

Developing Diversionary Pathways for Indigenous Youth with Foetal Alcohol Spectrum Disorders (FASD): A Three Community Study in Western Australia

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Our work unearthed a considerable body of bad law and poor policy. However, we also found an abundance of excellent practice on a local level by skilled and dedicated teams of professionals, from across the spectrum of government agencies and Indigenous community organisations, working together to minimize the negative impact of law and policy and create alternatives.

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The authors also acknowledge the funding contribution of the Australian Institute of Criminology through the Criminology Research Grants program.

Executive Summary

Research Aims

This research examines justice interventions for Indigenous young people suspected of having Foetal Alcohol Spectrum Disorders (FASD) and related disorders. It responds to the specific concerns of community members and justice professionals in the West Kimberley that increasing numbers of Indigenous youth are displaying symptoms of FASD and becoming enmeshed in the criminal justice system. This study explores and map outs diversionary alternatives 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.

This research aimed to:

- take stock of the inadequacies of the criminal justice system to respond to young people displaying symptoms of FASD in the West Kimberley;
- develop diversionary alternatives, particularly with a strong ‘cultural base’ and greater use of ‘problem solving’ meetings and family conferencing models;
- investigate whether diversionary and assessment options can be developed for the first point of contact with the criminal justice system;
- consult with community-owned organisations and mainstream agencies to identify the potential for an ‘early warning’ system to create opportunities for non-stigmatising interventions;
- investigate the potential for ‘on-country’ strategies in partnership with mainstream agencies;
- develop proposals for reform of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), with specific focus on the needs of young people with FASD.

What is FASD?

FASD is a non-diagnostic umbrella term encompassing a collection of disorders resulting from exposure to alcohol in utero, including Foetal Alcohol Syndrome (FAS), Partial FAS (pFAS) and alcohol-related neurodevelopmental disorder. 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).

Why is it a justice issue?

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 wilfully unwilling, to comply with court orders. An inadequate legal response can also increase the likelihood of young people with FASD developing secondary disabilities, such as substance abuse, which, in turn, increases their susceptibility to contact with the criminal justice system (as victims and offenders) (Koren 2004: 4).

Difficulties with memory place persons with FASD at a disadvantage when trying to explain behaviour, give instructions to lawyers, or give evidence (Parliament of Western Australia 2012: 75): seriously impeding the fair administration of justice. Once they become defendants, the difficulties that persons with FASD experience with memory and linking actions with consequences are likely to render diversionary alternatives such as fines, community-based orders, and good behaviour bonds, futile (Douglas 2010: 228).

There are also concerns expressed by justice professionals (shared by community organisations) that the lengthy screening, assessment and diagnostic processes when children are identified as possible FASD at court mean long periods on bail/remand. Anecdotal evidence suggests that this group is highly likely to re-offend on bail and be in limbo in terms of speedy access to treatment and support services.

Mentally Impaired Accused Legislation

In Western Australia, a diagnosis of FASD can trigger indefinite detention under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the CLMIA Act) if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. Unlike the *Young Offenders' Act 1994* (WA), the Act does not contain special procedures for persons who are 17 years of age or younger. Each jurisdiction in Australia has separate legislation governing fitness to stand trial (see Appendix 1). 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. 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 inadequacies of Western Australia's regime with regards to accused persons found unfit have been raised by in a number of contexts (Crawford 2010, 2014; Martin, 2015; Parliament of Western Australia, 2012; *BB (a child)* (2015); *State of Western Australia v Tax* [2010]). 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 ACT, NSW (District and Supreme Court proceedings), NT, SA and VIC) (see Appendix 1);

- 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; and
- the pressure the regime places on legal representatives.

Better Practice: Lessons from comparable jurisdictions

Our 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 also provides an example of a diversionary option, before fitness is raised, for persons with mental impairment in s32 of the *Criminal Law (Forensic Provisions) Act 2007* (NSW).

Internationally, New Zealand provides a best practice model for young people with FASD. Fitness provisions are governed by the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) (IDCCR) and the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) (CPMIP). Both pieces of legislation apply to adults and children. The IDCCR, in keeping with its approach to managing young people enshrined in the *Children, Young Persons and their Families 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. Further research is required into how these features might be adapted to the Western Australian context.

A new diversionary paradigm: a decolonising model

Our discussions with Indigenous stakeholders confirmed our 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.

Our proposed reform agenda takes into account a number of innovatory 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, our priority is to employ these systems as points of 'cultural interface'

(Nakarta 2002: 5) with emerging Indigenous owned and place-based practices and philosophies. What we call a 'decolonising' approach.

We require a paradigm shift underpinned by new legislation. 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' tends to involve programs designed and managed by mainstream bodied 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 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 1997* (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. Our decolonising model moves 'place', or 'country', from the periphery to the centre of intervention.

Introduction

Background

After decades of neglect, attention in Australia has recently focused on the inter-generational impact of long-term alcohol use in the form of Foetal Alcohol Spectrum Disorders ('FASD'), and the lack of responsiveness of the justice system to the needs of persons with FASD (Parliament of Australia 2015, 2012, 2011; Parliament of Western Australia, 2012; Office of Inspector of Custodial Services, 2014). FASD is a non-diagnostic umbrella term encompassing a collection of disorders resulting from exposure to alcohol in utero, including Foetal Alcohol Syndrome (FAS), Partial FAS (pFAS) and alcohol-related neurodevelopmental disorder.

While Australian data is limited, the prevalence of FASD in Indigenous communities is indicatively greater than non-Indigenous communities (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) 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).

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 wilfully unwilling, to comply with court orders. An inadequate legal response can also increase the likelihood of young people with FASD developing secondary disabilities, such as substance abuse, which, in turn, increases their susceptibility to contact with the criminal justice system (as victims and offenders) (Koren 2004: 4).

Research in the United States suggests that over half of persons with FASD will interact with the criminal justice system: around 60% will be arrested, charged or convicted of a criminal offence, and about half will have spent time in juvenile detention, prison, inpatient treatment or mental health detention (Streissguth et al. 2004: 230-1). Canadian research also indicates that young people with FASD are 19 times more likely to be arrested than their peers (Brown et al. 2015: 144). The cycle is particularly concerning in the context of the worsening over-incarceration of Indigenous youth in Western Australia (Loh et al. 2005; Parliament of Australia 2011, Amnesty International 2015). Despite constituting only 6.4% of youth in Western Australia (Australian Institute of Health and Welfare 2014), Indigenous youth account for 77% of youth in juvenile

detention, and are 53 times more likely to be detained than their non-Indigenous peers (Department of Corrective Service 2015a, 2015b; Amnesty International 2015).

The need to divert Indigenous youth with FASD from contact with the justice system has been acknowledged by a number of official sources. The Australian Parliament's House of Representatives Standing Committee on Indigenous Affairs (2015: para. 5.84) recently reported that '[t]here is...a great need for diversion programs which redirect individuals [with FASD] who come in contact with the criminal justice system.' The Western Australian Inspector of Custodial Services (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.' Diversionary alternatives are sorely needed. However, our 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 floodtide 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, underpinned by new legislation, is required.

Rationale and Aims of Study

The problematic interactions between people with FASD and the criminal justice system, and young people in particular, remain under-researched. The Australian Parliament's Standing Committee on Social Policy and Legal Affairs (2012: 3) recently reported that:

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.

Currently, the FASD space in Western Australia is largely the domain of clinicians, who have initiated new screening and assessment mechanisms in the West Kimberley in close partnership with Indigenous organisations. The Telethon Kids Institute, based in Perth, is leading valuable research into the prevalence of FASD amongst detainees in Western Australia's juvenile detention centre, 'Banksia Hill', in Perth, with a view to developing management plans and through care support (Telethon Kids Institute 2016). A full assessment of FASD can require input from a developmental paediatrician, a speech pathologist, a neurologist, an occupational therapist and a psychologist. The process can be slow, and expensive.

The identification of the impairments associated with FASD is essential to alert justice professionals to the reasons for an individual's responses, and to allow these impairments to be appropriately accommodated. A failure to do so increases the risk of persons affected by FASD coming into, and maintaining, contact with criminal justice system (Roach & Bailey 2009). Given the importance of identification, Australian research has, to date, focused on the awareness of lawyers and justice professionals of FASD (Douglas et al. 2012; Mutch et al. 2013) and sentencing issues (Douglas 2010; Crawford 2015).

Western Australian research, in particular, has concentrated on the awareness of justice professionals of FASD and the perceived impact of FASD on attitudes and practice within the justice system. In a recent study by Mutch et al (2013), 1873 West Australian justice professionals were surveyed, including judicial officers, police and lawyers; 23% responded. This study found ‘deficits in the treatment of individuals with FASD within the [Western Australian] justice system’ on par with studies conducted in Queensland and Canada (Mutch et al. 2013: 39).

However, we felt it was essential to also have a socio-legal perspective, and to explore diversionary pathways out of the justice system for Indigenous youth with FASD. Criminological research in Australia and internationally warns that even well intentioned intervention can have the unintended consequence of ‘net-widening’ by drawing young people deeper into the judicial and correctional systems in order for them to receive treatment and support (Austin & Krisberg 1981; Cohen 1985; Sarre 1999; Cunneen & White 2007). In Western Australia the stakes are particularly high given that the youth justice system is heavily dominated by an adult correctional philosophy focused on punishment and compliance, rather than welfare and rehabilitation (Blagg 2009, 2016). It does not offer a therapeutic environment within which begin to stabilize children with disabilities of this kind.

It bears repetition that: the state with the highest rate of Indigenous youth over-representation in Australia is ‘the only jurisdiction in Australia where the department responsible for adult offenders is also responsible for youth justice’ (Blagg 2015: 21). This is not to suggest that there is not good practice. The Amnesty International inquiry notes, for example, the efforts made to create a more youth centred practice by the creation of Regional Youth Justice Services (RYJS) in 2008 which more clearly separates youth justice and adult services. They have dedicated youth justice workers tasked with forming close links with communities and families, and focus more on prevention and diversion. Our discussions with Indigenous organisations, police and legal services in the West Kimberley were highly supportive of the RYJS and the work they do around bail accommodation, providing support for Juvenile Justice Teams (described later) and working closely with offenders and families.

A range of court users and professionals (Magistrates, police prosecutors, defense, mental health, drug and alcohol services) are extremely concerned that the focus on FASD will lead to greater use of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (CLMIA Act). Under this Act, a diagnosis of FASD can trigger indefinite detention in a custodial setting if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. There are also concerns in these quarters (shared by community organizations) that the lengthy screening, assessment and diagnostic processes when children are identified as possible FASD at court mean long periods on bail/remand. Anecdotal evidence suggests that this group is highly likely to re-offend on bail and be in limbo in terms of speedy access to treatment and support services.

This research aims to:

- take stock of the inadequacies of the criminal justice system to respond to young people displaying symptoms of FASD in the West Kimberley;
- develop diversionary alternatives, particularly with a strong ‘cultural base’ and greater use of ‘problem solving’ meetings and family conferencing models;
- investigate whether diversionary and assessment options can be developed for the first point of contact with the criminal justice system;
- consult with community-owned organisations and mainstream agencies to identify the potential for an ‘early warning’ system to create opportunities for non-stigmatising interventions;
- investigate the potential for ‘on-country’ strategies in partnership with mainstream agencies;
- develop proposals for reform of the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA), with specific focus on the needs of young people with FASD.

Our fundamental premise is 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: nor can solving the problem be isolated from the broader task of decolonising relationships between Indigenous people and the non-Indigenous mainstream. Our proposed reform agenda takes into account a number of innovatory 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, our priority is to employ these systems, not as ends in themselves, but only in so far as they offer points of ‘cultural interface’ (Nakarta 2002: 5) with emerging Indigenous owned and place-based practices and philosophies. Indigenous organisations in the Kimberley believe it is no longer acceptable to respond to crises such as FASD by simply extending the power and resources of mainstream agencies. There has to be a form of declonisation. This decolonising process involves expanding the role of Indigenous owned and place-based processes and services, working from a position of cultural security and embedded in Indigenous forms of knowledge. However, there are some mainstream reform practices capable, we suggest, of bridging the divide between the Indigenous and non-Indigenous domains.

Methodology

The research process involved a mix of comparative legal analysis (comparing Western Australia with similar jurisdictions in Australia and overseas); a review of the extant policy and practice literature around FASD; an examination of the literature on the Western Australian justice system in relation Indigenous youth, including statistics on over-imprisonment; and, a qualitative research phase, involving a range of place-based interviews and focus groups with community members, justice professionals, and key

individuals and groups in the West Kimberley region (Broome, Fitzroy Crossing and Derby). This place-based phase was buttressed by interviews, focus groups and round table events in metropolitan Perth.

To ensure our research was in alignment with the aspirations of Indigenous people in the West Kimberley, we formed partnerships with three prominent Indigenous led and managed agencies: *Nindilingarri Cultural Health* 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 where FASD was an issue.

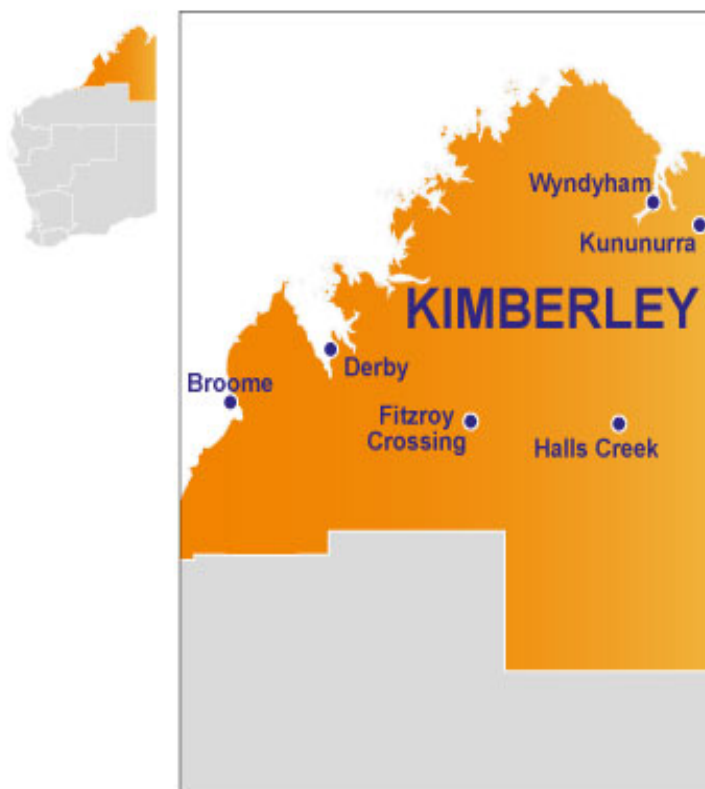


Image: Department of Regional Development

Focus groups in the research sites

In 2015, we travelled to the research sites and held focus groups with community members and stakeholders. Focus groups with community members were ‘non-intrusive’ and based on ‘a two-way exchange exercise’, rather than the traditional Western research practice of ‘intensive direct questioning’. The focus groups covered a range of issues, including:

- family, community, legal and government perspectives and understandings of FASD and related conditions in their locality;

- challenges and barriers facing these communities in terms of providing treatment and support for FASD youths and their families;
- the quality of intervention by agencies from the point of first contact through to sentencing and beyond (e.g. quality of police interviews; use of ‘font end’ diversionary mechanisms; assessment and screening; sentencing practices; use of bail and remand; availability of support services, etc);
- the degree to which present arrangements, including multi-agency work and judicial practice were ‘problem solving’ and ‘solution focused’; and
- the extent to which community ‘owned’ practices were being granted status and support by mainstream organisations and the courts.

While we had general points to discuss, Indigenous participants were encouraged to frame the agenda for discussion. The focus groups were held at the premises of our partner organisations in Broome and Derby in July 2015. The Broome focus group was attended by 19 participants, including representatives from government agencies and Aboriginal community groups, and ran for approximately 2 hours. The Derby focus group was attended by 8 participants, including representatives from government agencies and Aboriginal community groups, and ran for approximately an hour. The focus groups were not recorded. However, extensive notes were taken and used in the preparation of this report. During this field trip, we also met with members of the judiciary and the legal profession in Broome, and with Aboriginal organisations in Fitzroy Crossing.

In May 2016, we travelled to the research sites and presented our interim findings to community members and stakeholders, and sought feedback on our proposals. These meetings were well attended. We incorporated this feedback into our final report.

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 we were able to accompany the West Kimberley Magistrate on circuit, including court sittings in Broome, Derby and Fitzroy Crossing. As noted, we undertook extensive interviews and focus groups with key stakeholders in the West Kimberley region. We did not interview children or adults with FASD, but focused on the justice system’s response, as well as the perspectives of Indigenous workers and relevant community members. We supplemented this place-based research with discussions in Metropolitan Perth. In 2015, we hosted a roundtable at UWA with 30 participants from key agencies and groups, and we participated in a number of forums, including a FASD Symposium at UWA (Institute of Advanced Studies, 2015). Members

of the team have also presented interim findings at a number of national and international conferences and workshops.¹

A 'Strengths Based'/Appreciative Philosophy and a Postcolonial Stance

Linda Tuhiwai Smith describes research as 'the dirtiest word in the Indigenous vocabulary' (Smith 1999: 5). It is a discomfoting fact that Indigenous people are amongst the most researched as well as the most disadvantaged and imprisoned group in Australia. White researchers are, unsurprisingly therefore, treated with suspicion when they drop in to the Indigenous domain with research agendas that do not reflect the interests and aspirations of the Indigenous community. This research project emerged as a direct result of discussions between Indigenous leadership and Amnesty International Australia researchers in the Kimberley regarding the problem of Indigenous over-representation and youth suicide (Amnesty International Australia 2015). Indigenous women in Fitzroy Crossing, in particular, were concerned about the numbers of FASD afflicted children who were vulnerable to enmeshment in the justice system: concerns amplified by a diversity of professionals working in the justice system, from lawyers to police prosecutors. There was, then, a direct link between Indigenous community concern and the creation of the research project.

The fieldwork methodology followed the model established in previous works involving Indigenous people in the Kimberley by principal researcher, Professor Harry Blagg. This is based upon a participatory model of research that respects and integrates Indigenous perspectives into the research process. To this end we favoured an approach, or 'stance', fitting broadly into the Appreciative Inquiry (AI) paradigm, in that it is concerned with identifying strengths (or potential sources of strength) rather than continuously focusing on deficits and weaknesses (Robinson, Priede, Farrall, Shapland & McNeil, 2013). AI 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. As Rynne and Cassematis (2015: 105) maintain:

This level of engagement (through 'yarning') is more akin to First Peoples cultural values (Cunneen and Rowe 2014) than conventional western research practice where power flows down from the researcher to compliant participants (Walker et al. 2014). In practice, the goal of yarning in a research interface is to create collaborative research utilising a form of data endorsed by First Peoples participants (Penman 2006) as active empowered partners in terms of nominating research topics they believe would be directly beneficial to themselves and articulating any concerns that may exist with regard to the research process.

