

**THE DUTY WE OWE:  
FOETAL ALCOHOL SPECTRUM DISORDER,  
INDIGENOUS IMPRISONMENT AND *CHURNSIDE V  
WESTERN AUSTRALIA* [2016] WASCA 146**

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*The criminal justice system does not do justice to the pocket of Indigenous Australians suffering from a foetal alcohol spectrum disorder (FASD) due to prenatal exposure to alcohol. The criminal justice system has a duty to consider alternatives to incarceration for Indigenous Australians, particularly those with FASD, because many of the policy reasons for incarceration, such as deterrence and punishment, are not appropriate for someone suffering from FASD. This analysis considers that the judgment in *Churnside v Western Australia* [2016] WASCA 146 sets an important precedent in not only acknowledging the court's duty to consider alternatives to incarceration for non-violent crimes, but by positively acting upon their duty in making such arrangements.*

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I OUT OF SIGHT, OUT OF MIND

The umbrella term of Foetal<sup>1</sup> Alcohol Spectrum Disorders (FASD) encompasses a range of cognitive and/or physical impairments caused by prenatal exposure to alcohol. The National Organisation for Fetal Alcohol Syndrome explains that '[e]ach condition and its diagnosis is based on the presentation of characteristic features which are unique to the individual and may be physical, developmental and/ or neurobehavioural.'<sup>2</sup> Fetal Alcohol Syndrome (FAS) is

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<sup>1</sup> The words 'fetal' and 'foetal' shall be used interchangeably depending on the source.

<sup>2</sup> National Organisation for Fetal Alcohol Syndrome, *What is FASD?* (2013) <<http://www.nofasard.org>>

considered the most serious on the spectrum, and is generally the only condition that has obvious physical symptoms.<sup>3</sup> Because of FAS' noticeability, and FASDs invisibility, many people suffering from FASD are undiagnosed, often despite suspicions of its presence. FASD can range in severity, from mild unnoticeable effects to major physical and cognitive disabilities, and 'is an entirely preventable but incurable condition.'<sup>4</sup> Because FASD is not readily identifiable, it has been described as 'the invisible disability';<sup>5</sup> a 'hidden harm.'<sup>6</sup> Prenatal exposure to alcohol can cause cognitive impairment due to hindered development or damage to the foetus's brain, so a person with FASD may have 'ongoing impairment in comprehension, reason, judgment, learning or memory.'<sup>7</sup> They may also have 'developmental delays, difficulty hearing, problems with vision, learning problems, language and speech deficits, impulsiveness, a short attention span, and difficulties getting along with others.'<sup>8</sup> Although FAS is less difficult to identify than other FASDs due to its severity and common physical characteristics, it is 'almost certainly under-diagnosed and there is *no data on FASD prevalence*.'<sup>9</sup> The fact that there is no or little data on FASD means that to make a quantitative analysis of people with an FASD is impossible, and applying the issues faced by such people in the judicial system in WA can be speculative at best. In saying that, it is clear that our system of 'justice' does not serve one suffering from a cognitive disorder such as FASD.

When people suffering from FASD come into contact with the criminal justice system, the usual rules for imprisonment should not apply, not because justice is not 'deserved' but because the policy reasons behind incarceration are ineffective. Research conducted in Western Australia shows that there are more Indigenous children born with FASD than non-Indigenous children, and that these numbers are increasing.<sup>10</sup> Additionally, although the numbers are hard to quantify given its invisibility, it *is* known that a 'disproportionately large number of youth and adults with FASD are engaged with the legal system'.<sup>11</sup> As it stands in

<sup>3</sup> Department of Health, Government of Western Australia, *Fetal Alcohol Spectrum Disorder Model of Care* (2010) 5 ('Department of Health').

<sup>4</sup> Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm* (November 2012) vii (Graham Perrett MP) ('The Standing Committee').

<sup>5</sup> Education and Health Standing Committee, Parliament of Western Australia, *Foetal Alcohol Spectrum Disorder: The Invisible Disability* (2012) ('Education and Health Standing Committee').

<sup>6</sup> The Standing Committee, above n 4, 116.

<sup>7</sup> Education and Health Standing Committee above n 5, 43.

<sup>8</sup> *Ibid* 'Chair's Forward'.

<sup>9</sup> Department of the Attorney General (WA), *Equality before the Law Bench Book* (2009), 4.1.5 ('WA Bench Book') (emphasis added).

<sup>10</sup> *Ibid*; see also The Standing Committee, above n 4, 116. 'The prevalence of FAS in WA increased by 38% from that estimated [in 2000], giving a rate of 0.02 per 1,000 for non-Indigenous children and 2.76 per 1,000 for Indigenous Australians.

<sup>11</sup> *Ibid* 4.1.8.1.

Western Australian prisons there are 17 times more Aboriginal and Torres Strait Islander adults than non-Indigenous adults, and given the higher rates at which Indigenous people are born with FASD and the increased chances of someone with FASD coming into contact with the criminal law, some of those currently serving prison sentences may have FASD and be better suited to alternative arrangements. Although the evidence is anecdotal, ‘it is not uncommon to meet Aboriginal people who are either in jail or are in contact with the criminal justice system who it would appear have some form of FASD.’<sup>12</sup> According to current statistics, over a quarter of sentences are for non-violent crimes such as unlawful entry and drug offences,<sup>13</sup> and 3 in 5 adults had *returned* to prison.<sup>14</sup> The way a person with FASD is treated in the judicial system, especially if they are Indigenous, may have an important impact on their likelihood of rehabilitation or re-incarceration. It is within the court’s power to consider alternatives to incarceration for non-violent crimes and given the higher proportion of Indigenous over non-Indigenous people in Western Australian prisons it is their duty to do so. If different considerations are taken into account, be it in the way they are treated as a witness or in sentencing, then they may have a greater chance of reformation; they may not repeat similar offences and therefore may not return to prison.

