argued 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 rangers to 'care for country'. Immersion in on-country programs may be vital in preventing the emergence of secondary disabilities (Blagg, Tulich & Bush 2015). Existing laws that draw young people with FASD into the correctional system are obstacles to change and improved outcomes. Rather, Indigenous young people with FASD need to be diverted into non-stigmatising therapeutic alternatives run by Indigenous people.

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. Building the capacity of agencies to manage FASD is a welcome step. Yet there is also a need to build the capacity of communities and families to provide for the day-to-day care and support of young people with FASD. Once a diagnosis has been made, the main issue becomes one of stabilisation and support.

This 'scaffolding' supporting vulnerable Indigenous children and young people would best be constructed by Indigenous organisations and embedded in Indigenous country. There are examples of successful on-country initiatives that could be used as a basis for a new model of Indigenous youth justice. For example, the Yiriman Project, run by Elders from around Fitzroy Crossing in Western Australia, takes young people at risk of offending out onto traditional country, where they acquire bush skills in a culturally secure environment. The Magistrates Court has sent young people to the project as an alternative to custody, with considerable success. A three-year review of the Yiriman Project found (Palmer 2013: 122):

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 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.

Indigenous organisations should be funded to provide mentoring and family support services, interlaced with on-country camps that help to stabilise young people and heal families, thereby reducing the likelihood of further generations being lost to FASD.

## Longing for country

The potential game changer, then, that could provide the basis for a new Indigenous youth justice paradigm emerges not from Western epistemology alone, but at the intersection between Indigenous and non-Indigenous knowledge. Indigenous 'place' (or 'country') should be the heart of this nascent sphere. Indigenous place can become a fulcrum upon which a new decolonised justice system can be leveraged into being. The anthropologist WEH Stanner (1979: 230) observed:

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland...A different tradition leaves us tongueless and earless towards this other world of meaning and significance.

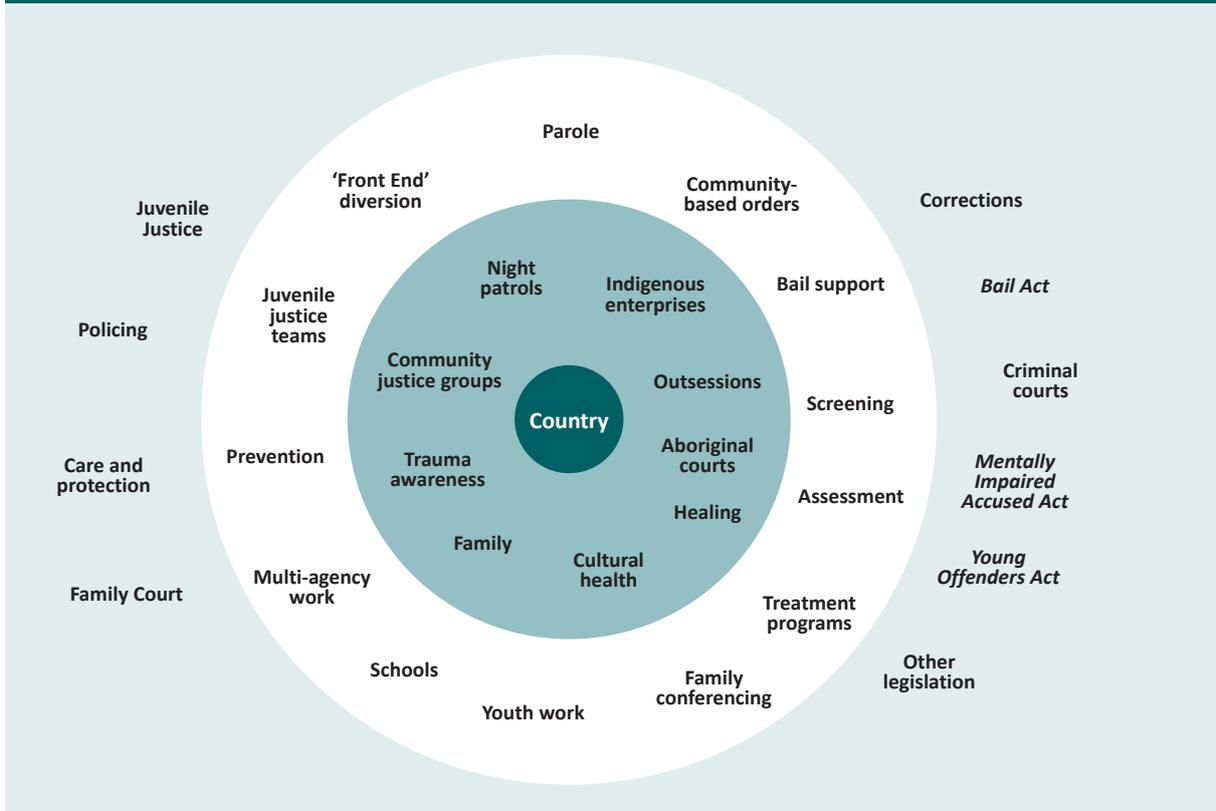
Deborah Bird Rose (1996: 7) describes this eloquently:

Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country.

This research uncovered strong support among Indigenous and non-Indigenous stakeholders for what might be called 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 those 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 community owned initiatives that draw on Indigenous cultural authority, rather than mainstream governments, 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. Paradoxically, the inner circle both acts as a pathway between the mainstream and the Indigenous domain and buffers the Indigenous domain from the negative impact of mainstream laws, policies and practices.

Another key message from the consultations was the need to work with and through family. Indigenous people were critical of the Western paradigm which tends to individualise, cutting Indigenous people off from their collective. There was support for forms of healing that involved the whole family. As one justice worker said, 'We need to support the entire family: don't water one flower and expect the garden to stay alive.'

Figure 1: Placing country at the centre



Improving diversionary pathways and interventions requires an understanding of the needs of people with FASD and a close synthesis of medical knowledge and the law. The aim is to construct a form of external ‘cultural scaffolding’ around the individual. Emergent research in neurodevelopmental science emphasises the need for interventions focused on optimising the functioning of the frontal lobe and limbic system, such as dance, art, nature discovery and storytelling, which have optimal efficacy when repeatedly implemented (Perry 2009). Research also emphasises the importance of relational health, as interventions are of maximum efficacy in environments of relational stability (Perry 2009). The presence of unfamiliar individuals can make a person with FASD more symptomatic and less responsive to interventions (Perry 2009). Consequently, supports for people with FASD should occur in familiar and safe social networks.

## Concluding comments

This approach does not rest on the classic ‘all or nothing’ notion of decolonisation requiring a radical break with the past, with Indigenous law somehow replacing settler law. This notion is, paradoxically, embedded in the binary logic of colonialism itself, which views sovereignty as absolute and indivisible (Chowdhry 2007). Instead, it poses a pluralist alternative where settler law increasingly cedes sovereign power to Indigenous law, allowing what Fitzgerald (2001: 41) calls a ‘vibrant and decentred’ justice system to flourish that respects Indigenous law and culture. This approach is intended to heal, rather than perpetuate, colonial binaries. Justice innovations showing promise in the mainstream system may be used to create constructive engagement spaces with the Indigenous domain where inter-cultural dialogue can take place. Fitzgerald (2001: 41) calls these devolved spaces ‘pods of justice’.

The justice system must be recalibrated to focus on the needs of the young person—including cultural needs—and to facilitate diversion into community owned and managed structures and processes. This project, while encouraging reform of the draconian CLMIA Act and highlighting the need to update the *Young Offenders Act* (and, in particular, the need to reform Juvenile Justice Teams), is also intended to illustrate how policing and judicial discretion already existing in legislation and at common law can be employed to better meet the needs of persons with FASD. The return of control over country, through native title, could be the game changer in creating a new space (and place) for decolonised justice practices at a community level. Country could offer a place of healing and stabilisation for children with FASD and their families. Improving diversionary pathways out of the criminal justice system is essential to reducing the incidence of secondary impairments among Indigenous young people with FASD.

Further research is needed into the funding implications of adopting a needs based justice model. The model proposed here would shift the emphasis of justice intervention from processing offenders to identifying solutions. The West Kimberley would be an ideal place to pilot a mobile needs focused court.

Funding is sorely needed for Indigenous community owned diversionary initiatives such as the Kimberley Aboriginal Law and Culture Centre’s Yiriman Project. Community owned programs have been successful in reducing the contact between Indigenous young people and the justice system. However, this should not obviate the need to heal families and communities, as well as individuals.