¹ Conference, seminar and workshop presentations on the project include addresses to: the Bar Association of Western Australia; Australian and New Zealand Society of Criminology Day Conference (Auckland); University of Victoria Criminology (Wellington) seminar; Social and Legal Studies International Conference (New Orleans);

AI is philosophically aligned to contemporary thinking regarding research in Indigenous communities, in the sense of endorsing and validating Indigenous knowledge and acknowledging the validity of Indigenous epistemologies (Fitzgerald 2001). We, therefore, employed a qualitative methodology in the three designated sites, embedded in an ethnographic and grounded research approach (Denzin & Lincoln 2011). Qualitative methodology is suited to research intended to identify new, *emerging* innovations, as opposed to simply evaluating existing, usually mainstream, practices and understanding. In this instance we sought to understand cultural perspectives on FASD-like conditions, and to highlight differences and points of synergy with mainstream perspectives and strategies that combine the strengths of local, 'place-based' systems with mainstream structures.

Our research was also informed by Postcolonial theory. The Postcolonial does not refer to the world after colonialism has ended; rather it refers to the diversity of cultural, social and political contestations and crises brought into being by colonial projects (Moore-Gilbert 2002). Postcolonial theories offer an alternative to the Anglospheric story of 'history' as a forwards moving process, ineluctably unfolding through linear time towards human progress and emancipation. Postcolonial theories stress, instead, tropes of continuity, reprise and repetition in the post-colony, where the 'past' constantly resurfaces in the present and Euro-modernity, far from offering improvement, delivers suffering, dispossession and genocide. Postcolonial theories are concerned with bringing into the framework of hearing those voices drowned out by colonial discourse.

This is useful in relation to settler colonial societies, such as Canada, Australia and New Zealand, because, while there has been formal 'independence' from the mother country, there has never been formal decolonisation of relationships between settlers and the Indigenous population. Instead, there have been intensifying struggles around what Coulthald (2014) calls the 'politics of recognition' and significant continuity in terms of the dominance of settler laws, that cement white privilege and sustain colonial oppression. There has, admittedly, been a minor 'cultural turn' in Australia, and other settler societies, accepting and even celebrating cultural difference, and acknowledging the value of culture in building resilient and healthy communities (Dockery 2009, 2011; Biddle 2011). On the other hand, as Walter Mignolo (2011) suggests, acceding 'cultural rights' to Indigenous people, stops well short of satisfying Indigenous demands for what he calls 'epistemic rights': the right to have Indigenous knowledge granted equal status to settler knowledge. Indigenous people vocally demand a seat at the table, and are no longer prepared just to sing and dance at the preliminaries.

Criminological and socio-legal theories emanating from the Global North cannot, on their own, provide a secure epistemic basis for a critique of the justice system in relation to Indigenous peoples, or form the basis for a new justice paradigm, because they operate without a theory of settler colonialism and its effects (Cunneen 2011; Blagg 2008; Anthony 2013). Settler colonialism differs from other brands of colonialism in that it involves the wholesale appropriation of land by white settlers. According to Patrick Wolfe (2006), the logic of white settlement is 'eliminatory' in relation to Indigenous

peoples' connection to land. The extinguishment of pre-existing Indigenous sovereign law in Australia became the 'litmus test of settler statehood' (Ford 2010). Settler colonialism uproots Indigenous occupants and replaces them in the soil: transplanting the Global North into the geographic south (Veracini 2013); transforming natives into strangers, strangers into natives (Pilay 2015). The fundamental fault line in 'frontier' Australian states such as Western Australia, the Northern Territory and Queensland, still runs between a non-Indigenous mainstream, who benefit from the dispossession of Indigenous peoples from their land, and an Indigenous minority, dispossessed of land by the mainstream.

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. Our decolonising model moves 'place', or 'country', from the periphery to the centre of intervention, as we describe later. It supports Indigenous 'epistemic rights' by acknowledging what Blagg and Anthony (2014) refer to as 'place-based sovereignty': the authority that flows from Indigenous occupation of country.

An Indigenous Youth Detention System: hyper-incarceration in Western Australia

Western Australia maintains a reputation as the 'deep south' of the Australian correctional landscape. Indigenous youth in Western Australia are 40 times more likely than their non-Indigenous peers to be in detention, which is the highest rate of overrepresentation of Indigenous young people in detention in Australia (Amnesty International 2015). Western Australia has the second highest overall rate of youth detention in the country (behind the Northern Territory), detaining young people at close to twice the national average (Office of Inspector of Custodial Services, 2013: 120). On the most recent available data, Indigenous youth made up 77% of all youth in detention in Western Australia (92 out of 120) and 59% of those being managed in the community (579 out of 974) (Department of Corrective Service, 2015a, 2015b). They constitute roughly 6% of the relevant population (Australian Institute of Health and Welfare, 2014). These staggering rates are, in large part, a function of changes to the youth justice system in the latter part of the last century.

Western Australia embraced 'punitive excess' (Cunneen et al. 2013) with enthusiasm in the early 1990s, introducing a range of tough on crime measures, including mandatory sentencing for juveniles and the assimilation of youth justice into the adult correctional system. The new system blurred and minimised, where it did not totally abolish, the boundaries between the youth and adult estates. It absorbed youth justice into the adult correctional bureaucracy, and managed youth justice on correctional lines with a greater emphasis on risk assessment and management, offender accountability and strict policing of court orders (Omaji 2003).

This period saw the introduction of youth specific legislation (The *Young Offenders Act 1994* (WA), hereafter the YOA). The YOA enshrined some children's rights in statute and is prefaced by principles supportive of diversion, such as detention as a sanction of 'last resort' (s 7(h)). Nonetheless, the Act reflected the mood of the time by enshrining 'punishment' as a legitimate goal of the youth justice system (s 7(j)). At the same time, a range of broader 'reforms' to justice legislation and policing practices, tightened the carceral screw by introducing stricter parole and bail conditions, and mandatory sentencing for property crime (for children as well as adults), which was buttressed by a range of 'zero tolerance' policing practices (move on orders, anti-social behaviour orders, youth curfews, and the like) that targeted Indigenous youth in white-public space (Cunneen & White 2007).

The rising proportion of Indigenous youth in detention is primarily the result of a drop in the non-Indigenous youth detention population, who have been the chief beneficiaries of diversion by the police, through cautioning and family conferencing at the 'front end' of the justice system. Roughly 50% of youths who would have gone to court before the YOA were now being diverted (Blagg 2008). Diversionary strategies, established under the YOA, such as the Juvenile Justice Teams (joint police and youth corrections teams who divert cases considered too serious to caution, but not serious enough for court, using elements of restorative justice) are clearly 'working', they are just not working for Indigenous youth. Furthermore, recidivism rates are high, with around 90% of Indigenous youth returning to custody within two years of release (Amnesty International 2015).

Geographic remoteness is also a key factor. On 30 June 2013, 41.2% of all young people in detention in Western Australia were from regional and remote areas: 84% of young people from regional and remote areas in detention over the past five years have been Indigenous, the majority from the Kimberley region where our study is based (Commissioner for Children and Young People, 2014: Table 9.25). Youths from the Kimberley are more likely than youths from other parts of the state to be incarcerated in Western Australia's mandatory sentencing regime (Amnesty International 2015). Further, on average, around 40% of young people in detention in Western Australia are un-sentenced (Department of Corrective Services 2016: 8): Indigenous youth represent 70% of those to whom bail has been refused and have been remanded in detention awaiting trial (Australian Institute of Health and Welfare 2014: Tables s 12 and s 18). The *Bail Act 1982* (WA) stipulates that a child 17 years of age or under can only be released on bail if a 'responsible person' signs a bail undertaking (Sch 1, Pt C, cl 2(2)(b)). Western Australia is the only state where this requirement is in place.

The youth justice system in Western Australia is in real terms, if not in name, an Indigenous youth detention system. The 'punitive surge' intensified already existing patterns of systemic racism that worked to criminalise Indigenous people (Cunneen et al. 2013). Unlike the 'punitive *turn*' (Feeley & Simon 1992) in Western Europe and the USA, that insinuated a break or rupture with the era of 'penal welfare' (Garland 2001), the surge represented a *continuation* of apartheid practices *a fortiori*. Indigenous families had

never been the beneficiaries of the kinds of state services commonplace in the white mainstream: ‘welfare’, for Indigenous people, usually meant forced institutionalisation and the break up of families (Haebich 2000). The new era of ‘governing through crime’ (Simon 2007) provided a new set of disciplinary mechanisms in new regimes but it targeted the same dispossessed Indigenous population. Detention became the new site for warehousing the dispossessed; previously the responsibility of missions, orphanages, and care homes.

The collateral damage of colonial dispossession is manifested in inter-generational trauma, family violence, alcohol related harms, and youth suicide, creating what Atkinson describes this as the ‘*trauma to prison pipeline*’ (Atkinson 2015). FASD – the inter-generational impact of long-term alcohol use – is increasingly being recognised as a symptom and legacy of colonisation. Judge Cozens, in the Territorial Court of Yukon, remarked in *R v Quash* [2009] YKTC 54, [62]:

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

Magistrates, defence lawyers, prosecution and police we have interviewed are increasingly concerned that many young Indigenous people who become enmeshed in the system may have some kind of cognitive impairment such as FASD.

There are currently no reliable estimates of just how many children currently passing through the justice system experience these impairments in Western Australia. One reason for this is that court users are fearful that any indication that a young person has FASD may lead to indefinite detention under the *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA) (CLMIA Act). There are therefore pressures on lawyers to encourage early pleas of guilty, as any sanctions would be time limited and less draconian than indefinite detention under the CLMIA Act. Before discussing these issues it would be useful to describe the way that one community has responded.

Fitzroy Crossing: Indigenous Women Take Charge

The Fitzroy Valley sits within the Kimberley region of Western Australia. Roughly 90% of residents in the Fitzroy Valley are Indigenous, most belonging to one of four language groups – Bunuba, Gooniyandi, Walmajarri and Wangkatjunga, spanning across approximately forty communities and outstations (Marninwarntikura Fitzroy Women's Resource Centre; Marra Worra Worra Aboriginal Corporation & Nindilingarri Cultural Health Services, 2009). The town of Fitzroy Crossing is the regional hub of the Valley. It has been reported that in 2007, ‘the communities of the Fitzroy Valley were in crisis’ (Aboriginal and Torres Strait Islander Social Justice Commissioner 2011: 69), with health professionals commenting on the devastating impacts of alcohol abuse within the community. A coronial inquiry into the high rate of suicide in the area found that there had been a 100 per cent increase in the number of self-harm deaths between 2005 and

2006, and that the rate of self-harm deaths in the Fitzroy Valley was exceptionally high (Hope 2008).

According to the Marninwarntikura Fitzroy Women's Resource Centre, the Fitzroy Valley was 'disastrous...and it is a state of dysfunction' (Marninwarntikura Fitzroy Women's Resource Centre; Marra Worra Worra Aboriginal Corporation & Nindilingarri Cultural Health Services 2009: 5). In 2007, Indigenous community members of Fitzroy Valley undertook an initiative to curb alcohol abuse in their community because of the high number of alcohol and drug related suicides in the Fitzroy Valley; extensive family violence and the increase in child protection issues associated with FAS (Aboriginal and Torres Strait Islander Social Justice Commissioner 2010: 72). As a result of the communities lobbying, the Director of Liquor imposed an initial six-month restriction on the sale of packaged liquor in the area. This restriction was then extended indefinitely (Kinnane et al. 2010). One of the main reasons for this community-led action was the impact that alcohol was having on unborn children.

Foetal Alcohol Spectrum Disorders

FASD

FASD was first identified in the 1960s in France in the respective works of a doctoral researcher, Jaqueline Roquette, and French paediatrician, Professor Lemoine (Lowenfels & Tuyns 1994). Lemoine (1968) published the first article on the subject in 1968, and was followed, in 1973, by North American academics (Jones et al. 1973; Jones & Smith 1973). Over the past four decades, significant progress has been made in understandings and awareness of FASD. Diagnostic challenges nonetheless remain, with ongoing debate regarding ‘the specific assessment techniques used to make the definitive diagnosis... especially for alcohol-related neurodevelopmental disorder’ (Popova et al. 2016).

Prevalence

The difficulty of obtaining accurate rates of FASD is well documented (Fitzpatrick et al. 2014: 451; Douglas 2010: 226; Allen et al. 2007: 65; Harris & Bucens 2003). The low reported rates in Australia are frequently attributed to under-diagnosis, under-reporting, lack of information regarding prenatal alcohol exposure, inconsistent diagnostic criteria, and under-representation of high-risk populations (Fitzpatrick et al. 2015: 451; Douglas 2010: 226; Fast & Conroy 2004: 162).

Most existing prevalence studies report only FAS. Existing Australian estimates of FAS in non-Indigenous populations have ranged from 0.14 to 1.7 per 100 children (Allen et al. 2007: 64; Harris & Bucens 2003: 530-1; Bower et al. 2000). Consistently with prevalence studies internationally (Chartrand & Forbes-Chilibeck 2003: 40), FASD is disproportionately diagnosed amongst Australia's Indigenous peoples (Parliament of Australia 2011: 96ff, 2012: 33ff). Australian estimates in Indigenous populations have ranged from 0.14 to 4.7 per 100 children (Parliament of Australia 2011: 96ff, 2012:33 ff). In 2015, Australia's first population-based study on the prevalence of FAS/pFAS, reported rates of 12 per 100 children in the remote Indigenous town of Fitzroy Crossing in Western Australia (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).

Primary impairments

The ‘primary’ effects of FASD are the physical and mental impairments that directly result from prenatal exposure to alcohol. Physical effects may include pre-natal and/or post-natal retardation of growth in weight and/or height below the tenth percentile, visual impairments, hearing impairments, and structural abnormalities of the heart, kidneys and skeleton (Douglas 2010; Floyd et al. 2005; O'Malley 2007: 11). FAS, the most severe end of the FASD spectrum, often results in craniofacial dysmorphism, such as a head size below the third percentile, small eyes, an under-developediltrum

(the groove between the upper lip and nose), a thin upper lip, and a flattening of the upper jaw (Douglas 2010: 222-3; Avner et al. 2006).

Prenatal alcohol exposure may also cause damage to the frontal lobe of the foetal brain, resulting in cognitive deficiencies (Kulaga 2006). Deficiencies may include impairments in learning, attention, memory, sensory perception, and language. Damage may also be caused to the limbic system, risking impairments in social judgment, impulse control, and emotional regulation (Chasnoff et al. 2010; Rasmussen, 2005). Difficulty with abstract reasoning often manifests as a failure to learn from experience, and to link consequences with actions (Douglas 2010: 223). People with FASD may also experience difficulty seeing ‘the big picture’, in the sense of imagining a future, thinking about others, explaining actions, or restraining impulses (Paige 2001: 25). The primary impairments associated with FASD also affect a person’s ability to engage in school and employment (Douglas 2010: 225). Research indicates that 60% of people with FASD have disrupted or curtailed school attendance that may exacerbate existing cognitive deficiencies (Douglas 2010: 224, Burd et al. 2003).

Secondary impairments

The ‘secondary’ effects of FASD are those that develop because of FASD’s primary effects. Secondary impairments or disabilities are a cluster of social and psychological problems that develop as a result of FASD’s primary effects being exacerbated by repeated negative contact with the criminal justice and related systems; inadequate support and misdiagnosis; existence on the margins of society; and institutionalisation (Streissguth & Kanter 1997). Research indicates that over 90% of people with FASD will be diagnosed with a psychiatric disorder during their lifetime (O’Malley 2007: 11), with 30% developing substance abuse problems (Boland et al. 1998). These secondary effects increase the susceptibility of persons with FASD to contact with the criminal justice system (Douglas 2010: 225; Koren 2004: 4), fuelling concerns of lifelong enmeshment in the criminal justice system. In this way, the criminal justice system is a disabling influence on people with FASD, intensifying their disablement through their interactions with the criminal justice system (Baldry et al. 2015; Dowse 2015).

One of the concerns expressed by justice professionals and community members, during the course of our research, is that the high prevalence of FASD in the West Kimberley will, unless adequately responded to, lead to increased rates of depression and anxiety disorders amongst young people with FASD. A further concern expressed in our focus groups was that this might contribute to the already alarming high rates of suicide in these communities.

The ‘hidden’ disability: FASD in the criminal justice system

There is a growing awareness of the criminal justice system’s inadequate accommodation of FASD-associated impairments (Roach & Bailey 2009: 3; Parliament of Australia, 2015; Parliament of Western Australia, 2012: 75). The assumptions of free will and individual

responsibility that underpin Australian criminal law are largely incompatible with the impairments associated with FASD (Roach & Bailey 2009: 3). The difficulties people with FASD may have learning from experience, linking actions with consequences, and restraining impulses, may render them more susceptible to engagement in criminal behaviour (Parliament of Western Australia 2012: 74-5). This is exacerbated by suggestibility, which, research indicates, often results in secondary participation in the commission of criminal offences by more sophisticated offenders (see *Alchin v SA Police* [1995] SCSA 981, [2] (Debelle J)). Consequently, international research indicates that 60% of individuals with FASD have been in trouble with the law (Streissguth et al. 2004), with young persons affected by FASD being disproportionately represented in the juvenile justice system (Cox et al. 2008).

The impairments associated with FASD pose unique challenges at each stage of the criminal justice process. The suggestibility of a person with FASD means they are more likely to gratuitously concur with propositions put to them by police in interviews. (Parliament of Western Australia 2012: 75). For example, recent media reports in Western Australia have raised concerns about the validity of the confession made by an Indigenous man, Gene Gibson, who is suspected of having FASD, to the manslaughter of Broome man, Joshua Warneke (Christodoulou 2015). Gibson, who is illiterate and from a remote community, confessed to the murder during a nine-hour interview with police, without an interpreter or a lawyer, despite his limited understanding of English (Christodoulou 2015). Lawyers from the Aboriginal Legal Service in Western Australia working in the Kimberley told us they had grave concerns about the reliability of evidence gained from police interviews with juveniles, given that many are undertaken without an appropriate adult present (in contravention of police rules). A number of senior officers with long experience working in the Kimberley told us that local police would often rely on a relative who would berate the child to confess, rather than a youth worker or ALS lawyer with an understanding of legal process and the right to silence.

Difficulties with memory place persons with FASD at a disadvantage when trying to explain behaviour, give instructions to lawyers, or give evidence (Parliament of Western Australia 2012: 75): seriously impeding the fair administration of justice. The difficulties that persons with FASD experience with memory and linking actions with consequences are also likely to render diversionary alternatives such as fines, community-based orders, and good behaviour bonds, futile (Douglas 2010: 228). The imposition of community-based orders on persons likely affected by FASD was recently criticised as ‘unrealistic’ by the Court of Appeal of the Supreme Court of Western Australia in the case of *AH v Western Australia* [2014] WASCA 228 (*AH*). In light of their inability to comply with such orders, these alternatives set people with FASD up for failure and further embroil them in the criminal justice system. These concerns are mirrored in prison, wherein persons with FASD are unlikely to be able to comply with prison rules, and may be victimised due to their suggestibility (Douglas 2010: 228). This may result in a worsening of impairments associated with FASD.

The identification of the impairments associated with FASD is essential to alert justice professionals to the reasons for an individual's responses, and to allow these impairments to be appropriately accommodated. A failure to do so increases the risk of persons affected by FASD coming into, and maintaining, contact with criminal justice system (Roach & Bailey 2009: 4). Taking into account the increased prevalence of FASD in Indigenous populations, this may only exacerbate the over-incarceration of Indigenous youth in Western Australia.