The case of *Churnside v Western Australia*,<sup>15</sup> discussed in Part V, is illustrative of the ability of courts to make alternative arrangements for an Indigenous man with FASD who commits a non-violent offence. The judgment considers the continued and increasing ‘over-representation of Aboriginal people in the criminal justice system of Australia’<sup>16</sup> despite recommendations made in the 1991 Royal Commission into Aboriginal Deaths in Custody.<sup>17</sup> The judgment acknowledges that Western Australia has the largest ‘rate of Aboriginal imprisonment’<sup>18</sup> compared with any other Australian jurisdiction, and that the importance of reducing the indigenous population residing in prisons is a duty of the court. Martin CJ, Mazza and Mitchell JJ note that although someone’s

<sup>12</sup> The Standing Committee, above n 4, 137, quoting The First Peoples Disability Network.

<sup>13</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2015*, ‘Snapshot’ (11 December 2015) catalogue no. 4517.0

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Western%20Australia~24>> (‘ABS, ‘Snapshot’). ‘The most common offence/charge was acts intended to cause injury (19% or 1,039 prisoners), followed by unlawful entry with intent (16% or 912 prisoners) and illicit drug offences (13% or 703 prisoners).’

<sup>14</sup> *Ibid.*

<sup>15</sup> [2016] WASCA 146 (‘*Churnside*’).

<sup>16</sup> *Ibid* [1].

<sup>17</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Final Report* (1991).

<sup>18</sup> *Churnside* [2016] WASCA 146 [2].

Aboriginality is not relevant in the sentencing process<sup>19</sup> and that FASD is not a condition ‘peculiar to Aboriginal people’,<sup>20</sup> the limited data suggests that Aboriginal people are over-represented on both accounts given the existence for many of ‘a traumatic childhood, deprivation and social disadvantage’.<sup>21</sup> They acknowledge that ‘the difficulty of achieving meaningful change should not be under-estimated’<sup>22</sup> and particularly given that it is beyond the court’s control to allocate government funding or ‘address the social disadvantage in remote Aboriginal communities’.<sup>23</sup> They also note that considerations such as community protection and the ‘seriousness of the offences or the pattern of offending’<sup>24</sup> may also ‘require the removal of an offender from the community.’<sup>25</sup> In noting these difficulties, however, and committing to finding alternatives to incarceration, the case is one in which the court emphasise it is their responsibility to help break the ‘tragic cycle’<sup>26</sup> of Indigenous imprisonment. This means, ultimately, that a more encompassing justice has a chance of being served.

## II DRAGGING OUR FEET: RELUCTANCE OR INABILITY TO DIAGNOSE THE ‘INVISIBLE DISABILITY’?

The Standing Committee states that ‘Australia is lagging behind in national screening and diagnostic practices,’<sup>27</sup> and Douglas notes that ‘[s]ignificant research has been undertaken in other jurisdictions, most notably in the United States and Canada, to improve identification and understanding of FASD.’<sup>28</sup> Australian researchers are therefore relying on overseas findings to estimate FASD prevalence in Australian judicial systems.<sup>29</sup> Because the data still remains ‘greatly underestimated’<sup>30</sup> finding a case where there is a definitive diagnosis of FASD is difficult. In a submission to the ‘Harmful use of alcohol in Aboriginal and Torres Strait Islander communities enquiry,’ Catherine Crawford, a magistrate for the Children’s Court of Western Australia, highlighted her concern that in the court process as it stands, it is not practical to obtain a diagnosis of FASD as ‘[c]urrently, with two exceptions in Australia, there is no dedicated

<sup>19</sup> Ibid [3], citing *Bugmy v The Queen* (2013) 249 CLR 571 [36].

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid [84].

<sup>23</sup> Ibid [5].

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid [6].

<sup>27</sup> The Standing Committee, above n 4, 116.

<sup>28</sup> Heather Douglas et al, The Importance of Foetal alcohol Spectrum Disorder for Criminal Law in Practice: Views of Queensland Lawyers (2012) 32 *Qld Lawyer* 153, 159.

<sup>29</sup> Ibid.

<sup>30</sup> National Indigenous Drug and Alcohol Committee, *Addressing Fetal Alcohol Spectrum Disorder in Australia*, (2012) 8.

diagnostic capacity.’<sup>31</sup> She states that ‘an assessment ... will take approximately 6 months, which makes it impossible to do fairness acting on the relevant sentencing principles.’<sup>32</sup> This inability to obtain a diagnosis is evident in the limited cases where FASD is openly suspected. In *AH v Western Australia* the accused was never assessed for FASD despite giving a history ‘of alcohol abuse by her mother ... [and] her evident intellectual and cognitive disabilities’.<sup>33</sup> In *TM v Karapanos*, there was the ‘real possibility’ that the accused suffered from FAS,<sup>34</sup> a possibility acknowledged by both the trial judge and the accused’s council, and yet no diagnosis was sought or made. Another case in which an accused was not fit to stand trial due to ‘intellectual impairment’<sup>35</sup> was that of *Western Australia v Tax*, in which a psychiatrist suspected FAS but was ‘unable at [that] time to indicate ... the cause of the mental impairment.’<sup>36</sup> These cases, in which each of the accused were Indigenous, serve to highlight the presence of FASD in the judicial system, as well as the lack of diagnosis and recognition the disorders are given, *even when suspected*. Douglas argues that the ‘[t]he low level of diagnosis [in WA] has been attributed to paediatrician’s fear of stigmatising the family’,<sup>37</sup> and Freckleton considers that many health professionals would rather diagnose ‘attention deficit/hyperactivity disorder (ADHD), autism spectrum disorder or general developmental delay’<sup>38</sup> rather than label the family with FASD.