Finally, this project has examined the inadequacies of the justice system’s response to Indigenous young people with FASD and the need for diversionary alternatives. Further research is also needed into diversionary alternatives for adults as well as juveniles, especially young adults aged 18 to 25. The support services for young people with FASD are inadequate. Yet there is, at least, an awareness of the problem in the juvenile justice sphere. Given the nature of the disability, there is no prospect of FASD affected people ‘maturing’ out of the condition—and there is a real danger of adults with FASD disappearing in the system.

## References

- Aboriginal and Torres Strait Islander Social Justice Commissioner 2011. *Social justice report 2010*. Canberra: Australian Human Rights Commission
- Amnesty International Australia 2015. *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*. Broadway: Amnesty International Australia
- Australian Institute of Health and Welfare 2014. *Youth detention population in Australia 2014*. Juvenile justice series no. 16. Cat. no. JUV 53. Canberra: Australian Institute of Health and Welfare
- Bennett P 2015. *Specialist courts for sentencing Aboriginal offenders*. Sydney: Federation Press
- Blagg H 2012. Reimagining youth justice: Cultural contestation in the Kimberley region of Australia since the 1991 Royal Commission into Aboriginal Deaths in Custody. *Theoretical Criminology* 16(4): 481–498
- Blagg H 2008a. *Crime, Aboriginality and the decolonisation of justice*. Sydney: Federation Press
- Blagg H 2008b. *Problem-oriented courts*. Perth: Law Reform Commission of Western Australia
- Blagg H, Tulich T & Bush Z 2015. Diversionary pathways for Indigenous youth with FASD in Western Australia: Decolonising alternatives. *Alternative Law Journal* 40(4): 257–260
- Boland FJ, Burrill R, Duwyn M & Karp J 1998. *Fetal alcohol syndrome: Implications for correctional service*. Canada: Correctional Service Canada
- Bower C & Elliott E 2016. *Australian guide to the diagnosis of fetal alcohol spectrum disorder (FASD)*. Report on behalf of the Steering Group to the Australian Government Department of Health. <http://www.apsu.org.au/home/australian-fasd-diagnostic-guidelines/>
- Brown NN, Burd L, Grant T, Edwards W, Adler R & Streissguth A 2015. Prenatal alcohol exposure: An assessment strategy for the legal context. *International Journal of Law and Psychiatry* 42: 144–148
- Chowdhry G 2007. Edward Said and contrapuntal reading: Implications for critical interventions in international relations. *Millennium* 36(1): 101–16
- Cox LV, Clairmont D and Cox S 2008. Knowledge and attitudes of criminal justice professionals in relation to fetal alcohol spectrum disorder. *Canadian Journal of Clinical Pharmacology* 15(2): 306–313
- Crawford C 2014. FASD Clinicians Forum. Speech delivered at the Telethon Kids Institute, 18 November 2014.
- Crawford C 2010. Families impacted by the criminal justice system on the frontier: A new model required. *Psychiatry, Psychology and Law* 17(3) 464–475
- Cunneen C and White R 2007. *Juvenile justice: Youth and crime in Australia*, 3rd ed. South Melbourne: Oxford University Press
- Davidson H 2016. Roseanne Fulton ‘abandoned by government again’. *The Guardian* 10 Mar
- Department of Corrective Services 2015a. *Young people in detention: Quick reference statistics*. Perth: Department of Corrective Services
- Department of Corrective Services 2015b. *Young people managed in the community: Quick reference statistics*. Perth: Department of Corrective Services
- Department of the Attorney General (WA) 2016. *Review of the Criminal Law (Mentally Impaired Accused) Act 1996: Final report*. Perth: Government of Western Australia
- Douglas H 2010. The sentencing response to defendants with foetal alcohol spectrum disorder. *Criminal Law Journal* 34(4): 221–239
- Fitzgerald T 2001. *The Cape York Justice Study*. Brisbane: Queensland Department of the Premier and Cabinet
- Fitzpatrick JP et al. 2015. Prevalence of fetal alcohol syndrome in a population-based sample of children living in remote Australia: The Lililwan Project. *Journal of Paediatrics and Child Health* 51(4): 450–457