Given the importance of identification, Australian research has, to date, focused on the awareness of lawyers and justice professionals of FASD (Douglas et al. 2012; Mutch et al. 2013) and/or sentencing issues (Douglas 2010; Crawford 2015). As noted, Western Australian research, in particular, has concentrated on the awareness of justice professionals of FASD and the perceived impact of FASD on attitudes and practice within the justice system. A 2013 study by Mutch et al surveyed 1873 West Australian justice professionals including judicial officers, police and lawyers, with a response rate of 23%. This study (2013: 39) identified a number of challenges to the effective management of persons with FASD within the justice system, and that there existed a need for:

- training and education to improve awareness of the specific impairments associated with FASD that impact on the treatment of individuals with FASD across the justice system of WA [Western Australia];
- training and education to describe how individuals with FASD should be managed;
- improved methods for the identification of individuals with FASD and referral for specialist assessment;
- identified specialist diagnostic services for FASD;
- information to enable the appropriate recognition and management of an individual's neurocognitive and behavioural impairments within the justice system;
- effective alternative sentencing options;
- programs and resources to provide appropriate treatment for the underlying fixed brain injury; and
- management and supportive environments specific to the needs of individuals with FASD.

Researchers at the Telethon Kids Institute are currently undertaking research into the prevalence of FASD amongst detainees in Western Australia's juvenile detention centre,

‘Banksia Hill’, in Perth, with a view to developing management plans and through care support (Telethon Kids Institute 2016).

As noted earlier, it is crucial that the identification of FASD triggers appropriate responses, and does not itself cause greater harm by ‘widening the net’: essentially, criminalising young people with FASD but failing to provide the necessary support needed to ensure reintegration into the community again. The inadequacy of existing solutions is well illustrated by the case of *AH* (2014). This case concerned a 21-year-old Indigenous woman from the Pilbara, suspected of being affected by FASD. Despite numerous reports and assessments identifying her impairments, the recommended support and assistance was never implemented. Consequently, her criminal behaviour escalated after the commission of her first offence at the age of 16. The Court considered this ‘conspicuous failure of the justice system’ not only failed the accused, but also failed to protect the communities in which she lived (para 8, Martin CJ, Mazza JA and Hall J).

While sentencing responses to FASD are criticised as inadequate (Milward 2014; Douglas 2010; Chartrand & Forbes-Chilibeck 2003), its identification risks much graver consequences in the context of fitness to stand trial. In Western Australia, a diagnosis of FASD can trigger indefinite detention under the Act if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment.

Fitness to Stand Trial

It is a cardinal principle of our law that no man can be tried for a crime unless he is in a mental condition to defend himself.

Humphreys J, *R v Dashwood* [1943] KB 1, 4

An accused person's mental fitness to stand trial relates to his or her ability to comprehend the proceedings and communicate *at the time of a criminal trial*. This is different to the defence, or partial defence, of mental impairment, which involves an inquiry into the mental state of an accused *at the time of the commission of the offence*. An accused's fitness 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 'Eastman'). If a person stands trial when their fitness is uncertain, as Gaudron J made clear in *Eastman* (2000: 22), 'there is a fundamental failure in the trial process'.

Each jurisdiction in Australia has separate legislation governing fitness to stand trial (see Appendix 1). The Western Australian regime is contained in the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) (the CLMIA Act). A diagnosis of FASD can trigger indefinite detention under the CLMIA Act if a young person is found unfit to stand trial for a criminal offence that carries a term of imprisonment. Unlike the *Young Offenders' Act 1994* (WA), the Act does not contain special procedures for persons who are 17 years of age or younger. The CLMIA Act is controversial because it provides for *indefinite* detention in a *custodial* setting *without* trial of a person found unfit to stand trial. 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.

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 indefinite incarceration of mentally impaired accused with FASD was highlighted by the case of Rosie Anne Fulton, a young Northern Territory Indigenous woman born with FASD. Rosie was imprisoned for 21 months in Eastern Goldfields Regional Prison, Western Australia, without support or treatment, after being found unfit to stand trial on charges of reckless driving and motor vehicle theft. Media attention and petitioning of the government precipitated her release in 2014 (see eg Stewart 2014). Since her release, Rosie has been in and out of prison, without stable accommodation. Her guardian, former Northern Territory police officer Ian McKinlay, says the lack of appropriate government support means Rosie will once again be 'abandoned to a perilous existence and imprisonment' (Davidson 2016).

The Western Australian Attorney General's Department recently undertook a review of the CLMIA Act. On 7 April 2016, the Final Report of the Review was tabled in Parliament (hereafter referred to as the '2016 Review'). 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.

Before exploring the key deficiencies of the legal regime for mentally impaired accused in Western Australia, this section provides a brief overview of the doctrine of unfitness to stand trial. It then outlines the key deficiencies of the CLMIA Act in light of the 2016 Review, and canvasses law reform options for better practice, drawing on Victorian, New Zealand and NSW experience. We note that caution is necessary in recommending that a jurisdiction model a feature or features of legislation from another jurisdiction. We present these examples of better practice as options which could be drawn upon, and adapted to local context, to improve the Western Australian regime to better meet the needs of Indigenous young people with FASD.

Background

The principles relating to fitness to stand trial derive from the common law, and have been traced to the procedures of the Medieval Courts of Law in England (Walker 1968; Loughnan 2012). At this time, a person could not be tried for a felony or treason *unless* he or she entered a plea of guilty or not guilty to the charged offence(s). As a result, an accused person who refused to enter a plea – or was unable to do so because he or she was deaf-mute or mentally unwell – could not be convicted and executed for a felony or treason, and their property could not be forfeited.

When an accused person refused to enter a plea, the Court had to decide whether the person's refusal was on the basis of 'malice' or 'by visitation of God' (Loughnan 2012: 77). A person found to have refused to enter a plea by 'malice' was subjected to *peine forte et dure*: the imposition of increasing weights on the chest until the person agreed to enter a plea, or died (Walker 1968: 220-1). A person found mute by 'visitation of God', because he or she was mentally unwell, would be assumed to have entered a plea of not guilty, and the trial postponed until he or she recovered.

In a 1790 decision, the Lord Chief Justice, Lord Kenyon, explained the rationale and basis for the doctrine:

the humanity of the law of England falling into that which common humanity, without any written law would suggest, has prescribed, that no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing; for, however guilty he may be, the inquiring into his guilt must be postponed to that season, when by collecting together his intellects, and having them entire, he shall be able so to model his defence as to ward off the punishment of the law (*Proceedings in the Case of John Frith for High Treason* (1790) 22 Howell's State Trials 307 at 317-318).

The authoritative test of fitness to stand trial, which formed the basis of subsequent Australian jurisprudence, was formulated a half century later in *R v Pritchard* (1836) 173

ER 135. In this case, Mr Pritchard, who was ‘deaf and dumb’, was charged with the offence of bestiality. The jury had to decide if Pritchard was mute by ‘malice’ or ‘visitation of God’ (Loughnan 2012: 77). Baron Alderson (1836: para 9), when instructing the jury, famously stated, ‘[t]he question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence of the charge’. His Honour (1836: 135) instructed the jury to consider whether the accused was:

of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence – to know that he might challenge any of you to whom he may object, and to comprehend the details of the evidence.

Baron Alderson’s instructions formed the basis, a century later, of the *Presser* standards. The *Presser* test was formulated by Smith J in the Victorian Supreme Court, and contains the minimum standards necessary for an accused to be tried without unfairness or injustice. His Honour stated (1958: 48):

He needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

The *Presser* test should be applied ‘in a reasonable and commonsense fashion’ (*Presser* (1958): 48), and does not mean that an accused must understand the law governing his or her case (*Ngatayi v The Queen* (1980) 147 CLR 1 (Barwick CJ, Gibbs, Mason & Wilson JJ)). Fitness is determined by an accused’s fitness at the time the question is raised and likely fitness during the course of the trial (*Kesavarajah* (1994) 181 CLR 230, 246 Mason CJ, Toohey & Gaudron JJ; 249 Deane & Dawson JJ).

Where a person who *may not* be fit to stand trial is tried, there is a miscarriage of justice: the miscarriage of justice ‘is that there has been a trial where there should not have been’ (*Eastman* (2002): para 317 Hayne J; *Ngatayi* (1980); *Kesavarajah* (1994)). While designed to ensure fairness to an accused, members of the High Court have repeatedly emphasised that, ‘it should not be overlooked ...that the usual consequence of a finding that a person is unfit to plead is indefinite incarceration without trial. It is ordinarily in the interests of an accused person to be brought to trial, rather than suffer such

incarceration' (*Eastman* (2002): para 24 Gleeson CJ; *Kesavarajah* (1994): 249, Deane & Dawson JJ).

Each Australian jurisdiction has introduced legislation to govern fitness to stand trial, with a number prescribing limited detention, rather than indefinite detention, for persons found unfit to stand trial. The Western Australian regime, however, retains *indefinite* detention in a *custodial* setting *without* trial of a person found unfit to stand trial.

The Western Australian Regime

The CLMIA Act was introduced in 1996 to improve and modernise Western Australian law relating to the treatment of accused persons with mental impairment in the criminal justice system (Foss 1996). This was much needed reform: the law relating to mentally impaired accused had remained unchanged since 1913. Prior to the CLMIA Act, s 631 of the *Criminal Code* (WA) governed fitness to stand trial. This provision was based on *Pritchard* and provided that incapacity could arise 'for whatever reason' – it need not relate to mental impairment (see eg *Ngatayi* (1980)).

The CLMIA Act introduced a definition of mental impairment, to mean intellectual disability, mental illness, brain damage or senility, and provided that fitness decisions be made by a judicial officer, rather than a jury. In his second reading speech to the Criminal Law (Mentally Impaired Defendants) Bill, Attorney-General Foss (1996) said:

Through this legislation and other initiatives the Government remains committed to the paramount goal of a safe and secure environment for all Western Australians while ensuring that all participants in the criminal justice system are treated fairly and equitably and the process itself is cost efficient and effective.

The CLMIA Act enshrines the common law 'presumption' of fitness to stand trial in s 10. The presumption is displaced by proof, on the balance of probabilities, that the accused is unfit to stand trial (CLMIA Act s12). The issue of fitness may be raised at any stage of the proceedings by the defence, prosecution, or the court (CLMIA Act s11(2)). The presiding judicial officer determines whether an accused is unfit to stand trial after conducting inquiries and informing himself or herself in any way the judicial officer thinks fit (CLMIA Act s12(1)). The judicial officer may, for example, order the accused by examined by a psychiatrist or other appropriate expert (CLMIA Act s12).

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

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

- (a) unable to understand the nature of the charge;
- (b) unable to understand the requirement to plead to the charge or the effect of a plea;
- (c) unable to understand the purpose of a trial;

- (d) unable to understand or exercise the right to challenge jurors;
- (e) unable to follow the course of the trial;
- (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- (g) unable to properly defend the charge.

If a court finds a young person is unfit, and ‘will not become mentally fit to stand trial within 6 months’, the court has two options: unconditionally release the accused; or make a custody order (where imprisonment is a sentencing option) (CLMIA Act ss 16(5), 19(4)). A custody order commits an accused person to indefinite detention, at the Governor’s pleasure. It is for this reason that the regime has been criticised by Reynolds J in *State of Western Australia v BB (a Child)* [2015] WACC 2 (*BB (a child)*) for allowing only ‘one extreme or the other.’

After the initial report made within 8 weeks of a custody order being imposed, the Board must provide annual written reports to the Minister, in addition to any reports the Minister may request, or that the Board considers justified by special circumstances (CLMIA Act s 33(2)). Reports must recommend whether or not the Governor should be advised to release the accused, and report on the factors in s 33(5) of the Act: namely, the likelihood of compliance; the risk the accused presents to the community; and imposing the least restriction on the accused’s freedom that is consistent with the health and safety of the accused and any other person. If the Board recommends the Governor to be advised to release the accused, it must also recommend any appropriate conditions (CLMIA Act s 33(4)(b)). On the advice of the Board and Minister, the Governor may order an accused’s conditional or unconditional release (CLMIA Act s 35).

Deficiencies

The inadequacies of Western Australia’s regime with regards to accused persons found unfit have been raised in a number of contexts (Crawford 2010, 2014; Martin, 2015; Parliament of Western Australia, 2012; *BB (a child)* (2015); *State of Western Australia v Tax* [2010] WASC 208 *Tax*). 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 ACT, NSW (District and Supreme Court proceedings), NT, SA and VIC) (see Appendix 1);
- 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; and

- the pressure the regime places on legal representatives.

No opportunity for acquittal

In deciding whether or not to make a custody order, the court must be satisfied such an order 'is appropriate having regard to' (CLMIA Act ss 16(6), 19(5)):

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

Regard to the public interest involves the 'consideration of all factors', including the interest in bringing accused persons to trial, punishing convicted persons, redress for victims, public protection, treatment and care of mentally ill and vulnerable persons, and the effect of a custody order, notably 'the placement of a mentally impaired unconvicted accused in prison': *The State of Western Australia v Sanders* [2012] WASC 209 [30] (Jenkins J) ('*Sanders*').

While the judicial officer does consider these factors, unlike most Australian jurisdictions, the regime does not involve a special hearing as to guilt or innocence. Special hearings were introduced in Australian jurisdictions because unfit accused did not otherwise have a trial or 'opportunity for acquittal' (NSW Law Reform Commission 2013: 141). In Australian jurisdictions that have special hearings, an unfit accused is only subject to the coercive provisions of the regime if he or she is found to have engaged in the conduct constituting the offence (often referred to as a qualified finding of guilt). The benefit of a special hearing mechanism is that the evidence against an accused is tested and subject to adversarial challenge. An unfit accused is afforded, as far as is possible, the benefit of the presumption of innocence and the heightened procedural and evidentiary requirements of the accusatorial trial process – and the possibility of acquittal.

The case of Marlon Noble, an Indigenous man imprisoned for 10 years upon a finding of unfitness in Western Australia, illustrates the danger of a lack of special hearing. The Australian Law Reform Commission (2014: fn 82) reported:

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

In NSW, NT, ACT, VIC a qualified finding of guilt is a bar to further prosecution in relation to the same conduct. In Western Australia, by contrast, the CLMIA Act provides that a person found unfit to stand trial in proceedings before the District or Supreme Court may be indicted, or again indicted, and tried for the offence (CLMIA Act s 19(7)).

In 2001, the Western Australian Law Reform Commission recommended the introduction of special hearings. However, this recommendation was not adopted. The 2016 Review considered whether to introduce a special hearing process. The Final Report of the Review (2016: 52-3) noted numerous criticisms of special hearings. These included that a special hearing would subject an unfit accused to a trial process, that the verdict made following a special hearing is deficient given the inability of an accused to properly instruct counsel or give evidence, and that the hearing may re-traumatise victims. The Review (2016: 53) noted, in line with submissions from the WA Police and the Office of the Director of Public Prosecutions, that, '[a]ny trial process requiring the participation of an accused who is unfit to stand trial would be intrinsically flawed'.

In light of this, the 2016 Review (2016: 55) recommended that the CLMIA Act be amended to:

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

In the ordinary course of a criminal trial, an accused person may raise 'no case to answer' at the conclusion of the Prosecution's case, submitting that the Crown – who carries the burden of proof – has failed to establish a case against him or her. Courts in Western Australia also have the power, when dealing with a person charged with an indictable offence, to determine, as a matter of law, that the accused has no case to answer (see ss 65, 98(2) *Criminal Procedure Act 2004* (WA)). The Review (2016: 54) therefore proposed that:

the issue of whether there is a case to answer could be considered as part of the ordinary trial process at the conclusion of the evidence (or at the point at which the trial was adjourned due to unfitness). In this regard, it is noted that it is always open to the defence to raise the question of whether there is a case to answer. By forming part of the ordinary trial process, consideration of this issue by the court is unlikely to significantly increase the burden on the Office of the Director of Public Prosecutions. Accordingly, amendment of the Criminal Law (Mentally Impaired Accused) Act 1996 merely makes consideration of this question mandatory in respect of the small number of highly vulnerable defendants who fall under the Act.

If implemented, requiring the court to consider whether there is a case to answer and the matter ought to be dismissed would be an improvement, if slight improvement, on the current regime.

Options available to a court

On a finding of unfitness, and that an accused will not become fit within 6 months, the court has two options: unconditionally release the accused; or make a custody order (where imprisonment is a sentencing option) (CLMIA Act ss 16(5), 19(4)). In the case of *Tax* (2010: para 18), the Chief Justice of the Supreme Court described this as a 'significant deficiency':

There is no intermediate course available to the court such as a conditional release in terms which would enable the court to fashion conditions which would enhance the protection and the safety of the community and perhaps enhance the treatment program that a mentally unfit accused person might need in order to be properly cared for.

The introduction of ‘community-based’ orders has been suggested to alleviate the extremity of an accused’s indefinite detention or unconditional release. For example, the Western Australian Inspector of Custodial Services (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.’

The 2016 Review (2016: 10) recommended that the options available to a court be expanded to include the range of orders ‘available under the Sentencing Act 1995, subject to any necessary amendments required to clarify that the accused has not been convicted of an offence’. The Review further recommended (2016: 59) that ‘a broader range of options to be made available for juveniles found mentally unfit to stand trial, modelled on the sentencing options under Part 7 of the Young Offenders Act 1994.’ For young persons, Part 7 of the YOA includes the options of an intensive youth supervision order, a youth community based order or a conditional release order.

While this is an important recommendation, and undoubtedly an improvement on the current regime, the problematic nature of such 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 YOA (Loh et al. 2005: 43). It is important to also note that for youth community-based orders, provided by s74 of the YOA, a young person must *consent* to the order. Even if an unfit young person with FASD has the capacity to consent to an order (questionable), research indicates that the difficulties a young person with FASD may have with memory and linking actions to consequences may mean that they are unable, rather than wilfully unwilling, to comply with court orders (Douglas 2010: 228; Education and Health Standing Committee 2012: 76).

These difficulties were confirmed in our research. In our focus groups and interviews, justice professionals in the West Kimberley emphasised the difficulties that Indigenous young people with FASD and other cognitive impairments are experiencing in complying with such orders. These difficulties as also been highlighted by the courts. In *AH* (2014: 37), the Full Court of the Western Australian Supreme Court stated:

While it may be appreciated that there are limited options available to the corrective services authorities in situations such as this, sending a warning letter to an illiterate itinerant young Aboriginal woman with intellectual disability was an exercise in the utmost futility.

Similarly, the President of the Children’s Court, Reynolds J, stated, in *BB (a child)* (2015: 8-9):

There are also systemic challenges in relation to the management of Court orders under the YO Act in cases such as BB's. The idea that for someone like BB, supervision by telephone would be meaningful and have the real potential to produce behavioural change is misplaced.

In addition to that, giving warning letters to young persons with mental impairment and/or no ability to read is simply process for the sake of process. It is not something that a Court would rely on.

Failure to comply with community-based orders may result in charges for breach and compound a young person with FASD's criminal history, rendering them more susceptible to a custody order under the Act. With regard to persons affected by FASD, such orders may therefore be counterproductive.

Fundamentally, these 'community-based' orders are inadequate because they are 'community-based' rather than 'community-owned' solutions (WA Law Reform Commission 2006: 36-7). The former are created by government agencies to operate in community settings, while the latter are determined by communities themselves (Blagg 2006: 318). As a mere annex of Western Australia's existing criminal justice system, 'community-based solutions' fail to reformulate the system's fundamental principles (Blagg 2008a: 183). We argue that a 'decolonising' approach that prioritises and enables diversion into community-*owned* and managed structures and processes, as opposed to government owned and controlled, if community-*based* or 'situated', systems has the potential to more adequately address the needs of Indigenous young people with FASD.