Crawford notes the reluctance of defence lawyers to raise the possibility of FASD or mental capacity is because in Western Australia there are two options: ‘release them into the community or put them in custody at the governor’s pleasure, which there is no end date for.’<sup>39</sup> Rosie Fulton is an example of this latter ‘option’. Rosie, an indigenous woman who suffers from FASD, spent nearly two years in Kalgoorlie prison without charge because the magistrate found she was unfit to plead and there were no adequate health care services for her.<sup>40</sup> An

<sup>31</sup> Evidence to Standing Committee on Indigenous Affairs, Parliament of Australia, Perth, 30 June 2014, 53 (Catherine Crawford).

<sup>32</sup> ABC Radio National, ‘Justice System Failing to Deal with Fetal Alcohol Spectrum Disorder’, *The Law Report*, 10 December 2013 (Catherine Crawford) <<http://www.abc.net.au/radionational/programs/lawreport/fetal-alcohol-spectrum-disorder/5144978>>.

<sup>33</sup> [2014] WASCA 228 [9].

<sup>34</sup> (2011) 250 FLR 366, [51], [85].

<sup>35</sup> *Western Australia v Tax* [2010] WASC 208, [11].

<sup>36</sup> *Ibid*.

<sup>37</sup> Heather Douglas et al, ‘Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland’s Criminal Justice System’ (2012) 21 *Journal of Judicial Administration* 178, 187.

<sup>38</sup> Ian Freckleton, ‘Fetal Alcohol Spectrum Disorder and the Law in Australia: The Need for Awareness and Concern to Translate into Urgent Action’ (2013) 20 *Journal of Law and Medicine* 481, 489-90 *Ibid* 490.

<sup>39</sup> Evidence to Standing Committee on Indigenous Affairs, Parliament of Australia, Perth, 30 June 2014, 53 (Catherine Crawford).

<sup>40</sup> ABC, ‘Jailed Without Conviction’ *Lateline*, 12 March 2014 (John Stewart).

ABC news report stated that it was only after ‘public outcry’ and over 120,000 signatures petitioning her release that alternative arrangements were made, allowing her release.<sup>41</sup>

There are obvious flaws in not wanting to raise a person’s possible FASD given these ‘options’, and the people that are being affected by the health and judicial systems’ reluctance and inability to diagnose someone as having FASD are *those with FASD*. This reluctance to diagnose has direct repercussions on the presence of FASD in the judicial system, and the lack of official data forces its stigma and invisibility further. The Standing Committee talks about the ‘vicious circle’: data can’t be obtained without screening, and screening can’t be implemented without data,<sup>42</sup> and without these then health training can’t begin. This then has a carry-on effect into the judicial system, given that statistics from Canada and the US indicate that ‘60 per cent of people with FASD have been in contact with the criminal justice system.’<sup>43</sup>

Promisingly, the lack of recognition insofar as the judicial system has been concerned in Australian states and territories, despite ‘clear knowledge of its existence dating back decades’<sup>44</sup> *is* being addressed in Western Australia. The WA Bench Book is the first to incorporate FASD in its consideration, so that ‘any person who presents to a court, if they have been afforded the diagnosis of FASD ... will be treated with equity before the law.’<sup>45</sup> Despite this, getting to the point of diagnosis is the issue. Whilst people with FAS may have physical characteristics unique to the syndrome, FAS is on one end of a large spectrum of disorders related to prenatal exposure to alcohol.

A Western Australian survey conducted by the Foundation for Alcohol Research and Education of judicial officers, lawyers, Department of Corrective Services staff and police officers found that ‘[s]uspicion of FASD was most commonly based on identification of a poor attention span, low intelligence quotient (IQ), maternal history of alcoholism and physical appearance.’<sup>46</sup> If this

<sup>41</sup> Tom Maddocks, ‘Rosie Anne Fulton: System has ‘Failed’ Intellectually Impaired NT Woman’, *ABC News* (Online), 1 July 2016 < <http://www.abc.net.au/news/2016-07-01/carers-says-system-has-failed-rosie-fulton/7560532>>.

<sup>42</sup> The Standing Committee, above n 4, 117.

<sup>43</sup> *Ibid* 137.

<sup>44</sup> *Ibid* 117 (quoting the Anyinginyi Health Aboriginal Corporation).

<sup>45</sup> *Ibid* 143 (quoting Dr R Mutch).