- King M, Freiberg A, Batagol B & Hyams R 2014. *Non-adversarial justice*, 2nd ed. Sydney: Federation Press
- Koren G, Roifman I & Nulman I 2004. Hypothetical framework: FASD and criminality – causation or association? The limits of evidence-based knowledge. *Journal of FAS International* 2(2): 1–5
- Loh NSN, Maller MG, Fernandez JA, Ferrante AM & Walsh MRJ 2005. *Crime and justice statistics for WA: 2005*. Report for the Crime Research Centre. Perth: University of Western Australia
- Martin W 2015. Indigenous incarceration rates: Strategies for much needed reform. Speech delivered at the Law Summer School, Perth, 20 February 2015
- Mischin M 2016. Criminal Law (Mentally Impaired Accused) Act 1996—Review. Statement by Attorney General. *Hansard* (Western Australia: Legislative Council) 7 Apr: 2247
- Murray S 2014. *The remaking of the courts: Less-adversarial practice and the constitutional role of the judiciary in Australia*. Sydney: Federation Press
- Murray S 2009. Keeping it in the neighbourhood? Neighbourhood courts in the Australian context. *Monash University Law Review* 35(1): 74–95
- Nakata M 2002. Indigenous knowledge and the cultural interface: Underlying issues at the intersection of knowledge and information systems. *IFLA Journal* 28: 5–6
- O’Carroll B 2013. Intellectual disabilities and the determination of fitness to plead in the magistrates’ courts. *Criminal Law Journal* 37(1): 51–67
- Office of the Inspector of Custodial Services (OICS) of Western Australia 2014. *Mentally impaired accused on ‘custody orders’: Not guilty, but incarcerated indefinitely*. Perth: OICS
- O’Malley KD 2007. Fetal alcohol spectrum disorders: An overview, in O’Malley KD (ed), *ADHD and fetal alcohol spectrum disorders*. New York: Nova Science Publishing: 1–24
- Palmer D 2013. ‘*We know they healthy cos they on country with old people*’: *Demonstrating the value of the Yiriman Project*. Fitzroy Crossing: Kimberley Aboriginal Law and Culture Centre
- Palmer D 2010. ‘*Opening up to be kings and queens of country*’: *An evaluation of the Yiriman Project*. Fitzroy Crossing: Kimberley Aboriginal Law and Culture Centre
- Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011. *Doing time – Time for doing: Indigenous youth in the criminal justice system*. Canberra: Parliament of Australia
- Parliament of Australia, House of Representatives Standing Committee on Indigenous Affairs 2015. *Alcohol, hurting people and harming communities: Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities*. Canberra: Parliament of Australia
- Parliament of Australia, House of Representatives Standing Committee on Social Policy and Legal Affairs 2012. *FASD: The hidden harm: Inquiry into the prevention, diagnosis and management of fetal alcohol spectrum disorders*. Canberra: Parliament of Australia
- Parliament of Western Australia, Legislative Assembly, Education and Health Standing Committee 2012. *Foetal alcohol spectrum disorder: The invisible disability*. Report No. 15. Perth: Parliament of Western Australia
- Perry B 2009. Examining child maltreatment through a neurodevelopmental lens: Clinical applications of the neurosequential model of therapeutics. *Journal of Loss and Trauma* 14(4): 240–255
- Roach K and Bailey A 2009. The relevance of fetal alcohol spectrum disorder in Canadian criminal law from investigation to sentencing. *University of British Columbia Law Review* 42: 1–68
- Robinson G, Priede C, Farrall S, Shapland J and McNeill F 2013. Doing ‘strengths-based’ research: Appreciative Inquiry in a probation setting. *Criminology and Criminal Justice* 13(1): 3–20
- Rose DB 1996. *Nourishing terrains: Australian Aboriginal views of landscape and wilderness*. Canberra: Australian Heritage Commission

Ross S 2015. Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program. *Trends & issues in crime and criminal justice* no. 499. Canberra: Australian Institute of Criminology. <https://aic.gov.au/publications/tandi/tandi499>

Stanner WEH 1979. *White man got no dreaming: Essays 1938–1973*. Canberra: Australian National University Press

Stewart J 2014. Intellectually impaired Aboriginal woman Rosie Fulton to be freed after 21 months in jail with no convictions. *ABC News* 25 Jun

Streissguth AP, Bookstein FL, Barr HM, Sampson PD, O'Malley K & Young JK 2004. Risk factors for adverse life outcomes in fetal alcohol syndrome and fetal alcohol effects. *Journal of Developmental and Behavioural Pediatrics* 25(4): 228–238

Streissguth AP & Kanter J (eds) 1997. *The challenge of fetal alcohol syndrome: Overcoming secondary disabilities*. Seattle: University of Washington Press

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