If non-custodial supervision orders are introduced, provision could be made, as currently exists under s17 of the YOA for community supervision, that is, for supervision to be provided, locally, by the Aboriginal Community. Supervision is defined, in s 17A of the YOA, to mean monitoring compliance with a court order, ensuring the young person lives in 'safe circumstances and is not at risk of harm' and 'assisting the young person with advice and support'. These provisions were introduced in 2004, and the explanatory memorandum to the amending Bill provides (2004: 3):

These arrangements allow the CEO to make agreements with Aboriginal communities to supervise young offenders on various community orders. The provisions will help overcome problems for juvenile justice staff in providing supervision in remote locations and increase the likelihood of Aboriginal offenders completing community orders.

In *BB (a child)* (2015: para 80) Reynolds J noted:

The YO Act makes provision to allow for persons in aboriginal communities to engage in the supervision of young persons on Court orders. See s 17B of the YO Act. Given the information in the YJ reports on the supervision of BB on the YCBO and the IYSO, it seems that there is scope to increase the practical application of s 17B of the YO Act in the Western Desert Lands so that aboriginal people in a community can supervise aboriginal children and young persons on Court orders in the same community.

His Honour continued (2015: para 83):

In summary, it seems that there is a need for some systemic changes in the way that public agencies approach and deliver services to aboriginal children and young persons in remote aboriginal communities. There is also room for improvement in capacity building aboriginal people in aboriginal communities and families, to assist in the supervision of aboriginal children and young persons on Court orders living in the same community.

Section 17 enables community supervision of court orders, and could be used to facilitate the use of ‘on country’ programs. However, s 17 was drafted in pre-Mabo language of ‘council of Aboriginal community’ and does not reflect current arrangements in many communities, particularly those with Traditional Owner groups. While the YOA was amended in 2004 – in the native title determination era – the definition of council is drawn from a much earlier piece of legislation, the *Aboriginal Communities Act 1979* (WA). Section 3 of the *Aboriginal Communities Act 1979* (WA) defines council as ‘the council of management or other governing body of that community’. For this section to be utilised as a tool to build capacity, it needs to be updated to acknowledge post-Mabo arrangements and recognise Traditional Owner groups.

Place of detention

The CLMIA Act empowers the Mentally Impaired Accused Board to decide placement of a person subject to a custody order. This decision must be made within 5 days of the making of a custody order (CLMIA Act s25). Where a court makes a custody order, a young person with FASD can only be detained in a juvenile detention centre (or prisons when adults) or a declared place designed to house and support accused persons with cognitive impairments who are detained under the CLMIA Act (s 24(1)). The young person cannot be detained in a mental health facility unless they have a treatable mental illness (CLMIA Act s 24(2)). Western Australia’s only declared place for the purposes of the CLMIA Act, the Bennett Brook Disability Justice Centre, opened in Perth in August 2015, and is a welcome development. However, the Centre has less than 10 beds and does not cater for children under 16 years of age (Disability Services Commission 2015).

A number of submissions to the 2016 Review addressed the inadequacies of detaining mentally impaired accused in a prison setting, in particular in relation to the availability and suitability of programs and services. The 2016 Review noted (at 304-5):

This view appears to be supported by the findings of the Inspector of Custodial Services, who noted in his 2014 report that over half of mentally impaired accused placed in prison were not assessed for treatment programs or were considered not suitable for programs delivered in a group setting. Not surprisingly then, the Inspector found that mentally impaired accused detained in prison were held for a significantly longer period under the Criminal Law (Mentally Impaired Accused) Act 1996 than those placed in a hospital. This was the case even though the alleged offences of people placed in a hospital were generally more serious than that of people placed in prison.

In *Tax* (2010: para 19), Chief Justice Martin of the Western Australian Supreme Court expressed his dissatisfaction with the regime:

The second deficiency is, as counsel for the State has pointed out, if I were to make a custody order there is no declared place to which Mr Tax could be taken and, because he does not suffer an illness, he could not be placed in a hospital. So, the effect of making a custody order is that Mr Tax would be imprisoned indefinitely. My only choices are between an unconditional release and indefinite imprisonment without significant prospect of treatment of the conditions which have made Mr Tax unfit to plead or which might have precipitated the offending which the State alleges.

The 2016 Review did not, however, recommend the abolition of prison as a placement option for detention of mentally impaired accused subject to custody orders. The Review noted (2016: 92) that in regional areas, prison may provide the only secure facility proximate to family and community. Instead the Review (2016: 92) found that a 'constructive response to concerns' was to focus on improving the provision and coordination of services to mentally impaired accused detained in prison, and the training of custodial staff.

Duration of detention

A custody order is of unlimited duration. Contrary to the regimes operating at the Commonwealth level, and in States and Territories =where a person is subject to a fixed term or limiting term, in Western Australia a person will be detained under a custody order until released by an order of the Governor (in practice, on the recommendation of the Mentally Impaired Accused Board (the Board)) (CLMIA Act s 24). The only protection against an accused's indefinite detention is the Board's reporting requirements under ss 33 and 34 of the CLMIA Act. On the advice of the Board and Minister, the Governor may order an accused's conditional or unconditional release (CLMIA Act s 35).

Some Australian jurisdictions, including New South Wales, South Australia and the Australian Capital Territory, have curbed the harshness of mentally impaired accused regimes by introducing 'limiting terms'. Limiting terms are a defined period of detention set by a court on the basis of the 'best estimate' of the term of imprisonment they would have imposed had the accused been convicted and sentenced to imprisonment following a normal trial (NSW Law Reform Commission 2013: 155). Limiting terms are an improvement on indefinite detention, but not a panacea. The NSW Law Reform Commission (2013: 16) reported:

From the perspective of the unfit defendant, the procedures set out in the MHFPA [Mental Health (Forensic Provisions) Act 1990 (NSW)] are a significant improvement on indefinite detention. However, from this perspective the limiting term is still in some ways an unfair outcome compared to a sentence imposed after a normal trial. There is no provision in the MHFPA for a non-parole period, and limiting terms can be longer than terms imposed for an equivalent offence on a fit offender, as the unfit defendant cannot take advantage of a discount for an early guilty plea.

In NSW, the Court may order that a person's detention be extended at the completion of a limiting term, on the application of the relevant Minister (*Mental Health (Forensic Provisions) Act 1990* (NSW) s54A, Schedule 1).

Victoria and the Northern Territory have adopted an intermediary position. While a supervision order is of indefinite duration, the Court must set a nominal or fixed term at the end of which the Court must undertake a major review (*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), ss27-28, 35; *Criminal Code Act 1983* (NT), s 43ZG).

It is not only the making of the order that is problematic. A young person may be remanded in custody while his or her fitness is investigated. In *BB (a child)* (2015: para 82), Reynolds J lamented the length of time the young person spent on remand – 30 December 2013 to 4 April 2014 – in order for fitness to be investigated: '[i]t is a long time for a young person and particularly for a young Aboriginal person being away from country and family and suffering from mental impairment.' The period served on remand, we note, is to be taken into account by the court in deciding whether to make a custody order (*Sanders* (2012)).

The 2016 Review (2016: para 227) recommended the retention of indefinite custody orders for unfit accused, emphasizing that the preventive, protective and therapeutic purposes of detention under the CLMIA Act are inconsistent with fixed terms. The Review (2016: para 228) did, however, recommend the establishment of a working group to review the operation of indefinite custody orders. Importantly, the Review (2016: para 352) did recommend that further consideration be given to 'developing juvenile-specific considerations in close consultation with relevant stakeholders' to be applied by the Mentally Impaired Accused Board in deciding whether or not to recommend release.

Difficulties for lawyers

The CLMIA Act places lawyers representing unfit young persons with FASD in a precarious position. This is not unique to Western Australia: similar concerns have been raised in Queensland and Local Court proceedings in New South Wales (where special hearing are not provided for) (O'Carroll 2013; NSW Law Reform Commission 2013: 345-6). Lawyers are faced with the dilemma of raising unfitness, which could result in their client being indefinitely detained without trial, or advising their client to plead guilty to the charged offences, as any custodial sentence imposed will be limited and shorter (AHRC 2013). This is only further complicated by mandatory sentencing provisions in Western Australia. Reynolds J articulated the problem in *BB (a child)* (2015: paras 55, 59):

The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed...The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial

plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.

Better Practice: Lessons from comparable jurisdictions

Our comparative work has identified a number of legislative schemes that could be drawn on to improve the Western Australian regime. 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 also provides an example of a diversionary option, before fitness is raised, for persons with mental impairment in s32 of the *Criminal Law (Forensic Provisions) Act 2007* (NSW).

Internationally, New Zealand provides a best practice model for young people with FASD. Fitness provisions are governed by the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) (IDCCR) and the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) (CPMIP). Both pieces of legislation apply to adults and children. The *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ), in keeping with its approach to managing young people enshrined in the *Children, Young Persons and their Families Act 1989* (NZ), mandates that, wherever possible, a young person's family must be fully engaged in decision making (s12). It also provides for needs assessments, which includes a cultural assessment if the person is Māori.

We reiterate that caution is necessary in recommending Western Australia model a feature or features of legislation from another jurisdiction. As we highlight below, each regime involves its own challenges and dilemmas. We present these better practice examples as options from comparable regimes that might be drawn upon, and adapted to local context, to improve the Western Australian regime to better meet the needs of Indigenous young people with FASD. Further research is indicated into how these features might be adapted to the Western Australian context.

Victoria: a child-focused model

Special provisions for unfitness in the Children's Court were introduced into Victorian regime in 2014, following an extensive review by the Victorian Law Reform Commission (2014). The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) has a strong focus on treatment and support, and includes a number of protections for young people. A young person charged with an indictable offence has the benefit of a special hearing (ss 38V-38X). The court must *not remand* a child in custody unless there is no practicable alternative and facilities or services are available (s 38J).

Under the Victorian regime, the Court has two options on finding unfitness: unconditional release (where satisfied that, if necessary, the child is receiving appropriate

treatment or support for the child's mental health or disability); or a supervision order (s 38Y(4)). A supervision order may be *custodial* or *non-custodial*. Before making a supervision order, the court must order a report covering:

- (a) whether the child has a mental impairment or other condition or disability and, if so, specify the services which are available and appropriate;
- (b) the services currently being made available to the child, whether or not by a government department, and whether the child has complied with those services;
- (c) if the court so requests, the services that would be made available to the child if a custodial supervision order were to be made in respect of the child.

The Act also provides for reports to be made by family members and the victim, and for a victim impact statement to assist the court in determining any conditions it may impose on the supervision order (s 42). The Act provides that the Children's Court must *not* make a supervision order unless the court finds that (s38ZH(7)):

- (a) there is no practicable alternative; and
- (b) the order is required for the protection of the child or community.

Importantly, supervision orders are centred on the treatment and support needs of the child. The Act states that the purpose of a supervision order is to ensure that a child receives treatment, support, guidance and assistance for the child's mental impairment or other condition or disability (s 38ZH(2)). A *custodial* supervision order has an additional purpose of protecting the child or the community while the child receives the treatment, support, guidance and assistance: s 38ZH(3). A young person can only be detained in a youth justice centre or a youth residential centre.

The duration of a supervision order is also statutorily prescribed. The Children's Court may make a supervision order for a term not exceeding 6 months: s 38ZI(1). The term of supervision order may be extended more than once by maximum of 6 months but so that the total period of the order does not exceed—12 months, where a child is 10-15 years of age; and 24 months, where a child is 15-21 years of age when the supervision order is made: s 38ZI(3).

The strong focus of the regime on the needs of the young person, and the provision of treatment and support services is commendable, and could be adapted to the Western Australian context – and facilitated, as outlined below, through a mobile needs focused court model. The newness of these provisions in the Victorian regime means that scant research exists on its operation and efficacy. What the Victorian regime does not do is expressly provide for cultural needs assessment. In this respect, the New Zealand model has much to offer.

New Zealand: needs and cultural assessment

In the early 2000s, New Zealand significantly reformed its unfitness regime – to modernise the law, and accommodate the needs of persons with an intellectual disability,

who were not covered by the previous regime (New Zealand Guide, 2003). Fitness to stand trial is now governed by the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003* (NZ) (IDCCR) and the *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) (CPMIP). The processes under the MPCIP and IDCCR are intertwined. Processes under both Acts may lead to a person either being detained in a ‘secure facility’ or required to attend a ‘facility’. A ‘secure facility’ can only be a place used by a service (‘an organisation that provides services for persons who have an intellectual disability’) for the purpose of providing care to persons who have an intellectual disability (ss 5(1), 9, IDCCR). Importantly, s 9(4) of the IDCCR provides that ‘in no case can a prison be used as a facility’. Persons with an intellectual disability detained under the CPMIP or IDCCR cannot be held in prison.

In reforming its unfitness regime regarding the sufficiency of evidence required about the offences before an accused person can be subject to the regime, New Zealand adopted a special hearing approach—but one that is distinct. Under s 9 of the CPMIP, as a threshold test, the court must be satisfied, on the balance of probabilities, that the evidence against an accused ‘is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged’. If the evidence is insufficient, the accused must be discharged. What makes this regime unique, is that the s9 hearing occurs prior to a fitness hearing. As Brookbanks has observed (2009: 30):

whereas other jurisdictions place the special hearing after a determination of unfitness to stand trial, New Zealand is unique in requiring that the determination regarding the defendant’s involvement in the offence be made before the issue of unfitness to stand trial is considered.

Following the s9 hearing, if the person is in custody, the Court may order that an assessment also be carried out by a ‘health assessor’ for the purpose of determining fitness (CPMIP s 38). Where practicable, and unless the Court directs otherwise, the health assessor must consult with the person’s caregiver, welfare guardian, parent if the person is a child, and family or whānau (CPMIP s39(2)).

Once a person is found unfit to stand trial, the court must order the person to either attend specified places or be detained in a hospital or secure facility for the purpose of conducting an inquiry into what order would be most appropriate (CPMIP s 23). The inquiry must take no longer than 30 days and, if the person has an intellectual disability, the needs assessment under the IDCCR must take place as part of the inquiry (CPMIP, s 23(4)-(5)).

The purposes of the needs assessment are to assess the kind of care that the care recipient needs, identify suitable services capable of providing care such care for the person, and prepare a care and rehabilitation plan (IDCCR s16). The needs assessment process is as follows (IDCCR ss 18-26):

- It begins with a consultation between the compulsory care co-ordinator, the person and, the person's caregiver, a member of the person's family or whānau, or a person concerned about the person's welfare.
- The coordinator must then consult with various persons set out in ss 20 and 21.
- If the person is Māori, the coordinator must also make a cultural assessment. That is, he or she must 'try to obtain the views of any suitable Māori person or Māori organisation concerned with, or interested in, the care of persons who have an intellectual disability' (IDCCR, s23(2)). The Māori person should be a member of the person's whānau, hapu, or iwi, if possible.
- Once the needs assessment is completed, the co-ordinator must instruct the person's care manager to prepare a care and rehabilitation plan. Sections 25 and 26 set out the matters that must be addressed in the plan. Importantly, one of these matters is the person's 'social, cultural, and spiritual needs', which must take into account the cultural assessment completed by the coordinator if the person is Māori.
- The plan is approved by the co-ordinator.

The New Zealand Ministry of Health (2004) has developed *Guidelines for Cultural Assessment – Māori* to promote best practice in assessments undertaken under the IDCCR. The Guidelines (2004: 3) outline the principles and goals of cultural assessment:

To provide an holistic picture of a person's needs.

It is an inherent right of an individual to receive a culturally appropriate assessment, care and service.

That the individual is heard and considered throughout their assessment, care and rehabilitation.

To enhance the cultural perspective on the needs of the person and their whānau through appropriate assessment, care and rehabilitation.

To establish and maintain a culturally effective and safe assessment and care under the IDCCR Act 2003.

To ensure the quality and effectiveness of assessment and service delivery for people with an intellectual disability.

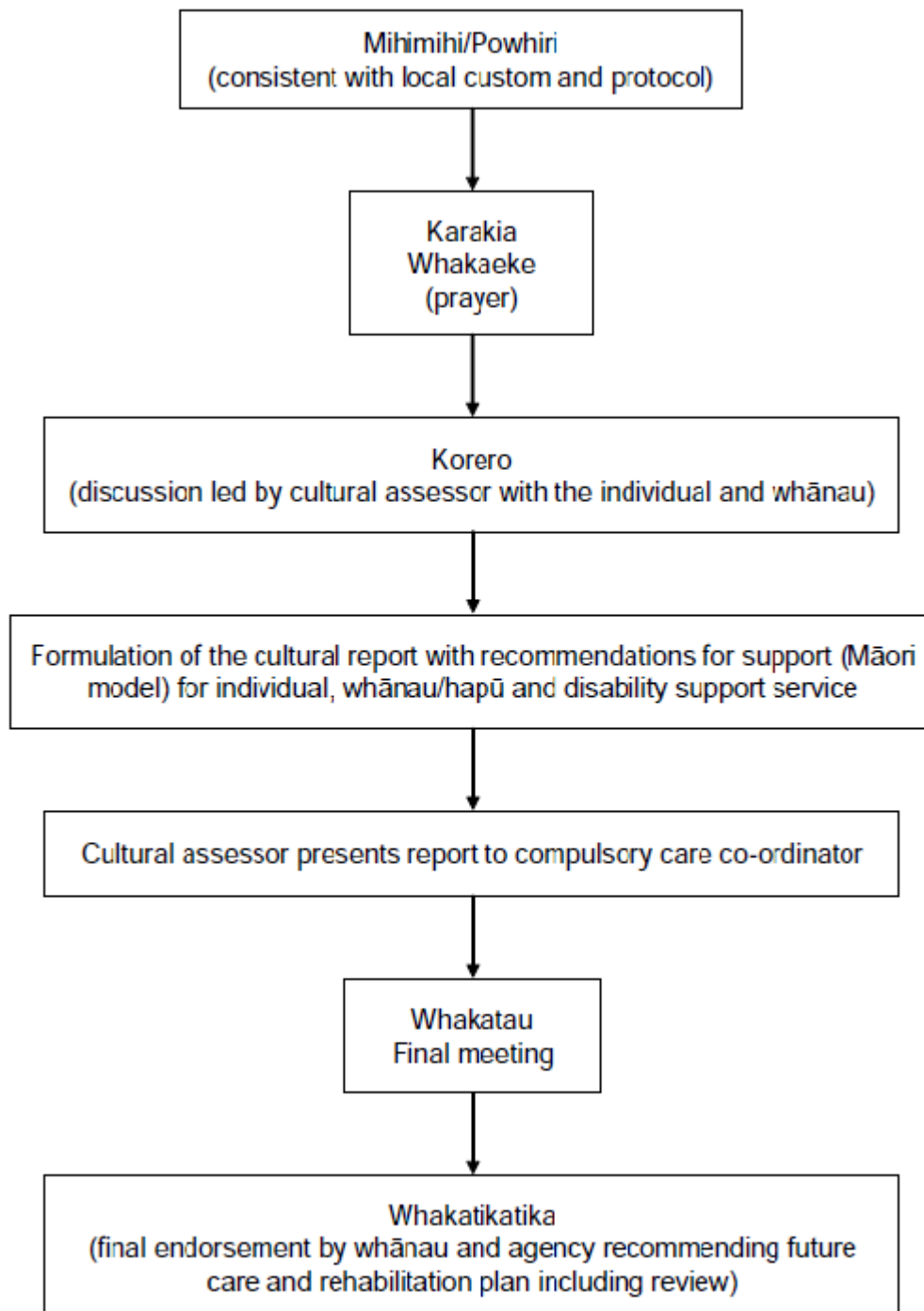
To ensure that people assessed are cared for in the least restrictive environment and their rights upheld.