<sup>46</sup> Foundation for Alcohol Research and Education, ‘Fetal Alcohol Spectrum Disorder: Knowledge, Attitudes and Practice within the Western Australian Justice System’ (Final Report, Telethon Institute for Child Health Research, April 2013) ix (‘FARE’).

survey reflects common knowledge in WA,<sup>47</sup> it is problematic given low IQ and physical characteristics occur in a minority of cases of FASD.<sup>48</sup> Similarly, there is little known about the quantity of alcohol consumed by the mother during pregnancy required to cause an FASD. Therefore, relying on these ‘characteristics’ to indicate that a witness may have FASD may mean that it is not suspected in the first place. FARE found of the survey that ‘participants generally indicated a limited capacity to formally identify and respond to the needs of people with FASD’.<sup>49</sup> This is evident in the cases mentioned previously, as although FAS or FASD was suspected or diagnosed, little was done by way of support despite recommendations by the courts and health professionals.<sup>50</sup>

### III THE FASD WITNESS: UNRELIABLE OR UNFAIRLY TREATED?

A range of issues may be faced by a witness with FASD in judicial proceedings given their propensity for having: ‘difficulty hearing; ... high levels of activity; difficulty remembering; a short attention span; language and speech deficits; low IQ; problems with abstract thinking; ...[and] poor judgement.’<sup>51</sup> The fact a witness may have some of these characteristics may go unnoticed however given the problems surrounding diagnosis and especially as ‘[m]any people do not want to acknowledge that they have memory or cognitive disabilities, so they will feign understanding.’<sup>52</sup> This ability to feign understanding Denfield describes as a “cloak of competency.” ... They mimic the behaviours of others and learn coping strategies to hide their struggles.’<sup>53</sup> In a complex procedure such as giving evidence in court, many of the above traits are required to understand such proceedings, and if the presence of a cognitive disorder does go unnoticed then the confusion and incomprehension surrounding the process can go unaddressed.

There are different capacities in which someone with FASD may be a witness and give evidence in judicial proceedings. These include being an accused, a victim, or a witness to the offence in question. They may already have a diagnosis (unlikely), and if not, they may have some evident physical or cognitive impairment. They may exhibit characteristics or behaviours such as an

<sup>47</sup> Ibid p.viii. Although FARE do admit their low numbers of respondents (23%), some 1873 people responded.

<sup>48</sup> National Organization on Fetal Alcohol Syndrome, *Recognizing FASD* <<http://www.nofas.org/recognizing-fasd>>.

<sup>49</sup> FARE, above n 46, ix.

<sup>50</sup> See in particular *AH v Western Australia* [2014] WASCA.

<sup>51</sup> WA Bench Book, above n 9, 4.2.7.

<sup>52</sup> Ibid 4.4.9.

<sup>53</sup> The Standing Committee, above n 4, 140 (quoting R Denfeld, *Catching the Subtle Signs of Cognitive Impairment, FASD, and other “Invisible” Disabilities*, 2011, Library of Defense).

'inability to comply with orders, emotional dysregulation and lack of consequential thinking'<sup>54</sup> indicating the presence of FASD. This may then prompt additional support being provided, or the denial of the court of giving evidence. On the other hand, they may have no obvious behavioural problems, in which case witness strategies can be utilised which can result in inconsistent statements.

A Canadian research paper found that for witnesses with FASD, '[f]actors such as leading questions, coercive interrogation techniques ... and a tendency to want to please others consistently result in unreliable statements'.<sup>55</sup> Permitted in cross examination are leading questions, 'those which directly or indirectly suggest the answer or which assume the existence of a fact which is in dispute.'<sup>56</sup> Given that in our justice system cross examination is *the way* 'of testing evidence put against an accused person, [and] is "one of the fundamental guarantees of life and liberty"',<sup>57</sup> these issues will come to the fore for a witness with FASD. Because people with FASDs 'are often highly suggestible ... and are prone to acquiesce',<sup>58</sup> the answer given to a leading question may be the one suggested or a confabulation thereof as 'there is a high risk that a person who has FASD may incorporate these suggestions into their narrative of events.'<sup>59</sup> This can then lead to inconsistencies in the witness's statement, which further point to the dubiousness of their credibility. Eades argues that 'inconsistency can be *achieved*'<sup>60</sup> through the co-construction of a story, arguing that inconsistencies can be actively constructed by the cross examiner. She argues that variations in stories can occur by the context in which they are told, however they are 'perceived as the failing of individual witnesses, who can be therefore deemed to be lacking reliability and truthfulness.'<sup>61</sup> Eades investigates the use of 'linguistic strategies' by lawyers, and describes this as lawyers' powers to 'decontextualise and recontextualise parts of witnesses' stories'.<sup>62</sup> If this strategy is employed against someone with FASD, whether or not it is known, the witness will be at a further disadvantage than someone without FASD, as '[t]he language used in legal documents and in legal hearings is complex'.<sup>63</sup> Because a witness with

<sup>54</sup> Evidence to Standing Committee on Indigenous Affairs, Parliament of Australia, Perth, 30 June 2014, 53 (Catherine Crawford).

<sup>55</sup> Karina Royer Gagnier, Timothy E Moore, and Melvyn Green, 'A Need for Closer Examination of FASD by the Criminal Justice System: Has the Call Been Answered?' (2011) 18(3) *Journal of Population Therapeutics and Clinical Pharmacology*, 426, 429.

<sup>56</sup> *Ibid* 546-7.

<sup>57</sup> *Stack v Western Australia* (2004) 29 WAR 526, 545.

<sup>58</sup> Heather Douglas et al, above n 28, 161.

<sup>59</sup> *Ibid* 162.

<sup>60</sup> Diana Eades, "Telling and Retelling Your Story in Court: Questions, Assumptions and Intercultural Implications", (2008) 20 (2) *Current Issues in Criminal Justice* 209, 216. (original emphasis).

<sup>61</sup> *Ibid* 223.

<sup>62</sup> *Ibid*.

<sup>63</sup> WA Bench Book, above n 9, 4.0.5.

