



North Australian Aboriginal Justice Agency

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FASD: A Justice Perspective

31st May 2018, Priscilla Atkins

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First, I acknowledge the Larrakia people and their Elders past, present and future. I acknowledge Aboriginal people from across the Territory, and all Territorians here today.

Delegates, it is my privilege to be here today to talk about this most important issue. I am heartened by feedback over the last day as to the knowledge and hopes and dreams that have been shared here.

Your presence here is a personal commitment to better understand FASD, and to explore how the community – our families and people – and governments can better respond. I thank you for this commitment.

I am here to present a justice perspective, and with the authority of an Aboriginal-led board. NAAJA is the legal service provider and justice agency for the Territory. Our board members are drawn from across the Territory and our regional and remote representation is strong.

When we talk about justice, we talk about a system comprising legal services, interpreter services, the courts, police, corrections (both prisons and community corrections), night patrol services and related agencies. It is all the laws and agencies of government and our courts. Community services also serve an important part. It is a large, well-resourced, and complex system.

We also talk about justice in the context of our Aboriginal narrative, of inherent rights and two worlds interacting. Aboriginal people hold views and interpret justice from their own perspectives, and these perspectives are relevant. We are well aware our

justice system overall often fails to understand, integrate and actively support Aboriginal agency into its structures and practices. It may do so at the edge, or on the surface, but it is not meaningfully embedded in the ways that it should.

Mostly, this is a resource issue. The justice system overall has grown exponentially over the last few decades yet our ideas and programs which actively empower Aboriginal people are often secondary to the key priorities, or are in the too hard basket. Layer upon layer our justice system has built up in this way, often influenced by the political priorities of the major population centres.

Today, genuine, Aboriginal-led solutions form a very small part of our justice system, and so the system overall is less responsive and adaptive to the circumstances of our people. Our message is clear, *if our prisons are full of Aboriginal people, and if there is diversity in language and culture across the population*, then the system *itself* needs to be culturally appropriate. There must be a critical mass of Aboriginal-led solutions.

I raise this point first because this forum is about a dual approach: what *people in communities* can do to improve the situation and what *governments* can do to improve the situation. Both approaches must walk side by side.

So, what does FASD look like from a justice perspective in the Territory?

Well,

- We know the primary disabilities associated with FASD are contributors to offending behaviour. These disabilities include an inability to control impulses and actions, and difficulty controlling behaviour. People affected by FASD exhibit difficulty with reasoning, memory retention and recognising the consequences of actions. There are many pitfalls for people affected by FASD including relationships, employment and high contact with the justice system. And as FASD is a spectrum people are affected to different extents.
- We understand our imprisonment rates, amongst the highest for any group in the world, are more than likely connected to the issue of FASD. With limited alternative, community-based options, prison becomes the default option. Prison is the place where we park those who are affected by FASD. We treat criminal actions by people affected by FASD with solely criminal responses.

The disability part of it is not only largely ignored, but also gets funnelled to an expensive prison and criminal justice system.

- Getting bail can be too hard. Release to parole can be too hard. Some may not show remorse because of their FASD, and so receive what is considered the appropriate sentence. There is very little political will or appetite to set up appropriately supported accommodation for Aboriginal people who may have FASD, even in the major city centres. And even if we do increase the capacity to assess and diagnose those at the high end of the spectrum, what about those who still exhibit behaviours and issues associated with FASD but do not meet the criteria for diagnosis? What if a person does not have FASD but their behaviours associated with foetal alcohol exposure contributed to their offending behaviour?
- For people affected by FASD, we know prison is not a deterrent. Our high recidivism rate is likely attributed to many people with FASD who come in and out, in and out. Prison does not factor as a pathway to influence the decisions they have made. We know once they are inside the prison there is very little that the law can do to influence how they are managed within the prison. When a person enters prison, society mostly says they have lost their rights.
- We know we have no reliable data sets to tell us the true nature of FASD in our justice system. We know our lawyers and judges often do not know how to refer someone who has FASD to accessible and properly-resourced options for assessments and supportⁱ. In some cases we have, and particularly for the recent Royal Commission, but the lists and potential lists are long. We also know diagnostic tools often do not account for indigeneity, similar to the many other tools used across the justice system.
- We know there is a particular, insidious nature to this disability. And that is we are already faced with significant challenges of ensuring appropriate cross-cultural communication. There has been much development in the justice system with the provision of interpreters and attempts to eliminate