To ensure that assessors undertaking the cultural assessment are competent in the area of intellectual disability.

To ensure the involvement of Māori in the development and delivery of intellectual disability services.

To respect the wishes of a person who may not wish to have contact with their whānau.

The Guidelines (2004: 12) provide the following recommended process for the Māori cultural assessment, to be applied in accordance with local tribal tikanga or customary practice:



Once the inquiry has been completed, if the Court is satisfied that ‘the making of the order is *necessary* in the interests of the public or any person or class of person who may be affected by the court's decision’, the Court must order that the person be detained in a hospital under the *Mental Health (Compulsory Assessment and Treatment) Act 1992* (NZ), or detained in a secure facility under the IDCCR (CPMIP s 24(2)). The court must consider evidence from at least one health assessor as to whether these orders are ‘necessary’ (CPMIP s 24(1)(b), (3)).

The duration of detention is also statutorily limited. If the person was charged with an offence which carries a sentence of life imprisonment, the maximum duration of the order is 10 years (CPMIP s30(1)). For other offences, the maximum duration is half of maximum term of imprisonment the accused would have been liable for if convicted (CPMIP s30(1)).

If the Court is not satisfied that one of these orders is necessary, it can order the person to be treated as a patient under mental health legislation, cared for as a care recipient under the IDCCR, or released unconditionally (CPMIP s 25(1)). The Court can decline to make an order if the person is liable to serve a term of imprisonment (CPMIP s 25(1)(c)). For persons who have an intellectual disability, if the Court orders that the person be detained under the IDCCR or cared for as a care recipient under the IDCCR, a needs assessment must be conducted (IDCCR s 15(b)).

Research demonstrates that the New Zealand regime is not a magic bullet – and has been controversial in many respects (Brookbanks 2013; Diesfeld 2013; Prebble et al. 2013). Legal challenges have concentrated on the power of courts to extend compulsory care orders beyond their initial three year term, and the power of clinicians to direct coercive assessments that are not required by the IDCCR (Brookbanks 2013; Diesfeld 2013). Care managers have articulated the tensions inherent in their role under the Act, including balancing risk and rehabilitation, and creating environments that promote individual autonomy and self-control while managing risk (Prebble et al. 2013). The dilemma of being both therapist and custodian was articulated by one care manager (Prebble et al. 2013: 115-6):

[A]t the end of the day we follow the disability model which doesn't really go together with compulsory care. The disability model in general [is] around the Disability Strategy ... and everything that links in. It's [the care manager's role] balancing empowerment and independence with compulsory care. As a clinician I personally have a lot of problems with that. (CM22)

We acknowledge the challenges in the operation of the New Zealand regime, but also highlight the centrality of needs and cultural assessments – and their absence from the Western Australian regime. Our consultations revealed strong support amongst community members and justice professionals for the introduction of a similar needs and cultural assessment in Western Australia. However, community members and justice professionals expressed concern about who would undertake a cultural assessment and how. A local process of cultural assessment must be developed in consultation with each

community. While legislative prescription of a cultural assessment would be preferable, a form of cultural or needs assessment may be possible under existing arrangements as the Court has the power, when determining fitness under s12 of the CLMIA Act, to inform itself in any way the Court thinks fit.

New South Wales: diversion before fitness

There is also the potential to provide for a diversionary option, before fitness is raised, drawing on a process in place in New South Wales. Under s 32 of the *Criminal Law (Forensic Provisions) Act 2007* (NSW), a Magistrate can divert persons who appear to have mental illness or intellectual disability, if the Magistrate *considers it appropriate*. This regime is also available in Children’s Court proceedings in New South Wales, and in relation to summary offences or indictable offences triable summarily. Under s32(2), a Magistrate may adjourn the proceedings, grant bail or make any other order he or she considers appropriate. In addition, the Magistrate may make an order dismissing the charge and discharge an accused (s32(3)):

- (a) into the care of a responsible person, unconditionally or subject to conditions, or
- (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of the defendant’s mental condition or treatment or both, or
- (c) unconditionally.

Pursuant to s 32, a Magistrate must first determine the ‘jurisdictional question’ of whether the defendant is eligible to be dealt with under s32; that is, whether he or she is ‘developmentally disabled’, ‘mentally ill’ or has a treatable ‘mental condition’: s32(1)(a); *El Mawas* (2006) McColl JA, para 75. If the person is eligible to be dealt with under s 32, the Magistrate must determine whether the appropriate to deal with the defendant in accordance with s 32, and which action should be taken under s32(2)-(3) (see McColl JA, paras 74-77, *El Mawas* (2006)).

The case law provides guidance to a Magistrate on when he or she might ‘consider it appropriate’ to deal with the defendant under s 32. This exercise of discretion is conditioned by the public interest in ensuring ‘that those charged with a criminal offence face the full weight of the law; and the public interest in treating those who have a mental health or cognitive impairment with the aim of ensuring that the community is protected from their conduct’ (NSW Law Reform Commission 2012: 247-8). The seriousness of the offence is relevant to the decision as to appropriateness (*El Mawas* (2006); *Confos* [2004]; *Soliman* [2013]; *Lopez-Aquilar* [2013]).

This diversionary option has garnered much support for being ‘humane and therapeutic’ (Steele, Dowse & Trofimovs 2016: 180; NSW Law Reform Commission 2012; Richardson & McSherry 2010; Gotsis & Donnelly 2008). It provides an express diversionary pathway for persons with intellectual and mental impairment before fitness is raised (*El Mawas* (2006) citing *Mackie v Hunt* (1989)). However, in undertaking its extensive review of the criminal law and procedure applying to people with cognitive and

mental health impairments, the NSW Law Reform Commission (2012: 256ff) noted a number of problems with s32. Namely, that it is underutilized; that non-compliance is not reported to courts; difficulties in obtaining treatment plans; it creates a revolving door; and the limited duration of 6 months. The Commission noted that to make a s 32 order, the court must have evidence of a treatment plan, but that there we difficulties in obtaining and putting together a plan. This echoes concerns raised in earlier research and reporting (Gotsis & Donnelly, 2008: 17; Richardson & McSherry 2010: 252). Richardson and McSherry (2010: 252) write:

Clear and effective treatment plans required by magistrates to exercise their discretion under section 32 are not always made available or of an adequate standard, and thus impede a magistrate's ability to give a section 32 order.

The Commission (2012: 92) also highlighted the increased scope for s 32 to be used in NSW Children's Court proceedings, given that, from 2006-11, 111 young persons or nearly 2% were discharged under s 32 whereas young people with mental impairment are significantly overrepresented in the justice system. Similarly, research indicates that Aboriginal people are 'far less likely' to receive a s 32 order due to the 'drive for efficiency' in the local court, the impact this 'high-volume' condition has on legal representation and the lack of community options to divert defendants into (MacGillivray & Baldry 2013: 24; Baldry, McCausland, Dowse & McEntyre 2015).

Importantly, Steele, Dowse and Trofimovs examined the criminal justice pathways of 149 persons subject to s 32 orders, and found that they experienced 'early and ongoing contact with police, cycling in and out of custody for low-level offences, as well as contact with police as victims of crime' (Steele, Dowse & Trofimovs 2016: 203). Steele, Dowse and Trofimovs problematise the view of s 32 as an humane and therapeutic diversionary pathway, illustrating how s 32 diversion forms part of broader patterns of criminalization that occur beyond the prison (Steele, Dowse & Trofimovs 2016: 203).

The coercive nature of s 32 diversion – which may requiring persons who have not been found guilty of an offence to comply with liberty restricting conditions – must also be borne in mind (Steele, Dowse & Trofimovs 2016; *El Mawas* (2006) McColl JA, para 73). This was one of the reasons why the Victorian Law Reform Commission did not recommend the adoption of a s 32-type diversionary measure in Victoria (Victorian Law Reform Commission 2014: 139-40).

The NSW Law Reform Commission made a number of important recommendations to improve the operation of s 32 diversion in NSW. The Commission recommended that where fitness is raised in Children's Court proceedings, the court must first consider whether an order under s 32 should be made. It also recommended a change in terminology from treatment plan to diversion plan to better reflect the needs of people with cognitive impairment. Importantly the Commission (2012: 270) recommended that the Court adopt a less adversarial approach:

Where there is to be ongoing monitoring of diversion involving reporting at key milestones or regular intervals, a different and less adversarial approach by the court is desirable. Consistency in the magistrate who provides that monitoring is highly desirable. A separate listing time for these cases may be adopted in some courts. Judicial education concerning adopting a problem solving approach in the context of s 32 is desirable, and may be resourced from specialist courts that presently adopt this approach.

The Commission (2012: 383) continued:

A court-based case management service will be necessary to ensure that young people with impairments are able to benefit from s 32 in the same manner as adults. However, given the particular needs of young people, and the service sectors that respond particularly to the needs of young people, a case management service specific to young people appears to be desirable to perform this role.

Our proposed mobile ‘needs focused’ court, outlined below, would facilitate court-based management, judicial monitoring and a non-adversarial problem solving approach. It would also facilitate, through the co-location of services, the efficient development of treatment and diversion plans and other reports required by magistrates. Our proposed model would shift the emphasis of justice intervention 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 introduction of a like pre-fitness diversionary provision in Western Australia would enable Indigenous young people suspected of having FASD to be diverted into ‘on-country’ programs, and where appropriate monitored by the Court. The pre-trial court-based diversionary provisions in the YOA provide for diversion into the Juvenile Justice Teams, but do not have the flexibility of s 32. The only like provisions in the YOA – ss 67, 68 – are enlivened *after* a plea of guilty or finding of guilt.

Moving forward: opportunities for diversion

The CLMIA Act has been criticised for ‘creating a paternalistic and archaic regime of exclusion, punishment and discrimination’ (Mental Health Law Centre (WA) 2013: 7). It was drafted by the same bureaucratic regime responsible for drafting new punitive sanctions in Western Australia in the mid-1990s, such as mandatory sentencing, which also does not differentiate between adults and children. Not surprisingly, therefore, the legislation does little to protect or acknowledge the special needs of children, and the necessity of having a separate regime for them.

The 2016 Review provides some hope of an improved regime: recommending the CLMIA Act be amended so that the Court may order modifications to court processes to assist an accused person, and expanding the options available to a Court on a finding of unfitness. While important, these recommendations do not do far enough. Consideration should be given to recalibrating the regime to focus on the needs of the young person – including cultural needs – and to facilitating diversion into community-*owned* and

managed structures and processes. Further research should be undertaken into the funding implications of adopting a needs based model. As we outline below, though a mobile 'needs focused' court may be one way to more adequately address the needs of Indigenous young people with FASD.

The Need for On-Country Diversionary Alternatives

Diversionary practices favour the least intrusive option at any point of interaction between an accused person and the justice system. Intervention must be a last resort and commensurate with the scale of offending, with a presumption towards non-intervention where possible. The system must be employed parsimoniously and subject to rigorous gatekeeping (Goldson 2013). The problem with this minimalist, ‘leave the kids alone’ version of diversion is that it reflects an essentially Eurocentric worldview in which children will mature out of crime and develop a stake in conformity. In the context of many Indigenous youth, particularly with FASD and other disabilities, maturation does not bring with it desistance from offending, less conflict with the police, or access to the mainstream world of work and domestic stability.

To be effective, diversion has to involve diversion *not just out of one system but into another*. It is not just a question of doing less harm, but of promoting a positive good by channelling Indigenous youth into non-stigmatizing therapeutic alternatives, particularly in the emerging sphere of Indigenous on-country initiatives (discussed later). Furthermore, diversion of this kind provides a mechanism for implementing recommendations 62, 235, 236 and 239 of the *Royal Commission into Aboriginal Deaths in Custody* (Johnson 1991) calling for greater investment in, and referral to, community programs run by Indigenous organizations. For example, *Recommendation 62: Young Aboriginal People and the Juvenile Justice System* (Johnson 1991: 252) asserts:

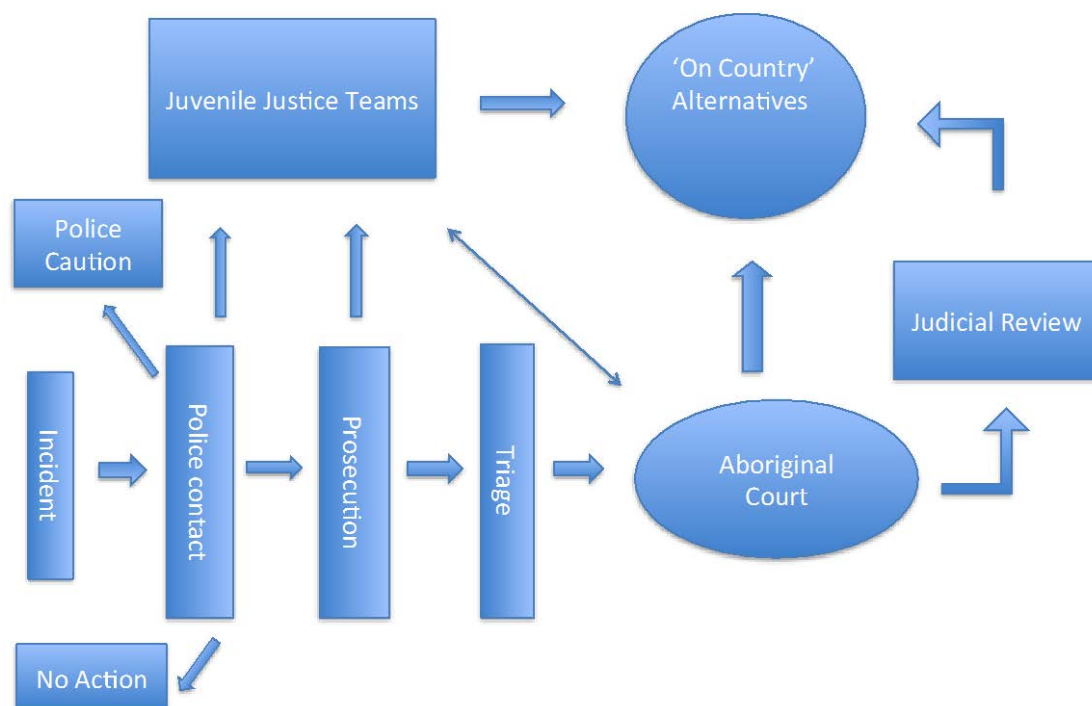
That governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.

It would be understandable for critical scholars and activists to demand the introduction of youth justice reforms based on the progressive trinity of children’s rights, restorative justice, and community based alternatives. Viewed through a postcolonial lens, however, even the ‘soft’ (rehabilitative) end of the justice spectrum is problematic because it still rests on notions of reintegration into mainstream norms, values and beliefs and a ‘normal’ life in western modernity. These avenues are closed off to the majority of Indigenous youth in the Kimberley, most of who are unlikely to achieve a ‘stake in conformity’. This can be linked to the devastating impact of settler colonialism, the consequences of which continue to reverberate in the present.

As we demonstrate below, there needs to be diversionary options at every point of contact between a young person and the justice system. Figure 1 sketches the contours of a model that places referral to community owned ‘on-country’ diversionary schemes as an option both for the police and other agencies in Juvenile Justice Teams (JITs) and

for courts. The flow chart shows that diversion to JJTs is an option for police, prosecutors and the courts under the YOA. We add into the process a ‘triage’ phase at the point of contact with courts and the establishment of Aboriginal Courts, which will also be involved in judicial monitoring.

Figure 1: Overview of Proposed ‘Country-centric’ Diversionary Pathways



Facilitating Diversion at the First Point of Contact

As noted earlier, the police are the ‘gatekeepers’ of the criminal justice system and its key decision makers where most youth offending is concerned, because they have the discretion to deal with many cases informally or formally (Blagg & Wilkie 1997; Cunneen & White 2007). Western Australia adopted diversion as the preferred way of dealing with most juvenile crime under the YOA. Doubt remains as to whether current diversionary practices meet the needs of Indigenous youth and their families. Our ‘decolonizing’ model tasks agencies with new demands: *the requirement, not simply to divert individual young people, but to help strengthen Indigenous initiatives through resource sharing and the establishment of local protocols that would facilitate diversionary programs run and owned by Indigenous people.* This may be enabled and maintained by establishing a local community justice group, as recommended by the Law Reform Commission of Western Australia (LRCWA) (2006b:

97) and is practice in Queensland and New South Wales, to ‘increase the participation of Aboriginal people in the operation of the criminal justice system and to provide support for the development of community-owned justice processes.’ The Commission (2006b: 97) recommended amendments to the *Communities Act 1979* (WA) that would allow discrete communities gazetted under the Act to establish community justice groups on the grounds that:

The recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts and other justice agencies to access the expertise, community and customary law knowledge, and authority of community justice groups.

However, the LRCWA’s recommendations refer only to discrete remote communities for as defined for the purposes of the *Communities Act 1979* (WA), whereas we consider it essential to create community justice groups in urban, rural and remote communities, not covered by this legislation. The LRCWA’s recommendations on this issue appear outdated in that they do not take into account Native Title legislation and the role this has given to Prescribed Bodies Corporate, Traditional Owner groups, and similar entities, who now have a crucial role in social and economic development.

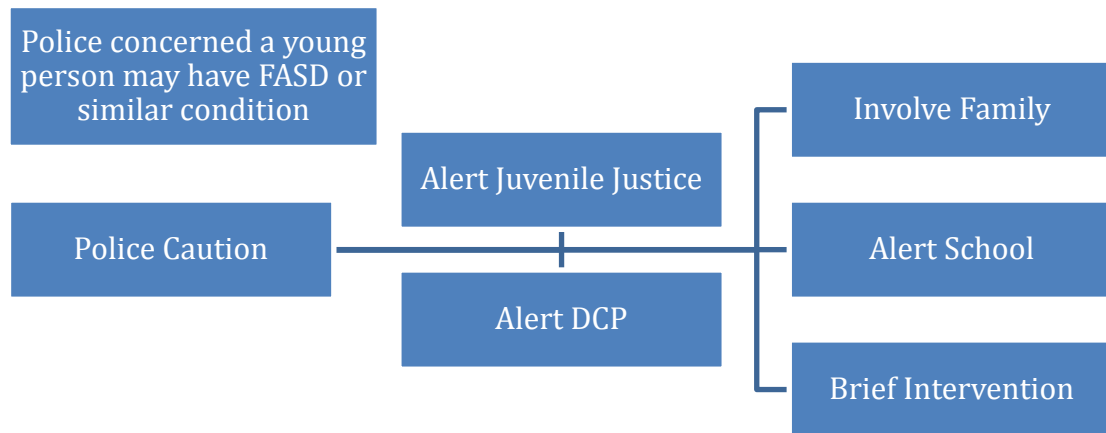
The model developed in Queensland under the *Community Justice Group (CJG) Program* is more flexible, and provides support to Aboriginal and Torres Strait Islander people within the criminal justice system. The program ‘allocates funding to Aboriginal and Torres Strait Islander organisations to develop strategies within their communities for dealing with justice-related issues and to decrease Aboriginal and Torres Strait Islander peoples’ contact with the justice system’ (Queensland Courts website 2016). The CJG, amongst other functions, ensures that there are suitable Aboriginal elders, or significant people, to sit in Murri courts and be involved in diversionary conferencing; these are paid positions.