FASD may have ‘considerable difficulty understanding sarcasm, idiom or metaphor, and these are all common characteristics of language used in the courtroom process,’<sup>64</sup> the linguistic strategies employed by lawyers will be superior to what the witness can deliver. Although leading questions can be disallowed by the trial judge<sup>65</sup> the discretion to do so is not taken lightly, and considering the invisibility of the disorder, may not be employed.

There is no easy answer as to how a witness with FASD should be treated when involved with judicial proceedings. Whether they should be excluded from testifying or not is one of appropriateness of the circumstances and degree of severity of the disorder and as discussed below, there are legislative provisions made for those that are ‘mentally impaired’. The crux of the issue therefore is *getting* to the diagnosis given that a *lack* of diagnosis means that witness interrogation strategies can be utilised that unwittingly may not be appropriate.

#### A *Legislative Measures: Evidence Act 1906 (WA) and the Special Witness*

Although legislative provision has been made for those suffering from ‘mental impairment’, the issue is whether FASD fits into the legislative definition of mentally impaired. Section 106A of the *Evidence Act 1906* (WA) (*‘Evidence Act’*) provides that the term ‘mental impairment’ has the same meaning as that of s 8 of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) and ‘means intellectual disability, mental illness, brain damage or senility.’ Provisions 106B, 106C and 106R of the *Evidence Act* allow for mentally impaired witnesses. The WA Bench Book defines an intellectual disability as one in which the ‘thought processes, learning, communicating, remembering information and using it appropriately, making judgements and problem solving’<sup>66</sup> can be affected. Because FASD has the potential to ‘affect the ability to understand and respond appropriately to interviewing, to be a reliable and credible witness [and] to understand ... the court proceedings’ it would seem that someone with FASD could theoretically be classed as a ‘special witness.’<sup>67</sup> As a special witness, they are entitled to a support person,<sup>68</sup> a communicator,<sup>69</sup> and to give evidence via video link.<sup>70</sup>

<sup>64</sup> Education and Health Standing Committee above n 5, 76.

<sup>65</sup> *Stack v Western Australia* (2004) 29 WAR 526.

<sup>66</sup> WA Bench Book, above n 9, 4.2.5.

<sup>67</sup> *Evidence Act 1906* (WA) s 106R.

<sup>68</sup> *Ibid* s 106R(4)(a).

<sup>69</sup> *Ibid* s 106R(4)(b).

<sup>70</sup> *Ibid* s 106N(2).

That a FASD sufferer could be a special witness is theoretical due to the difficulty in sourcing cases where witnesses have been unequivocally diagnosed with FASD and have been allowed to give evidence. In *Western Australia v Cox*, the victim of sexual penetration was an ‘incapable person because of mental impairment which she has suffered all her life as a result of foetal alcohol syndrome.’<sup>71</sup> Because of this, her evidence was not allowed as ‘her capacity to give meaningful testimony [was] uncertain.’<sup>72</sup> However, as the Standing Committee highlights, many ‘individuals with FASD have brain damage that affects their cognitive development, but may not necessarily have an intellectual disability or a mental illness.’<sup>73</sup> This could mean that the legislative protections would not apply to them. For those that *have* been diagnosed, the WA Bench Book highlights that the ‘accuracy and completeness of the evidence people with learning disabilities provide can be significantly improved if suitable questioning strategies are adopted, depending on the nature of the evidence in question.’<sup>74</sup>

The increased chances of having a prior conviction are also detrimental to the FASD sufferer when it comes to subsequent sentencings, given the existence of ‘tough-on-crime’<sup>75</sup> and ‘3-strike’<sup>76</sup> policies.

#### IV THE SENTENCING ISSUE: INTERMINABLE INDIGENOUS IMPRISONMENT

A sentencing judge must take several policy considerations into account when determining whether detention is suitable and if so, the length of imprisonment to be imposed. In Western Australia, Douglas notes that such ‘aims include punishment, rehabilitation, deterrence, denunciation and community protection.’<sup>77</sup> It is easy to see how these might apply. Take the deterrent effect of sentencing for example; imprisonment might discourage future offending if the offender does not want to return to prison. Community protection, whilst the relevant offender is incarcerated, gives the community peace of mind and protects them from further offences being committed. These policy considerations however are redundant when it comes to someone with FASD who, by nature of the disorder, cannot (not will not) understand considerations such as deterrence.

<sup>71</sup> [2008] WASC 287, [2].

<sup>72</sup> *Ibid* [3].

<sup>73</sup> The Standing Committee, above n 4, 141.

<sup>74</sup> WA Bench Book, above n 9, 4.3.2.

<sup>75</sup> Duncan McConnel, Law Council of Australia, ‘Indigenous imprisonment: New approaches overseas and at home’ (Speech delivered at the Western Australia Law Summer School, The University of Western Australia, 12 February 2015) 19.

<sup>76</sup> *Ibid* 15.

<sup>77</sup> Heather Douglas, ‘Foetal Alcohol Spectrum Disorders: A Consideration of Sentencing and Unreliable Confessions’ (2015) 23 *Journal of Law and Medicine*, 427, 431 (citation omitted).