misunderstandings between the court and persons in court, but this serves little purpose when a defendant cannot see the linkage between cause and effect, or cannot genuinely understand the concept of consequence. Is a person not responding the way that we anticipate because of a language issue, or FASD, or any other number of mental health or disabilities? Is it all of these? Our court and legal system is already chronically underfunded which places pressure on these issues.

- The latin term *mens rea* – meaning ‘the intention or knowledge of wrongdoing that constitutes part of a crime’ as opposed to conduct – is a hallmark of our justice system, but what if intention is skewed by the disabilities of FASD? And considering the statistics we have heard of some communities 1 in 5 has FASD, or 20% of a given population. If these are children are diagnosed as such, what does their future hold and how will the justice system respond when they are older?
- In the youth justice space, we have already heard of the landmark study in Western Australia which found that of 99 young people sentenced in detention, 88 of 99 had at least one domain of severe neurodevelopment impairment, and 36 were diagnosed with FASD. WE know that of the 16 children and young people who gave evidence to the NT Royal Commission on their experiences in detention, 56% had FASD, 56% had a history of self-harm/suicide ideation and 31% had some form of brain injury.
- This data speaks to the importance of comprehensive neurocognitive assessments for young people in contact with the youth justice system. The reports prepared by the PATCHES team assisted young peoples’ families, their case workers, lawyers, teachers and support workers to understand the young person’s needs, strengths and challenges and implement strategies to engage and support them. NAAJA continues to advocate for young people before the Youth Justice Court to have multidisciplinary assessments to assist the court tailor sentences which take into account a young person’s neurocognitive abilities and capacity.

- Currently there are challenges to ensuring these reports are readily available, including limited funding and a lack of a specialist health professionals in the NT. NAAJA welcomes the recent alcohol inquiry's recommendation to establish a multi-disciplinary diagnostic service be established to which child protection workers, legal practitioners, judicial officers and correctional staff may refer people suspected of having a cognitive impairment such as FASD. Unless we have comprehensive diagnostic and support services to work with young people at risk of neurodevelopmental impairments, we will continue to fail young people in contact with the youth justice system.
- And we also know this issue is not confined to criminal law. We know young people who have FASD may display behavioural problems whereby the parents or guardians may be considered unsuitable for care. Assumptions of bad parenting can be easy to make. And where a pregnant mother has an addiction, what responsibility is there for the State where it also knows this and does not provide appropriate supports and interventions?
- And as we learn more about this issue, what matters arise in the context of systemic discrimination and access to services? The services in regional and remote areas are significantly less than those available in our major population centres. In one way, this is because of distance and cost, but our mothers and families who have children with FASD are not offered suitable accommodation close to services. Also, the vulnerable mother who is pregnant and is in a complicated relationship with a father who may have an addiction but also needs help isn't offered safe and suitable accommodation and other services immediately, and in order to prevent FASD.

All these things make up just part of the complexity of our wicked problem. They underpin a need for significant reform.

And whilst it is heartening to see the solid commitment towards alcohol reform and the courageous political stance of being upfront about our alcohol culture in the Territory, there is much that can be done for the justice system to adapt and respond to these issues.

In closing, I return to the first issue I raised which is the importance of Aboriginal-led solutions and how these form a very small part of our justice system. Aboriginal-led solutions from a health perspective and supported by a broad range of professionals including people here today is what our justice system needs.

We have heard about the trauma-informed approach for organisations and systems, and how those affected by trauma require the right connections for healing. Our justice system can learn significantly from this, and I thank you.

END

ⁱ A 2013 survey in Queensland showed 82% of judges who suspected FASD did not send an accused for assessment for the common reason that they did not know where to send them.