The juvenile justice teams and police cautioning in Western Australia represent the standard police response to youth offending. However, Aboriginal young people are more likely to be proceeded against by way of arrest and bail, and to be held in police custody, and less likely to be issued with a court attendance notice than non-Aboriginal young people (Ferrante et al. 2005: 46). A Price Consulting Group report (2009) noted that in 2007 roughly 80% of non-Aboriginal young people were being diverted from court, while only 55% of young Aboriginal people were diverted. An inquiry into youth justice in Western Australia by Amnesty International Australia (2015) also expressed concerns about the low rate of diversion for Indigenous youth in the Kimberley.

Police Cautioning

We suggest that police officers concerned that a child may have FASD should be encouraged to refer a case, as part of cautioning, to Youth Justice and Children’s Protection services, who should liaise with the school, family and an Indigenous service provider. This may encourage greater use of cautioning by the police, if they feel a young person’s behaviour is being addressed.

Figure 2: Front End Diversion – Police Cautioning



Juvenile Justice Teams

Police in Western Australia have discretion to refer matters to a Juvenile Justice Team, conditional on the offence not falling within one of the Scheduled Offences of the YOA. Section 24 of the YOA sets out some core principles for diversion:

- (a) the treatment of a young person who commits an offence that is not part of a well-established pattern of offending should seek to —
 - (i) avoid exposing the offender to associations or situations likely to influence the person to further offend; and
 - (ii) encourage and help the family or other group in which the person normally lives to influence the person to refrain from further offending; and
- (b) the treatment of a young person who commits an offence should be fair, should be in proportion to the seriousness of the offence, and should be consistent with the treatment of other young persons who commit offences; and
- (c) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and
- (d) it is to be made clear to a young person who is dealt with for an offence —
 - (i) what act or omission constituted the offence; and
 - (ii) what it is that the person is required to do.

Besides this diversionary pathway, under s 27 of the YOA, prosecutors also have powers to refer a matter or matters to the Juvenile Justice Team:

Where there is sufficient evidence to justify charging a young person with the commission of an offence, a person who could lay the charge may, having regard to the circumstances, refer the matter for consideration by a juvenile justice team instead of laying a charge.

As a final pathway, the courts may also refer to a Juvenile Justice Team under s 28:

(1) If a young person has been charged with an offence, the court may refer the matter for consideration by a juvenile justice team —

(a) before dealing with the charge; or

(b) a plea of guilty has been entered but before the court records a finding that the young person is guilty of the offence; or

(c) after a hearing of the charge but before the court records a finding that the young person is guilty of the offence; or

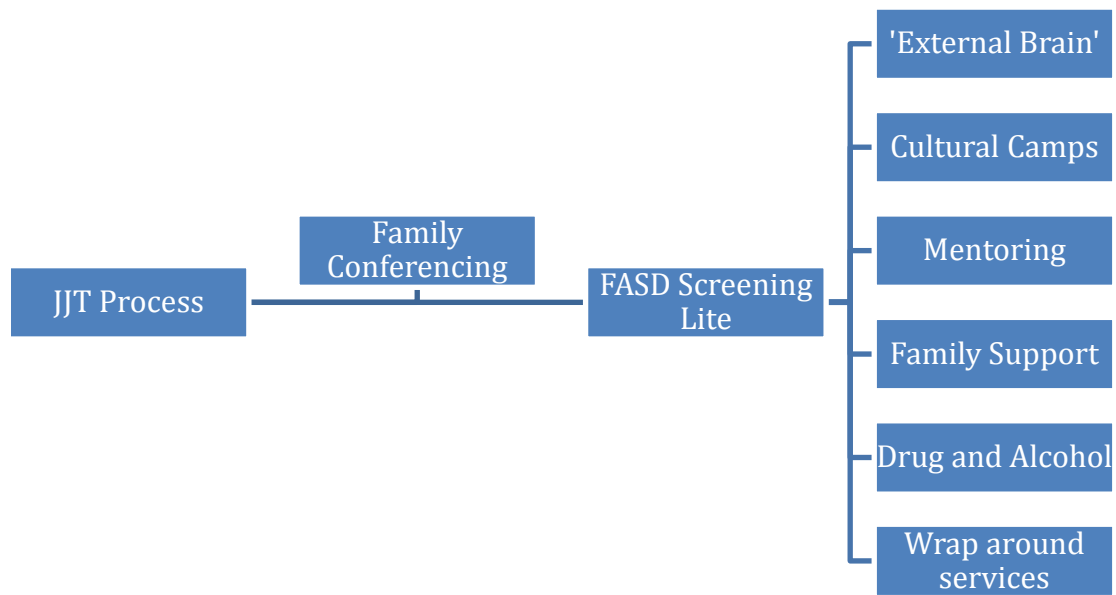
(d) after a plea of not guilty has been entered and the court has found the charge proved but before the court records a finding that the young person is guilty of the offence.

(2) A consideration under subsection (1) of whether or not it is appropriate to refer a matter for consideration by a juvenile justice team is to be made without an adjournment for any assessment of the young person concerned.

(3) If under subsection (1) a court refers a matter for consideration by a juvenile justice team, the court is not to make any order against the young person concerned at the time the matter is so referred.

There are, then, three distinct pathways to pre-trial diversion in Western Australia. Historically, there has been a tendency for courts to compensate for low referral rates to Juvenile Justice Teams from the police and prosecution by employing s 28, as above, for cases they consider better dealt with by front-end diversion (Blagg 2008a). Amnesty International (2015) has noted that referrals to Juvenile Justice Teams by police have been in sharp decline since 2010. Yet they remain an important diversionary tool (Amnesty International 2015). We consider it essential that the Juvenile Justice Team process and arrangements are refreshed and given greater credibility by ensuring that there is an Aboriginal community worker attached to each team and that this is supplemented by a part time psychologist able to provide a functional assessment of children where there is a possible FASD, or similar condition. Juvenile Justice Teams should be resourced to broker services that can provide the ‘external brain’ for the child, discussed in more detail below, and link them with local services.

Figure 3: Front End Diversion – The Juvenile Justice Team Process



Facilitating Diversion at the Court Stage: A mobile ‘needs based’ court

Our consultations with community members and justice professionals support law reform, and creating 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, we argue for a mobile ‘needs focused’ court that draws on the techniques employed by ‘problem oriented courts’, to promote better outcomes for young people with FASD. Our preferred model is a ‘hybrid’: it takes elements from the ‘Koori Court’ model, with its focus on the involvement of Elders in the court process, and the Neighbourhood Justice Centre model, which has a single magistrate, a comprehensive screening process for clients when they enter the court, and rapid entry into, preferably on-country, support. We envisage this hybrid approach facilitating 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 may be a second, third or fourth language. There is glaring need for interpreters able to assist Indigenous people to understanding the process and able to participate, 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

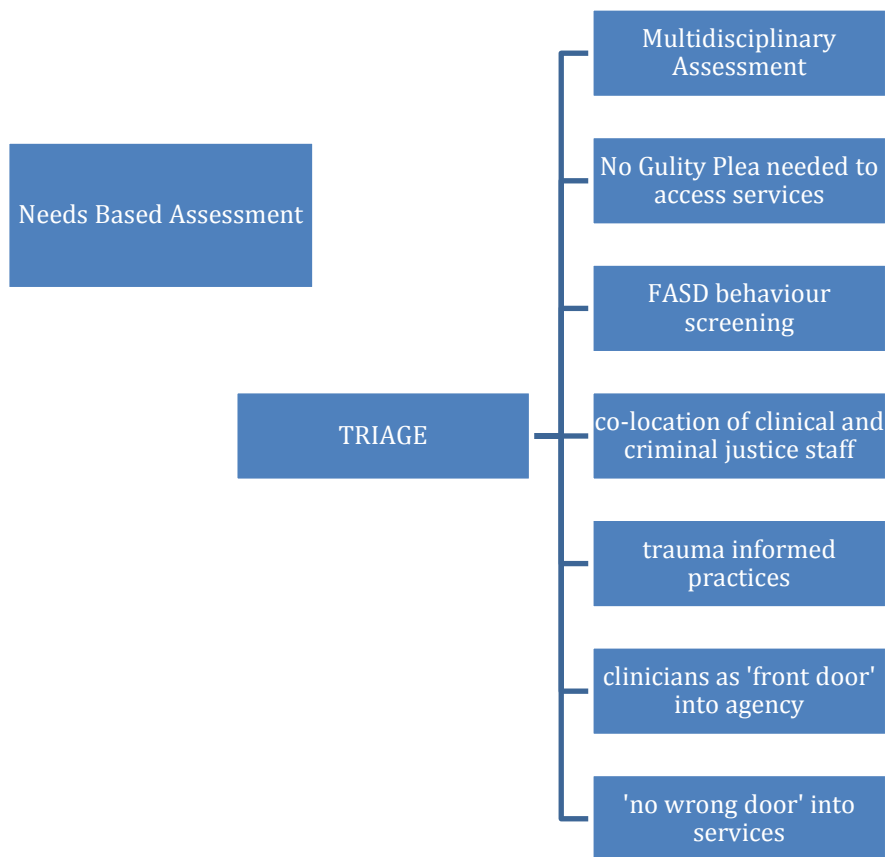
Indigenous people's own forms of cultural and legal authority, represented by Indigenous Elders and other people of significance

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; 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 2009, 2014). 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 (s4M, *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 (NJC website 2016). The Centre does not have jurisdiction to deal with sexual offending (s 4O).

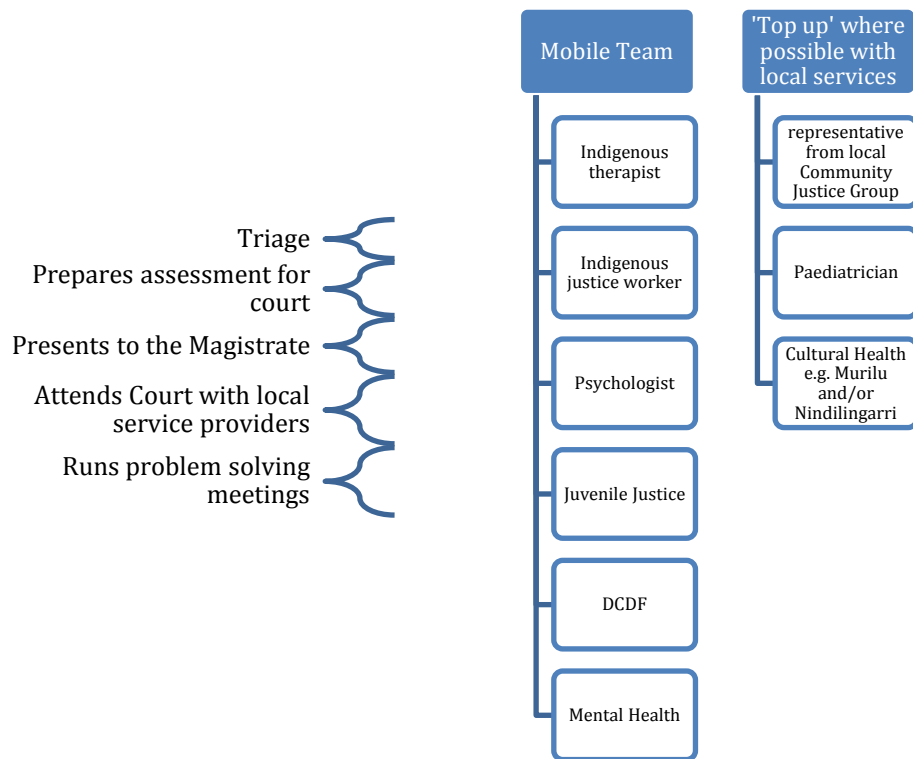
One of the most notable and successful aspects of the Centre is the quality of the intake 'needs based' assessment by clinical services team when an individual arrives at court. We consider such an approach critical to a successful, 'FASD aware' triage process in our model court.

Figure 4: 'Needs Based Assessment and Triage'



This 'needs focused' approach shifts the emphasis of justice intervention 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 some kind of '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, able, with the right support, to work with affected youth and their families, including on-country options. We give the examples of the Murulu FASD program run by Marninwarntikura in Fitzroy Crossing and the cultural health programs run by Nindilingarri. We see no reason why the services should not accompany the Magistrate's circuit in the West Kimberley.

Figure 5: ‘Justice on the Road’ – Mobile Team



Placing Country at the Centre

Our proposed reforms take a number of reforming practices in the mainstream, 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 new engagement spaces between Indigenous and non-Indigenous domains. There are already a number of options. Community owned initiatives such as the *Yiriman* project, representing the four language groups, Nyikina, Mangala, Karajarri and Walmajarri, in the Fitzroy Valley, takes young people at risk onto remote desert country to ‘build stories in young people’ (Blagg 2012: 481-9).

‘Cultural Bosses’, based at the Kimberley Aboriginal Law and Culture Centre (KALACC), 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 Ranger Programs to ‘care for country’. Immersion in on country programs may be vital in terms of preventing the

emergence of secondary disabilities (Blagg, Tulich & Bush 2015, 2015/16). Existing laws that draw young people with FASD into the correctional system are obstacles to change and improved outcomes for Indigenous young people. 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 presented, the main issue becomes one of stabilisation and support, what has been called the 'external brain' (Douglas 2010: 233-5).

This 'external brain', or what we term 'scaffolding', around 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 Cultural Bosses from around Fitzroy Crossing in Western Australia, takes young people at risk out onto traditional country, where they acquire bush skills in a culturally secure environment. The Magistrate's Court has sent young people on to the project as an alternative to custody, with considerable success. A three-year review of the *Yiriman* Project found that (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 are definitely immediate healthy effects of taking young people away from their poor diets and living conditions that create depression and despair. There is also evidence that *Yiriman* has assisted in the campaign to minimise young people's involvement in the justice system. Indeed, some, including a magistrate, conclude that *Yiriman* is more capable in this regard than most other diversionary and sentencing options. There is certainly evidence (tracked through case studies) that a range of young people have been nurtured through their involvement in *Yiriman*.

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. The YOA already allows for Indigenous communities to supervise young people the subject of orders under the Act (s 17B).

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 point

of intersection between Indigenous and non-Indigenous knowledge. Indigenous ‘place’ (or ‘country’) should be the heart (in both a figurative and metaphorical sense) of this nascent sphere. *Indigenous place can become a fulcrum upon which a new decolonised justice system can be leveraged into being.* The anthropologist WH Stanner (1979: 230) observed: ‘there is no English terminology able to capture or ‘give sense to’, the ‘link between an Indigenous group and its homeland...we are tongueless and earless to this other world of meaning and significance’. Deborah Bird Rose (1996: 9) describes this eloquently.

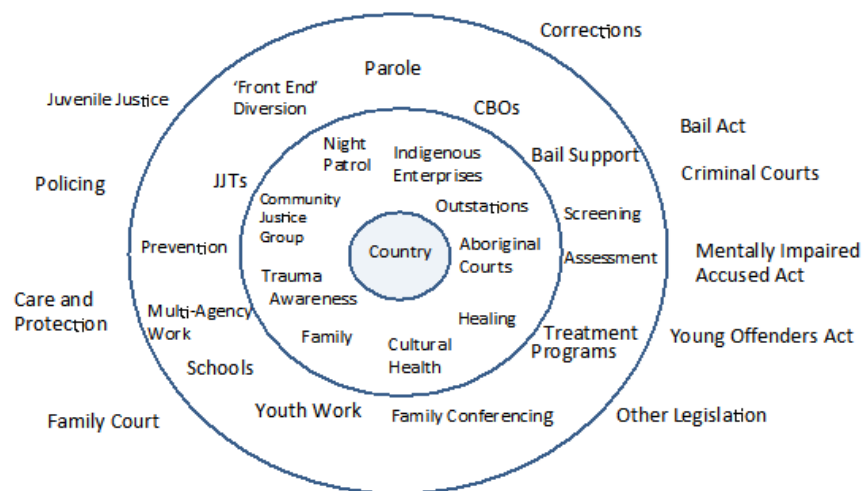
Country in Aboriginal English is not only a common noun but also a proper noun. People talk about country in the same way that they would talk about a person: they speak to country, sing to country, visit country, worry about country, feel sorry for country, and long for country.

While, the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) remains the ‘moral touchstone’ for justice reform in Australia (Marchetti and Daly 2004), it is, itself, rooted in a colonial worldview (Marchetti 2006) and focuses on making extant systems ‘work’ for Indigenous people, rather than create fresh systems. Importantly, the RCIADIC pre-dated an event of huge significance to Indigenous people: the recognition of native title in the High Court of Australia’s judgment in *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1 in 1992. The subsequent native title process provides the ‘missing link’ for a reformed system, based on respect for Indigenous worldviews and the potential for ‘country’ to provide the alternative site for new practices that effectively begin to decolonise the justice process. Western Australia is nearing a ‘post-determination era’: roughly 80% of the landmass of the Kimberley, for example, is now covered by a native title determination. Traditional Owners are now able to form Prescribed Bodies Corporates under the *Native Title Act 1993* (Cth) to hold native title rights and interests.

Our research uncovered strong support amongst Indigenous and non-Indigenous stakeholders for what might call a ‘country-centric’ response to FASD. As set out in Figure 6, 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 colonization 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 what we have called community *owned* initiatives that draw on Indigenous cultural authority, rather than mainstream governmentality, for legitimacy and status; they include a range of practices from Aboriginal courts through to Aboriginal Night Patrols. These initiatives are generally ‘place-based’ and situated on, or close to, country: the latter being the source of Indigenous law and culture. Paradoxically, the inner circle acts as both a pathways 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 our consultations was the need to work with and through family. Indigenous people were critical of the western paradigm which tends to individualise and atomise, 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 6: Placing Country at the Centre



We have stressed that an inadequate criminal justice response can increase the likelihood of people with FASD developing secondary impairments or disabilities, such as substance abuse, which, in turn, increases their susceptibility to contact with the criminal justice system (either as victims or offenders). Importantly, secondary impairments can be prevented or reduced by improving the responsiveness of the justice system and support services to young people with FASD. Improving diversionary pathways out of the criminal justice system is key to reducing the incidence of secondary impairments

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. Research indicates that young people with FASD require significant levels of support (an ‘external brain’) (Douglas 2010) to compensate for their incapacity to manage daily life. 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. While it lies beyond the scope of this project, this diversionary approach should be available for adults as well as juveniles, especially young adults in the 18-25 year old population range. 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.

Concluding Comments

Our approach does not rest on the classic notion of decolonisation in terms of the ‘all or nothing’ rupture, or 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 (Chowdry 2007). Instead, it poses a pluralist alternative where settler law increasingly secedes sovereign power to Indigenous law and culture, allowing what Fitzgerald (2001: 41) calls a ‘vibrant and decentred’ justice system to flourish that respects Indigenous form of law and culture. Our approach is intended to heal, rather than perpetuate, colonial binaries. We suggest that we may be able to use some justice innovations showing promise in the mainstream system 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 needs to 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. Our project, while encouraging reform of the draconian CLMIA Act and highlighting the need to update the YOA (in particular, the need to refresh Juvenile Justice Teams), is also intended to employ policing and judicial discretion already existing in legislation and at common law, rather than push for legislative change that is unlikely to be forthcoming in a continuingly punitive political climate in Western Australia. For example, we have argued that young people thought to be FASD should only be interviewed in the presence of an independent adult not of the prosecutory authority such as a social worker, disability worker, youth worker, or lawyer. The Aboriginal Legal Service must be notified in the case of Indigenous children. The practice of having only family members present when interviewing children and young people disadvantages vulnerable children. The return of control over country, through Native Title, we suggested, could be the game changer in terms of 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 amongst Indigenous young people with FASD.