This means that the chance of reoffending is high, and thus community protection is short-term at best. Additionally, without bespoke and appropriate support, a FASD sufferer will not be ‘rehabilitated’ from a period of imprisonment. Douglas highlights that in Canada it has therefore been accepted that ‘the calculus of sentencing the average offender simply does not apply to an offender with FASD.’<sup>78</sup>

The Australian Bureau of Statistics’ latest released data shows that nationally, as of 30 June 2015, ‘[i]mprisonment rates [had] reached their highest since 2005’<sup>79</sup> and that there was an increase of 7% of prisoners identifying as Aboriginal or Torres Strait Islander.<sup>80</sup> In Western Australia, ‘Aboriginal and Torres Strait Islanders comprised 38% (2,113 prisoners) of the adult prisoner population.’<sup>81</sup> The data summary shows that the ‘age standardised imprisonment rate was 17 times the non-Indigenous age standardised imprisonment rate’.<sup>82</sup> This means that 3,067 per 100,000 Indigenous adults are imprisoned, compared with 181 per 100,000 of non-Indigenous adults.<sup>83</sup> These statistics are staggering. They are alarming. And yet they are not new. They are not decreasing.

At the opening of the Law Society of Western Australia Summer Law School 2015, president Duncan McConnel spoke of the *increasing* rate at which Indigenous people are incarcerated in Australian prisons and the continued duty of the judicial system to reduce the cycle of Indigenous imprisonment. He begins by acknowledging that the ‘Aboriginal peoples have been marginalised and excluded from the story of our nation. The unfortunate legacy of [which] is visible for all to see today.’<sup>84</sup> In regards to ‘recognition and reconciliation’<sup>85</sup> McConnel summarises Australia’s few ‘watershed’ moments, and notes that the ‘more recent bi-partisan desire to amend the Australian Constitution and to “close the gap” in living standards between Indigenous and non-Indigenous people signify a nation

<sup>78</sup> Ibid 431, citing *R v Harper* [2009] YKTC 18, [39].

<sup>79</sup> ABS, ‘Snapshot’, above n 13.

<sup>80</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2015*, ‘Aboriginal and Torres Strait Islander Prisoner Characteristics’ (11 December 2015) catalogue no. 4517.0  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~7>>

<sup>81</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2015*, ‘Western Australia’ (11 December 2015) catalogue no. 4517.0

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Western%20Australia~24>>.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> McConnel, above n 75, 4.

<sup>85</sup> Ibid, McConnel speaks of the 1967 referendum; 1975, the Racial Discrimination Act; 1976, the Northern Territory Land Rights Act; The Native Title Act.

striving for maturity and reconciliation.’<sup>86</sup> He goes on to posit that it therefore ‘stands in stark juxtaposition to all of this official goodwill and intent that policy makers and politicians are in complete inertia with respect to the rate at which we imprison Aboriginal and Torres Strait Islander people.’<sup>87</sup>

McConnel asserts that the Law Council recognises that in order to reduce the disproportionate numbers of Indigenous Australians in prison there are two major considerations; the first being a long term commitment to removing the ‘substantive barriers’<sup>88</sup> which remain as the ‘the terrible legacy afflicting a group that is just one generation removed from a country in which their parents’ and grandparents’ formal rights to equal pay, equal participation and equal opportunity were yet to be realised’.<sup>89</sup> These barriers, such as ‘intergenerational and cyclical disadvantage, poverty, endemic substance abuse, unemployment and under-education,’<sup>90</sup> suffered by many Aboriginal and Torres Strait Islander people, are ‘interlinked with and inter-related to offending, police contact and incarceration.’<sup>91</sup> The second consideration is the ‘immediate impact of tough-on-crime policies ... which inevitably impact most heavily upon those suffering from the disadvantage and marginalisation that characterise many Indigenous peoples and communities.’<sup>92</sup> McConnel notes that although the ‘Federal Government has advised that it intends to address the suggested “underlying causes” of high rates of offending and victimisation in Indigenous communities ... [it] has eschewed any direct action to specifically address imprisonment.’<sup>93</sup> He highlights that the removal of Indigenous women from the family unit<sup>94</sup> and children in contact with the criminal justice system from a young age stymie any ‘efforts to improve education, increase employment and improve community safety’<sup>95</sup> and thus fail in diverting numbers from prison sentences. He notes that overseas efforts for ‘justice reinvestment ... by diverting offenders into programs designed to give them the best chance possible of reintegrating into society’<sup>96</sup> have been successful.

The propensity for someone with FASD entering the criminal justice system coupled with the increasing numbers of Indigenous imprisonment means that

<sup>86</sup> Ibid 5.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid 8.

<sup>89</sup> Ibid 7.

<sup>90</sup> Ibid 7.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid 8.

<sup>93</sup> Ibid 11.

<sup>94</sup> Ibid 12.

<sup>95</sup> Ibid 13.

<sup>96</sup> Ibid 17, Particularly New Zealand, Canada and the United States.

when someone becomes involved with judicial proceedings who is both Indigenous *and* suffering from FASD, more should be done to ensure that they are not lost in the system like Rosie Fulton, or are not subject to interminable imprisonment because the aims of imprisonment, such as rehabilitation and deterrence, have not worked. The Court of Appeal in the recent case of *Churnside v Western Australia*, in which the appellant was an Indigenous man with FASD, emphasised that it is the duty of a sentencing judge to explore alternatives to incarceration for Indigenous Australians, given their continued over-representation in the judicial system. Because the accused had FASD, the possible failure of alternative arrangements outweighed the almost certain failure of the aims of detention.