Further research is needed into the funding implications of adopting a ‘needs based’ justice model. Our proposed model take a number of reforming practices in the mainstream, 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. It would also facilitate, through the co-location of services, the efficient development of treatment and diversion plans and other reports required by magistrates. Our proposed model would shift the emphasis of justice intervention from processing offenders to identifying solutions, placing 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. As we have argued, the West Kimberley would be an ideal place to pilot some kind of ‘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, able, with the right support, to work with affected youth and their families, including on-country options.

Funding is sorely needed for Indigenous community-owned diversionary initiatives such as the Kimberley Aboriginal Law and Cultural Centre’s *Yiriman Project*. Community-owned programs have been successful in reducing the contact between Indigenous young people with the justice system. However, this should not obviate the need to heal families and communities, as well as individuals. Funding for Indigenous community-owned bail accommodation and support services is essential to ensure young Indigenous people with FASD are not held on remand solely due to a lack of other options.

Further research is indicated into how the better practice examples of from New Zealand, Victoria and New South Wales might be adapted to the local context to improve the Western Australian regime to better meet the needs of Indigenous young people with FASD. The introduction of separate provisions for children found unfit to stand trial is a crucial step in reforming the CLMIA Act. The Victorian regime provides a strong legislative model of this, with its dedicated focus on treatment and support. Our project has also highlighted the need for research to be undertaken into the development of local processes of cultural assessment, drawing on the New Zealand model, in consultation with local communities. Similarly, the introduction of a pre-fitness diversionary provision such as exists in New South Wales could enable Indigenous young people suspected of having FASD to be diverted into ‘on-country’ programs and, where appropriate, monitored by the Court.

Our 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 in the 18-25 year old population range. 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.

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APPENDICES

Appendix 1: Comparative table of Australian legislation governing mentally impaired accused

Legislation (and jurisdiction) ²	Definition of <i>mental impairment and unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge makes decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order): Where is the person detained? Who makes decision? Can they be released? By whom? On what grounds? What treatment is available?
<p>WESTERN AUSTRALIA</p> <p><i>Criminal Law (Mentally Impaired Accused) Act 1996</i> (WA)</p> <p>Section 4 provides that this Act applies in respect of any accused before <u>any court exercising criminal jurisdiction</u>.</p>	<p><i>Mental impairment</i> means intellectual disability, mental illness, brain damage or senility (s 8).</p> <p><i>Unfitness</i>: s 9 provides -- An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —</p> <p>(a) unable to understand the nature of the charge;</p> <p>(b) unable to understand the requirement to plead to the charge or the effect of a plea;</p> <p>(c) unable to</p>	<p>The question of fitness may be raised at any time and more than once (s 11).</p> <p>The question is decided by the presiding judicial officer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit (s 12).</p> <p>Judicial officer may: order the accused to be examined by a psychiatrist or other appropriate expert; order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court; adjourn the proceedings and, if there is a jury, discharge it; make any other order the judicial</p>	<p><u>For courts of summary jurisdiction and matters in District/Supreme Court:</u></p> <p>If Court/Judge satisfied that accused will not become mentally fit within 6 months, must make an order under s 16(5) (summary) or s 19(4) (District/Supreme).</p> <p>An order under s 16(5)/19(4) is an order dismissing the charge (if no indictment) or quashing the indictment without deciding guilt and either:</p> <ol style="list-style-type: none"> 1) releasing the accused; OR 2) subject to s 16(6) (summary) /19(5) (District/Supreme), making a custody order. <p>A custody order can only be made if statutory penalty for the alleged offence is or includes imprisonment, and Court/Judge is satisfied that order is appropriate having regard to:</p> <ol style="list-style-type: none"> (a) strength of evidence; (b) nature of alleged offence; (c) accused’s character, antecedents etc; and (d) the public interest 	<p>There does not appear to be any specific provision for young people.</p>	<p>Definition of <i>custody order</i> (s 3): an order than an accused be kept in custody in accordance with Part 5.</p> <p>Where is the person detained? Who makes the decision?</p> <p>Person is detained in</p> <ol style="list-style-type: none"> (a) an authorised hospital (same defn as in <i>Mental Health Act 1996</i>); (b) a “declared place” (a place declared by Governor – s 23); (c) a detention centre (as per <i>Young Offenders Act 1994</i>); or (d) a prison (as per <i>Prisons Act 1981</i>) <p>(ss 23, 24).</p> <p>However, only to be detained in hospital if person has a mental illness capable of treatment (s 24(2)).</p>

² Note: legislative provisions have been summarised/shortened and are not a word-for-word reflection of what appears in the legislation.

	<p>understand the purpose of a trial; unable to understand or exercise the right to challenge jurors;</p> <p>(e) unable to follow the course of the trial;</p> <p>(f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or</p> <p>(g) unable to properly defend the charge.</p>	<p>officer thinks fit.</p>	<p>(s 16(6) (summary); s 19(5) (District Supreme)).</p> <p>If not satisfied that accused will not become fit, Court/Judge must adjourn to see whether or not accused will become mentally fit (not more than total period of 6 months) (ss 16(2)(b), 16(3) (summary); ss 19(1)(b), 19(2) (District/Supreme)).</p> <p>If proceedings adjourned, the Court/Judge must make an order under s 16(5)/19(4) if at any time the court is satisfied that the accused will not become mentally fit, or if, after 6 months of initial finding, the accused has not become mentally fit.</p> <p><u>A point of difference:</u> For proceedings in a court of summary jurisdiction, if an order is made either releasing the accused or making a custody order, the accused cannot again be charged with or tried for the offence (s 16(8)).</p> <p>For proceedings in the Supreme/District Court, if such an order is made, the accused may be indicted or again indicted and tried for the offence (s 19(7)).</p>	<p>A mentally impaired accused cannot be detained in a detention centre unless under the age of 18: s 24(5).</p> <p>Determination as to where the person is to be detained is to be made by the Mentally Impaired Accused Review Board (the Board) within 5 working days of the custody order: s 25(1).</p> <p>Until Board determination, place of detention is to be an authorised hospital (if mental illness) OR prison/detention centre: s 25(3).</p> <p>Can they be released? By whom? On what grounds? Release is possible, on the order of the Governor (s 24).</p> <p>The Governor may make a conditional/ unconditional release order (ss 24, 35).</p> <p>The Board must give the Minister a written report concerning the accused within 8 weeks after the custody order made, if it considers special circumstances exist and, in any event, once a year: s 33(2). Such a report must recommend whether or not Governor should release the accused: s 33(3).</p> <p>Temporary (not exceeding 14 days) leave of absences also possible – decision lies with Governor, Board</p>
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					<p>may recommend to Minister that Governor be advised to grant leave of absence: see ss 27, 28.</p> <p>What treatment is available?</p> <p>Treatment appears only to be available to those detained in an authorised hospital (therefore, mental illness is necessary): see s 25(2) and (3).</p>
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge makes decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>AUSTRALIAN CAPITAL TERRITORY</p> <p><i>Crimes Act 1900</i> (ACT)</p> <p>Section 310 provides that Div 13.2, which deals with unfitness to plead, applies to a criminal proceeding in the Supreme Court or the Magistrates Court.</p>	<p><u>Mental impairment</u></p> <p>Definition of “mental impairment” is said in Dictionary to be that provided by s 27 of the <i>Criminal Code 2002</i> (ACT):</p> <p><i>mental impairment</i> includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.</p> <p><u>Unfitness to plead</u></p> <p>By s 311(1), a person is “<i>unfit to plead</i>” if the person’s mental processes are disordered or impaired to the extent that the person cannot –</p> <p>(a) under the nature of the charge; or</p>	<p>A person is presumed to be fit to plead; this presumption only rebutted if it is established, on investigation, that person is unfit: s 312(1),(2).</p> <p>Question of person’s fitness to plead is a question of fact to be decided on balance of probabilities: s 312(3).</p> <p>No party bears the burden of proof: s 312(4).</p> <p><u>Procedure if question raised – Magistrates Court</u></p> <p>If question raised in MC (other than at committal hearing) and court satisfied that there is a real and substantial question about fitness, court must reserve question for investigation (s 314(1)).</p>	<p><u>If person found unfit to plead and unlikely to become fit</u></p> <p>If court decides defendant is unfit to plead and unlikely to become fit within 12 months, the court must:</p> <p>(a) for proceeding in the SC – discharge any jury and hold and <i>special hearing</i> under s 316;</p> <p>(b) for proceeding in the MC – conduct a hearing under s 335 (s 315C).</p> <p><u>If person found unfit but likely to become fit within 12 months</u></p> <p>Section 315D(1) provides that if the court decides that the defendant is unfit to plead but is likely to <i>become</i> fit within 12 months, the court must adjourn the proceeding and –</p> <p>(a) if defendant charged with a serious offence - remand defendant in custody or release on bail; or</p> <p>(b) if defendant charged with an offence other than serious offence – make orders it considers appropriate.</p> <p>(Note: “serious offence” means an offence involving</p>	<p>There does not appear to be any specific provision for young people.</p> <p>Section 300(2) states that to remove doubt, a reference to the Magistrates Court in the Part includes a reference to the Children’s Court.</p>	<p>Where is the person detained?</p> <p>It is unclear where the person is to be detained if a detention order is made.</p> <p>There appears to be no definition of “custody”.</p> <p>The criteria for detention under s 308 include the principles that a person should not be detained in a correctional centre unless <u>no other reasonable option is available</u>: s 308(d).</p> <p>It appears that the alternatives may be custody in a correctional facility, OR detention in a mental health facility (where ACAT is exercising its jurisdiction under the <i>Mental Health (Treatment and Care) Act 1994</i> – see, eg, s 300, 318).</p>