## V CHURNSIDE V WESTERN AUSTRALIA

### A *Case Summary*

In December 2015 the appellant (Churnside) was convicted after pleading guilty of two counts of aggravated burglary. The circumstances of aggravation were that he was accompanied by a co-offender in the commission of the crimes.<sup>97</sup> In committing the first offence, Churnside and his co-offender went into an unlocked property in Karratha ‘for the purpose of stealing alcohol and cash’,<sup>98</sup> where they found and took some bottles of alcohol. The second offence involved the appellant and the same co-offender entering a different residence where they stole ‘a handbag from a bedroom and a mobile phone from the kitchen bench’.<sup>99</sup>

Churnside was an indigenous man with FASD and had a significant criminal history for similar offences. Despite noting significant differences between the appellant and his co-offender ‘as a consequence of the appellant’s cognitive and intellectual impairment’, the sentencing judge imposed a total effective sentence of 22 months on Churnside.<sup>100</sup> His co-offender had a total effective sentence of 2 years 9 months imposed and both were eligible for parole.

There were four reports tendered at the initial hearing: a psychological report, a neuropsychological report, a paediatric report and a pre-sentence report. The first three reports indicated that the appellant suffered from cognitive defects and

<sup>97</sup> Criminal Code Compilation Act WA 1913, s 400(1)(a)(iii): circumstances of aggravation means circumstances in which immediately before or during or immediately after the commission of the offence the offender is in company with another person or other persons.

<sup>98</sup> *Churnside* [2016] WASCA 146 [10].

<sup>99</sup> *Ibid* [11]. The co-offender was ‘convicted of the same offences as the appellant and of four additional offences’ including the offence of indecently dealing with a child under 13, and is not the subject of this analysis.

<sup>100</sup> *Ibid* [54].

suspected FASD. Martin CJ, Mazza and Mitchell JJ noted that the ‘reports received by the sentencing judge were all entirely consistent’ and established that the appellant suffered from a ‘neurocognitive disorder’ due to prenatal exposure to alcohol, the consequences of which were exacerbated by his exposure to domestic violence, lack of strong social attachments and ‘general family dysfunction’.<sup>101</sup> They showed that Churnside had ‘cognitive difficulties [effecting] his capacity for social interaction, his ability to solve social problems, and his ability to assert himself in dealing with his peers.’<sup>102</sup> The reports established that Churnside could not be held ‘morally responsible for his pre-birth and childhood experiences’<sup>103</sup> and that his neurocognitive disorder had a ‘profound and continuing impact on every aspect of his day to day functioning, including his thought processes, his social interactions and his behaviour’.<sup>104</sup> His lack of schooling and substance abuse was relevant, being a ‘likely consequence’ of his mental impairment and childhood trauma and ‘exacerbated by undesirable peer associations’.<sup>105</sup> The pre-sentence report indicated that ‘the appellant presented as an ongoing risk to the community ... given his evident disabilities’<sup>106</sup> however all of the reports suggested that imprisonment would *not* have a deterrent effect and that Churnside’s only hope of rehabilitation would be through established support in the community.

Martin CJ, Mazza and Mitchell JJ considered that Churnside’s ‘established pattern of criminal behaviour ... clearly established the trajectory of his offending behaviour and the likelihood of that behaviour continuing’<sup>107</sup> or escalating given the lack of deterrent effect imprisonment had had on him previously or was likely to have in the future. They considered that currently, Churnside was living ‘without significant support in an environment which promotes a purposeless anti-social lifestyle’<sup>108</sup> and that the ‘only prospect of changing his behaviour’ was by ‘support and assistance which he needed to cope with daily life; the avoidance of substance misuse and negative peer associations; and the development of [life] skills’.<sup>109</sup>

## B *Issue on Appeal and Policy Considerations*

<sup>101</sup> Ibid [75].

<sup>102</sup> Ibid [20].

<sup>103</sup> Ibid [75].

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid [41].

<sup>107</sup> Ibid [76].

<sup>108</sup> Ibid [4].

<sup>109</sup> Ibid [75].

The issue on appeal was whether the sentencing judge erred in imposing a prison sentence as opposed to a community-based order. In the first instance it had been accepted that detention would not deter him from reoffending and that the policy consideration of protecting the community was short-term at best. However, the sentencing judge considered that there was no viable community support available, and given Churnside's criminal history he had no choice but to issue a term of imprisonment. On appeal, it was discovered through ordered investigation that there *were* viable community-support plans and that it was the court's duty to contemplate, and even instigate, these options. Given the near certainty of Churnside reoffending once the prison sentence was served, in this case the hope of rehabilitation a community order offered outweighed the policy considerations for imprisonment.

In considering the grounds of appeal, Martin CJ, Mazza and Mitchell JJ considered the 'critical question' was whether immediate imprisonment was appropriate in all the circumstances, given the appellant's childhood trauma and social disadvantages which were 'exacerbated by his very significant mental impairment.'<sup>110</sup> They note that there will be 'cases where the seriousness of the offences or the pattern of offending ... is such as to demand the imposition of a term of imprisonment to be immediately served',<sup>111</sup> but that Churnside's was *not* such a case.<sup>112</sup> Although policy considerations for imprisonment were important, Martin CJ, Mazza and Mitchell JJ accepted that due to his FASD, imprisonment was unlikely to deter or 'have any impact upon the prospect of the appellant reoffending after release'.<sup>113</sup> In considering long-term community protection the 'court was obliged to use every means at its disposal'<sup>114</sup> to reduce the risk of the appellant reoffending, as opposed to the short-term protection incarceration offered. As the moral culpability of his behaviour was diminished given the 'disabilities which he suffers through no fault of his own',<sup>115</sup> the punitive element of imprisonment was ineffectual. The court considered they must also provide 'some measure of justice to the appellant who would otherwise be destined to an indefinite and perhaps escalating cycle of offending and imprisonment as a result of his pre-birth and childhood experiences.'<sup>116</sup> If alternatives arrangements were not utilised, Churnside would be at an endless disadvantage.

### C *The Appealing Alternative and Result of Appeal*

<sup>110</sup> Ibid [69].

<sup>111</sup> Ibid [5].

<sup>112</sup> Ibid [6].

<sup>113</sup> Ibid [69].

<sup>114</sup> Ibid [82].

<sup>115</sup> Ibid [79].

<sup>116</sup> Ibid [82].

Martin CJ, Mazza and Mitchell JJ found that the trial judge erred in determining there was no viable community arrangement ‘without directing the making of inquiries which would establish whether that was in fact the case.’<sup>117</sup> They note that although there were no ‘definite plans’ there were ‘possibilities and opportunities which could be explored’ so that ‘the court could be satisfied that a viable community-based sentencing disposition was available’.<sup>118</sup> They considered that the sentencing judge erred by not causing ‘further enquiries’ into these possibilities which could, and had since their enquiries, induce the ‘development of a specific proposal which would provide the appellant with the support which he so obviously needs in an environment in which the risk of him reoffending could be reduced.’<sup>119</sup> It was significant that amongst the appellant’s criminal history, the longest period in which he did not commit an offence was when he was living with his great-uncle in Youngaleena. It was therefore no trivial opportunity for Churnside and his family to relocate from Karratha and its ‘adverse influences’ to Youngaleena where alcohol is prohibited, and ‘where he could be exposed to the beneficial influence of his great uncle.’<sup>120</sup>

In considering alternative arrangements for Churnside, Martin CJ, Mazza and Mitchell JJ asserted that the

courts of this State must make every possible effort ... to engage the services of governmental and non-governmental agencies to assist offenders to change their living circumstances and behaviour in a way which will reduce the risk of reoffending, particularly in relation to offenders who suffer from cognitive deficits of the kind associated with foetal alcohol spectrum disorder.<sup>121</sup>

The appeal was allowed and a Community Based Order (‘CBO’) was imposed. Most powerfully, although Martin CJ, Mazza and Mitchell JJ acknowledge that there is no certainty that the steps outlined in the CBO will ‘succeed in changing the appellant’s behaviour’, the arrangements provide the ‘hope or prospect of a change for the better, whereas a term of imprisonment offered no such hope or prospect.’<sup>122</sup> Without the efforts of the courts being made to reduce the risk of reoffending, ‘the repetitive cycle of offending followed by

<sup>117</sup> Ibid [6].

<sup>118</sup> Ibid [82].

<sup>119</sup> Ibid [83].

<sup>120</sup> Ibid [81].

<sup>121</sup> Ibid [7].

<sup>122</sup> Ibid [84].

ineffective punishment is likely to continue indefinitely to the detriment of both the relevant offender and ... the community.’<sup>123</sup>

## VI CONCLUSION

Because Churnside’s case is not in a vacuum, because FASD is more prevalent in Indigenous people, and because Indigenous people are incarcerated at an alarming rate, it is clear that something needs to change. One journalist notes that from the ‘landmark decision’,<sup>124</sup> Western Australian courts ‘have been put on notice they must do everything in their power to break the “tragic cycle” of indigenous imprisonment and help Aboriginal people overcome severe disadvantage.’<sup>125</sup> Hopefully this is true, hopefully the lower courts act on it and hopefully it doesn’t take an appeal for alternatives to be investigated. The recognition that the courts have an *active* role in engaging with external services to assist those who need assistance is pinnacle if Indigenous rates of imprisonment are to reduce because, as is clearly reflected in the statistics, the current approach is not working; the numbers of Indigenous children born with FASD are increasing, as are the numbers of their imprisonment.

The recognition FASD is attracting in order for support processes to be put in place<sup>126</sup> gives the hope of diverting individuals from, rather than to the criminal law. Although FASD is hard to diagnose due in part to its ‘invisibility’, lack of resources, health training and a reluctance to stigmatise the family,<sup>127</sup> once it has been diagnosed the courts must take it seriously. *Churnside v Western Australia*<sup>128</sup> is illustrative of the ability for appropriate alternative arrangements to be tried before resorting to incarceration for someone suffering from FASD, and the recognition that imprisonment *won’t work* means that in the long run, aims such as deterrence and community protection may have a chance of being successful. Perhaps then we will be talking about the invisibility of Indigenous Australians with FASD in the judicial system for a very different reason.

<sup>123</sup> Ibid [7]

<sup>124</sup> Sophie Morris, ‘Jail Quashed to End Crime Cycle’ *The West Australian* (Online) 2 September 2016 <<https://au.news.yahoo.com/thewest/wa/a/32509350/jail-quashed-to-end-crime-cycle/#page1>>.

<sup>125</sup> Ibid.

<sup>126</sup> See, for example: Telethon Kids Institute, ‘Alcohol & Pregnancy & FASD Projects 2010 – 2018’, *Alcohol & Pregnancy & Fetal Alcohol Spectrum Disorders Research Program*, <<http://alcoholpregnancy.telethonkids.org.au/media/1294096/research-summary-cover-page.pdf>>.

<sup>127</sup> Lorian Hayes, Heather D’Antoine and Maureen Carter, ‘Addressing Fetal Alcohol Spectrum Disorder in Aboriginal Communities’ in Pat Dudgeon, Helen Milroy and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 2014) 355, 359.

<sup>128</sup> [2016] WASCA 146.