<p>(b) enter a plea to the charge and exercise right to challenge jurors or jury; or</p> <p>(c) understand that proceeding is an inquiry about whether person committed the offence; or</p> <p>(d) understand the substantial effect of any evidence; or</p> <p>(e) give instructions to person's lawyer.</p> <p>However a person is not unfit to plead only because the person is suffering from memory loss: s 311(2).</p>	<p>If question raised at committal hearing, the committal hearing must be completed and if the person is committed for trial, the question must be reserved for the Supreme Court: s 314(2).</p> <p><u>Procedure if question raised – Supreme Court</u></p> <p>If question reserved or otherwise raised in SC and court satisfied that there is a real and substantial question about fitness, court must reserve the question for investigation: s 314(3).</p> <p><u>Court may dismiss if trivial/appropriate given nature of mental impairment</u></p> <p>If court considers that, because of trivial nature of charge or nature of defendant's mental impairment, it would be inappropriate to inflict any punishment on the defendant, the court may decide not to carry out or continue the investigation and may <u>dismiss the charge</u> and order that person be released: s 315(4).</p> <p><u>Investigation</u></p> <p>Court must adjourn hearing or trial in which question was raised and proceeding with investigation: s 315(1).</p> <p>Court may make any orders</p>	<p>actual or threatened violence and punishable by imprisonment for longer than 12 months; OR an offence against s 27 (acts endangering life)).</p> <p>Court may reinvestigate (on application or its own initiative) the defendant's fitness to plead at any time, but if it has not reinvestigated within 6 months after initial decision, the court must reinvestigate within 30 days of end of that period: s 315D(3),(4).</p> <p>If, on reinvestigation, court decides that defendant is unfit, the court must:</p> <p>(a) if in the Supreme Court – discharge any jury and hold a <i>special hearing</i> under s 316; or</p> <p>(b) if in Magistrates Court – conduct a hearing under s 335 (s 315D(9)).</p> <p><u>Special hearing – Supreme Court</u></p> <p>Supreme Court must conduct special hearing as nearly as possible as if ordinary criminal proceeding: s 316(1).</p> <p>By s 316(2), special hearing is trial <u>by jury</u>, unless SC is satisfied that accused is capable of making an election to have special hearing by single judge before court first fixes a date <u>and</u> the accused makes that election, <u>or</u> SC is satisfied that the accused is incapable of making such election <u>and</u> before the court fixes a date any guardian of the accused notifies the court that it would be in the best interests of the accused to have a special hearing by single judge.</p> <p>SC must direct ACAT to appoint a guardian with power to make election under 316(2) if satisfied that accused is incapable: s 316(3)(a).</p> <p>Unless SC otherwise orders, accused must have legal representation at a special hearing: s 316(6).</p>			<p>However, under the <i>Mental Health (Treatment and Care) Act 1994</i>,</p> <p>Who makes decision?</p> <p>The Supreme Court or the Magistrates Court (or Children's Court) is to decide on the appropriate order – see adjacent columns and ss 318, 319, 335.</p> <p>Can they be released? By whom? On what grounds?</p> <p>The SC or MC may order that person be held in custody until the ACAT orders otherwise unless, in consideration of criteria for detention in s 308, it is satisfied that it is more appropriate to order that accused submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order.</p> <p>Section 68 of the <i>Mental Health (Treatment and Care) Act 1994</i> ('MH(TC)A') provides ACAT's powers to review person's fitness to plead.</p> <p>Where a person has been found by SC or MC to be unfit to plead, an order has been made under ss 318(2), 319(2) or (3) or 335(2),(3) or (4) and the charge is for an offence punishable by imprisonment for 5 years or longer, the ACAT may (on application or by its own initiative) review the person's fitness at any time: s 68(1), (2) MH(TC)A.</p>
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		<p>considered appropriate, including:</p> <ul style="list-style-type: none"> (a) granting bail; (b) remanding defendant in custody for a stated period; (c) requiring examination by psychiatrist (s 315(2)). <p>However, court must not make an order remanding the defendant in custody at a place other than a correctional centre unless satisfied that the facilities or services necessary for the order are available at the place: s 315(3).</p> <p>On investigation, the court may call evidence on its own initiative or require defendant to be examined: s 315A(1)(b).</p> <p>The <u>court</u> must decide whether the defendant is unfit to plead: s 315A(3).</p>	<p>At special hearing, accused taken to have pleaded not guilty: s 316(8).</p> <p>By s 316(9), if special hearing is by jury, the SC must explain to jury—</p> <ul style="list-style-type: none"> (a) meaning of unfitness to plead; (b) that accused is unfit to plead; and (c) that purpose of special hearing is to ensure that, despite the unfitness, the accused should be acquitted unless it can be proved BRD that the accused engaged in the conduct required for the offence charged; and (d) the actions available to the jury under s 317; and (e) the legal and practical consequences of those actions. <p>By s 317(1) – (3), if not satisfied BRD that the accused engaged in the conduct required for the offence charged, jury/judge must find accused not guilty and accused will be dealt with as thought it was verdict at an ordinary trial.</p> <p>A finding that accused engaged in the conduct required is <u>not</u> a basis in law for recording a conviction and, except as provided in s 319A (action if accused becomes fit after special hearing), bars further prosecution in relation to conduct: s 317(4).</p> <p><u>If accused not acquitted at special hearing</u></p> <p>If accused is charged with a <i>non-serious offence</i> and is <u>not acquitted</u>, SC may make orders it considers appropriate, including:</p> <ul style="list-style-type: none"> (a) that accused be detained in custody until the ACAT orders otherwise; (b) that accused submit to jurisdiction of ACAT to allow ACAT to make a mental health order (s 318). <p>Note: s 300 provides that “ACAT” means the ACAT</p>		<p>However, the ACAT <u>must</u> review the person’s fitness to plead:</p> <ul style="list-style-type: none"> (a) as soon as practicable (but within 3 months) after the end of 12 months after the day the order is made; and (b) at least once every 12 months after each review (s 68(3) MH(TC)A). <p>Section 68 applies even if person is no longer in custody or under a mental health order: s 68(8) MH(TC)A.</p> <p>Further, s 72 MH(TC)A provides for periodic review of orders for detention, including orders made under Part 13 of the <i>Crimes Act</i> requiring a person to be detained in custody until ACAT orders otherwise: s 72(1).</p> <p>By s 72(2), where a person has been in custody under an order for detention—</p> <ul style="list-style-type: none"> (a) for 6 months; or (b) for a further period of 6 months following the last review, the ACAT shall, as soon as practicable, review the order for detention and <u>may order the release of the person.</u> <p>In considering whether or not to release person, the ACAT shall have regard to:</p> <ul style="list-style-type: none"> (a) the nature and extent of the person’s mental dysfunction or
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			<p>exercising its jurisdiction under the <i>Mental Health (Treatment and Care) Act 1994</i>.</p> <p>If accused charged with a <i>serious offence</i> and is <u>not acquitted</u>, SC must order that accused be detained in custody until ACAT orders otherwise UNLESS, in consideration of criteria for detention in s 308, it is satisfied that it is more appropriate to order that accused submit to jurisdiction of ACAT to enable ACAT to make mental health order: s 319.</p> <p><u>Powers of Magistrate if satisfied that accused is mentally impaired</u></p> <p>The following applies to criminal proceedings (not including committal proceedings) with respect to—</p> <p>(a) summary offences; and</p> <p>(b) indictable offences that may be heard and determined summarily (s 332).</p> <p>Indictable offence is to be heard and determined summarily if—</p> <p>(a) MC satisfied that accused is unable, because of mental impairment, to elect to have case heard summarily; and</p> <p>(b) prosecution agrees to the offence being heard and determined summarily (s 333).</p> <p>To determine whether or not accused has a mental impairment, MC may make orders:</p> <p>(a) that the accused submit to the jurisdiction of the ACAT;</p> <p>(b) that the proceedings be adjourned;</p> <p>(c) that the person be released on bail (s 334(8)).</p> <p>By s 334(2) (read with s 334(1)), if MC is satisfied that the accused is mentally impaired <u>and</u> that it would be appropriate to deal with the person under this division, the MC may:</p> <p>(a) dismiss the charge and require the accused to</p>		<p>mental illness, including likely effect on person's behaviour in the future;</p> <p>(b) whether or not, if released—</p> <p>(i) the person's health or safety would be, or would be likely to be, substantially impaired; or</p> <p>(ii) the person would be likely to do serious harm to others;</p> <p>(c) the best estimate of the sentence nominated by the relevant court under the <i>Crimes Act</i> as the sentence it would have imposed had the person been found guilty (s 72(3) MH(TC)A).</p> <p>If, on a review, the ACAT does not order the release of person, the ACAT may—</p> <p>(a) make mental health orders (including additional orders) in respect of the person; or</p> <p>(b) vary or revoke any of the mental health orders in force in respect of the person (s 72(5) MH(TC)A).</p> <p><u>Limit on duration of detention:</u></p> <p>By s 75(1) MH(TC)A, the ACAT is not permitted to require a person to remain in custody for a period that is, or for periods that in the aggregate are, greater than the <u>limiting period</u>.</p> <p>Section 72(2) MH(TC)A clarifies that "limiting period" means a period that</p>
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			<p>submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order; or</p> <p>(b) dismiss the charge unconditionally.</p> <p>An order under s 334(2) does not constitute a finding that an offence has or has not been committed: s 334(7).</p> <p>However, MC may only make the above orders in relation to proceedings with respect to an <u>indictable offence</u> that may be heard and determined summarily with consent of the DPP: s 334(4).</p> <p>In determining order, MC shall have regard to —</p> <p>(a) the nature and seriousness of the mental impairment;</p> <p>(b) the period for which the mental impairment is likely to continue;</p> <p>(c) the extent to which by reason of the accused’s mental impairment the accused is likely to do serious harm to himself;</p> <p>(d) whether the ACAT could make an order under the <i>Mental Health (Treatment and Care) Act 1994</i>, s 26 (What ACAT must take into account) or s 27 (ACAT may not order particular drugs etc);</p> <p>(e) the seriousness of the alleged offence;</p> <p>(f) the antecedents of the accused; and</p> <p>(g) the effectiveness of any order previously made, including to the extent to which—</p> <p>(i) the order assisted the accused to obtain <u>appropriate treatment</u> and care for his or her mental impairment; and</p> <p>(ii) access to that treatment and care has enabled the accused to modify behaviour, being behaviour of a kind that has previously resulted in the accused having been charged with an offence (s 334(3)).</p> <p><u>Hearing under s 335 – Magistrates Court</u></p>		<p>is equivalent to the period—</p> <p>(a) commencing on the day on which an order of the relevant court under the <i>Crimes Act</i>, part 13 is made requiring the person to be detained in custody until the ACAT orders otherwise; and</p> <p>(b) ending on the day on which, if the person had been sentenced to imprisonment for a period equivalent to the term nominated under <i>Crimes Act</i> ss 301, 302, 304 or 305 that sentence would have expired.</p> <p>What treatment is available?</p> <p>There does not appear to be any express provision under the <i>Crimes Act</i> for the type of treatment (if any) available for those detained in custody.</p> <p>Referral to ACAT for the making of a mental health order appears generally to occur in the alternative to detention: see s 319.</p> <p>However, under the MH(IC)A, on a review of detention orders the ACAT may, if it does not order the release of a person, make a mental health order in respect of the person: s 72(5).</p> <p>It therefore seems that some treatment is contemplated for those detained in custody.</p>
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			<p>The following applies to an <u>indictable offence</u> that can be heard and determined <u>summarily</u> if MC is of the opinion that the case can properly be disposed of summarily having regard to—</p> <ol style="list-style-type: none"> (a) any relevant representations made by accused; (b) any relevant representations made by the prosecutor in the presence of the accused; (c) the circumstances and, in particular, the degree of seriousness of the case; (d) any other circumstances that appear to MC to make it more appropriate for the case to be dealt with on indictment rather than summarily (s 335(1)). <p>If MC decides as mentioned in s 315C or s 315D(9) that accused charged with a <u>serious offence</u> is unfit to plead; and, after hearing the charge, MC is satisfied BRD that the accused engaged in the relevant conduct, the MC shall order that the accused be detained in custody until the ACAT orders otherwise UNLESS, in consideration of criteria for detention in s 308, it is satisfied that it is more appropriate to order that accused submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order (s 335(2)).</p> <p>If MC decides as mentioned in s 315C or s 315D(9) that accused charged with <u>an offence other than a serious offence</u> is unfit to plead, and after hearing the charge, the MC is satisfied BRD that the accused engaged in the relevant conduct, the MC may make any orders it considers appropriate, including:</p> <ul style="list-style-type: none"> • that accused be detained in custody until the ACAT orders otherwise; • that accused submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order (s 335(4)). <p>By s 335(6), in a hearing under s 335:</p>		
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			<p>(a) if legal representation is available—accused shall have legal representation unless the MC otherwise orders; and</p> <p>(b) the accused is to be taken to have pleaded not guilty.</p> <p>If MC is satisfied BRD that accused engaged in the conduct required for the offence charged, the finding—</p> <p>(a) is not a basis in law for recording a conviction for the offence charged; and</p> <p>(b) except as provided in s 335A (action if accused becomes fit to plead after hearing), bars further prosecution of the accused for any offence in relation to the conduct</p> <p>(s 335(7)).</p> <p><u>Special verdict of not guilty because of <i>mental impairment</i></u></p> <p><u>Defence of mental impairment in Supreme Court – indictable offences</u></p> <p>If accused pleads <u>not guilty</u> because of mental impairment to indictable offence before SC, SC must enter a special verdict that person is not guilty because of mental impairment if:</p> <p>(a) the court considers the verdict appropriate; and</p> <p>(b) the prosecution agrees to entering the verdict (s 321(1),(2)).</p> <p>By s 323(1), if accused has been charged with a <u>non-serious offence</u> and special verdict of not guilty because of mental impairment is returned/entered, SC may:</p> <p>(a) make an order requiring accused to submit to jurisdiction of ACAT to enable ACAT to make recommendations as to how accused should be dealt with; or</p> <p>(b) make any other orders it considers appropriate.</p>		
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			<p>The orders available to SC include:</p> <ul style="list-style-type: none"> (a) that accused be detained in custody until the ACAT orders otherwise; (b) that accused submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order (s 323(3)). <p>If accused has been charged with a <u>serious offence</u> and special verdict of not guilty because of mental impairment is returned/entered, SC must order that accused be detained in custody until ACAT orders otherwise UNLESS, in consideration of criteria for detention in s 308, it is satisfied that it is more appropriate to order that accused submit to jurisdiction of ACAT to enable ACAT to make mental health order: s 324.</p> <p><u>Defence of mental impairment in Magistrates Court</u></p> <p>If accused pleads not guilty because of mental impairment to a charge in Magistrates Court, MC must find that person is not guilty because of mental impairment if:</p> <ul style="list-style-type: none"> (a) MC considers the finding appropriate; and (b) prosecution agrees to the finding (s 327). <p>If accused has been charged with a <u>non-serious offence</u> and is found not guilty because of mental impairment, MC may:</p> <ul style="list-style-type: none"> (c) make an order requiring accused to submit to jurisdiction of ACAT to enable ACAT to make recommendations as to how accused should be dealt with; or (d) make any other orders it considers appropriate (s 328(1)). <p>The orders available to MC include:</p> <ul style="list-style-type: none"> (a) that accused be detained in custody until the ACAT orders otherwise; 		
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			<p>(b) that accused submit to the jurisdiction of the ACAT to enable the ACAT to make a mental health order (s 328(3)).</p> <p>If accused has been charged with a <u>serious offence</u> and is found not guilty because of mental impairment, MC must order that accused be detained in custody until ACAT orders otherwise UNLESS, in consideration of criteria for detention in s 308, it is satisfied that it is more appropriate to order that accused submit to jurisdiction of ACAT to enable ACAT to make mental health order: s 329.</p> <p><u>Criteria for detention – Supreme Court and Magistrates Court</u></p> <p>Pursuant to s 308, in making decision which could include an <u>order for detention</u>, the SC or MC shall consider the following criteria:</p> <ul style="list-style-type: none"> (a) the nature and extent of accused’s mental impairment, including the likely effect on person’s behaviour in the future; (b) whether or not, if released— <ul style="list-style-type: none"> (i) the accused’s health and safety is likely to be substantially impaired; or (ii) the accused is likely to be a danger to the community; (c) nature and circumstances of the offence; (d) the principle that a person should not be detained in a correctional centre unless <u>no other reasonable option</u> is available; (e) any recommendation made by the ACAT about how the accused should be dealt with. <p><u>Duration of detention – Supreme Court</u></p> <p>Supreme Court must not order that an accused be detained for a period greater than the term nominated under s 301 or 302, as the case may be: s 303.</p>		
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			<p><u>Duration of detention – if not acquitted following special hearing</u></p> <p>If, under ss 318 (2) or 319 (2), the SC makes an order that accused be detained in custody until ACAT orders otherwise, court shall indicate whether, if the special hearing had been normal criminal proceedings against a person who was fit to be tried, it would have imposed a sentence of imprisonment: s 301(1).</p> <p>If (under s 301(1)) the SC indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate: s 301(2).</p> <p><u>Duration of detention – if acquitted following special hearing</u></p> <p>If, under ss 323 or 324, the SC makes an order that the accused be detained in custody until ACAT orders otherwise, court shall indicate whether, if the accused had not been acquitted, it would have imposed a sentence of imprisonment: s 302.</p> <p>If SC indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate if person had been found guilty: s 302(2).</p> <p><u>Duration of detention – Magistrates Court</u></p> <p>The MC must not order that an accused be detained for a period greater than the term nominated under ss 304(2) or 305(2): s 306.</p> <p><u>Duration of detention – if charges dismissed following special hearing</u></p>		
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			<p>If, under ss 328 or 329, MC makes an order that accused be detained in custody until ACAT orders otherwise, the MC shall indicate whether, if the charges against the accused had not been dismissed, it would have imposed a sentence of imprisonment: s 304(1).</p> <p>If MC indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate: s 304(2).</p> <p><u>Duration of detention – if charges not dismissed</u></p> <p>If under s 335, MC makes order that the accused be detained in custody until ACAT orders otherwise, MC shall indicate whether, if the hearing had been a normal criminal hearing against a person fit to be tried for and convicted, it would have imposed a sentence of imprisonment: s 305(1).</p> <p>If MC indicates that it would have imposed a sentence of imprisonment, it shall nominate a term in respect of that offence, that is the best estimate of the sentence it would have considered appropriate: s 305(2).</p>		
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>NEW SOUTH WALES</p> <p><i>Mental Health (Forensic Provisions) Act 1990</i> (No 10) (NSW)</p>	<p><i>Mental condition</i> means a condition of disability of mind not including either mental illness or developmental disability of mind (s 3).</p> <p><i>Mentally ill person</i> is said to have the same</p>	<p><u>In District Court and Supreme Court:</u></p> <p>The question of unfitness is, so far as practicable, to be raised before the person is arraigned, but may be raised at any time, and on more than one occasion (s 7).</p> <p>If the question is raised <u>before</u> the</p>	<p><u>In District Court and Supreme Court:</u></p> <p>If, following inquiry, person is found unfit, the Court:</p> <p>(a) must refer the person to the Mental Health Review Tribunal (Tribunal), and</p> <p>(b) may discharge any jury and may, pending the determination of the Tribunal, do any one or more of the following:</p> <p>(i) adjourn the proceedings,</p> <p>(ii) grant the person bail,</p>	<p>There does not appear to be any specific provision for young people.</p>	<p><u>In District Court and Supreme Court:</u></p> <p>(Note: only few provisions relating to summary proceedings, but wide powers to make any orders considered appropriate – see s 32).</p>

	<p>meaning as under the <i>Mental Health Act 2007</i>, in which:</p> <ul style="list-style-type: none"> • mental illness means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms: <ul style="list-style-type: none"> (a) delusions, (b) hallucinations, (c) serious disorder of thought form, (d) a severe disturbance of mood, (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d) (s 4 <i>MHA</i>). • <i>Mentally ill person</i> means (s 14 <i>MHA</i>): if person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, 	<p>person is arraigned, the Court must determine whether an inquiry should be conducted before the hearing of the proceedings (s 8).</p> <p>If the question of is raised <u>after</u> the person is arraigned, the Court must hear any submissions relating to the conducting of an inquiry in the absence of any jury which has been constituted (s 9).</p> <p>Pursuant to s 10, if:</p> <p>(a) Court determines that an inquiry should be conducted and does not subsequently determine, before the inquiry is commenced, that there is no longer any need for such an inquiry; or</p> <p>(b) the question of unfitnes is raised after the person is arraigned,</p> <p>the Court must (except as provided by this section), as soon as practicable after the determination is made or the question is raised, conduct an inquiry to determine whether the person is unfit.</p> <p>Before conducting an inquiry, the Court may do any one or more of the following:</p> <p>(a) adjourn the proceedings,</p> <p>(b) grant the accused person bail,</p> <p>(c) remand the accused person in custody for a period not exceeding 28 days,</p>	<p>(iii) remand the person in custody until the determination of the Tribunal has been given effect to,</p> <p>(iv) make any other order that the Court considers appropriate (s 14).</p> <p>It is presumed that a person found to be unfit to be tried continues to be unfit until the contrary is, on the balance of probabilities, determined (s 15).</p> <p><u>Function of Tribunal on referral:</u></p> <p>Tribunal must, as soon as practicable after referral, determine whether, on the balance of probabilities, the person will, during the period of <u>12 months</u> after the finding of unfitnes, become fit to be tried (s 16(1)).</p> <p>If Tribunal determines that a person will, during the period of 12 months, become fit, the Tribunal must also determine whether or not:</p> <p>(a) the person is suffering from mental illness, or</p> <p>(b) the person is suffering from a mental condition for which treatment is available in a mental health facility and, if the person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility (s 16(2)).</p> <p>If determined that the person will become fit, the Court may then make orders granting bail, or order that the person be detained in mental health facility or in a place other than a mental health facility, for a period not exceeding 12 months (s 17).</p> <p>If Tribunal determines that a person <u>will not</u> become fit, the Tribunal must notify the DPP.</p> <p>If Court receives notification of determination that a person <u>will not</u> become fit to be tried, the Court is to conduct a <i>special hearing</i> as soon as practicable <i>unless</i> the</p>		<p>Pursuant to s 42, a “forensic patient” is, relevantly, a person detained in a mental health facility, correctional centre or other place pursuant to an order under ss 14, 17(3), 24, 25, 27 or 39.</p> <p>Effect of a custody order (or like order):</p> <p>Where is the person detained? Who makes decision?</p> <p>Court may make orders that the person be detained in mental health facility or in a place other than a mental health facility (s 27) (see Options column).</p> <p>Can they be released? By whom? On what grounds?</p> <p>By s 45, the Tribunal <u>must</u> review a person’s case as soon as practicable after orders made by Court for detention in mental health facility OR other facility (pursuant to ss 17 or 27).</p> <p>On a review, the Tribunal must determine whether person has become fit to be tried for an offence.</p> <p>Tribunal must review the case of each forensic patient every 6 months but may review at any time (s 46).</p> <p>By s 43, Tribunal must not make an order for release of a forensic patient unless it is satisfied that:</p>
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	<p>treatment or control of the person is necessary:</p> <p>(f) for the person's own protection from serious harm, or</p> <p>(g) for the protection of others from serious harm.</p> <p>No definition of <i>unfitness to be tried</i>.</p>	<p>(d) request the accused person to undergo a psychiatric examination or other examination,</p> <p>(e) request that a psychiatric report or other report be obtained,</p> <p>(f) discharge any jury constituted,</p> <p>(g) make any other order that the Court considers appropriate (s 10(3)).</p> <p>By s 10(4), if the Court is of the opinion that it is inappropriate, having regard to the trivial nature of the disability or any other matter, to inflict any punishment, the Court may determine <u>not to conduct an inquiry</u> and may dismiss the charge and order that the person be released.</p> <p>The question of unfitness to be determined by Judge alone: s 11.</p> <p><u>Conduct of inquiry:</u> The accused person is, unless the Court otherwise allows, to be represented by an Australian legal practitioner, and an inquiry is not to be conducted in an adversary manner (s 12). → NO ONUS – non-adversarial inquiry (cf Victoria).</p> <p><u>For proceedings before Magistrate:</u></p>	<p>DPP advises that no further proceedings will be taken (s 19(1)(b)).</p> <p>A <u>special hearing</u> is to ensure, despite unfitness, that the person is acquitted <i>unless</i> it can be proved, on the limited evidence available, the person committed the offence charged or other offence available in alternative (s 19(2)).</p> <p>If DPP advises Court that person will not be further proceeded against, the Court must order release of the person (s 20).</p> <p><u>Nature and conduct of special hearing:</u></p> <p>The question whether an accused person has committed an offence is to be determined by the Judge alone unless an election to have a jury is made by:</p> <p>(a) the accused person, and the Court is satisfied that the person sought and received advice from a legal practitioner and understood the advice, or</p> <p>(b) a legal practitioner representing the accused person, or</p> <p>(c) the prosecutor (s 21A).</p> <p>A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings and the accused person must, unless Court otherwise allows, be represented by legal practitioner (s 21(1) and (2)).</p> <p>At a special hearing:</p> <p>(a) the accused person is to be taken to have pleaded <u>not guilty</u>, and</p> <p>(b) the legal practitioner, if any, may exercise the rights of the person to challenge jurors or the jury, and</p> <p>(c) the accused person may raise any defence that could be properly raised if the special hearing were</p>	<p>(a) the safety of the patient or any member of the public will not be seriously endangered by the patient's release, and</p> <p>(b) other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care.</p> <p>Tribunal may, after reviewing under s 46, make an order as to:</p> <p>(a) patient's continued detention, care or treatment in a mental health facility, correctional centre or other place, or</p> <p>(b) the patient's release (either unconditionally or subject to conditions) (s 47(1)).</p> <p>However, Tribunal must not make an order as to the release of a forensic patient if person has been remanded in custody pending the person's return to court, but may make recommendation.</p> <p>On reviewing under s 46 the case of a forensic patient who is subject to a finding that the person is unfit to be tried, the Tribunal must make a recommendation as to fitness (s 47(4)).</p> <p>Tribunal must have regard to the following matters when determining what order to make about a person:</p> <p>(a) whether the person is suffering from a mental illness or other</p>
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		<p>No formal procedures are set out for a finding that a person is suffering from a mental illness or condition under s 32.</p> <p>Section 36 simply provides that a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.</p>	<p>an ordinary trial, and</p> <p>(d) the accused person is entitled to give evidence (s 21(3)).</p> <p>By s 21(4), at the commencement of a special hearing for which a jury has been constituted, the Court must explain to the jury the fact that the accused person is unfit to be tried, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts available and the consequences of those verdicts.</p> <p><u>Outcome of special hearing</u></p> <p>Verdicts available:</p> <p>(a) not guilty,</p> <p>(b) not guilty on the ground of mental illness,</p> <p>(c) that on the limited evidence available, the accused person committed the offence charged,</p> <p>(d) that on the limited evidence available, the accused person committed an offence available as an alternative to the offence charged (s 22(1)).</p> <p>A verdict in accordance with s 22(1)(c) or (d) constitutes a <i>qualified</i> finding of guilt and does not constitute a basis in law for any <u>conviction</u> (s 23(3)(a)) but is to be taken to be a conviction for the purpose of enabling a victim of the offence in respect of which the verdict is given to make a claim for compensation (s 23(3)(d)).</p> <p>If, following a special hearing, it is found that an accused person committed the offence, the Court:</p> <p>(a) must indicate whether, if the special hearing had been a normal trial, it would have imposed a <u>sentence of imprisonment</u>, and</p> <p>(b) where the Court would have imposed such a sentence, must nominate a term in respect of that offence, being the best estimate the Court would have considered appropriate if the special hearing</p>		<p>mental condition,</p> <p>(b) whether there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm or the protection of others from serious harm,</p> <p>(c) the continuing condition of the person, including any likely deterioration in the person's condition, and the likely effects of any such deterioration,</p> <p>(d) in the case of a proposed release, a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the person, as to the condition of the person and whether the safety of the person or any member of the public will be seriously endangered by the person's release,</p> <p>(e) in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody (s 74).</p> <p>By s 75, Tribunal may impose conditions on orders for release or granting leave of absence, including as to:</p> <ul style="list-style-type: none"> the appointment of a case manager, psychiatrist or other health care professional to assist in the care and treatment of the
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			<p>had been a normal trial (s 23(1)).</p> <p>By s 23(2), if Court would not have imposed a sentence of imprisonment, the Court may impose <i>any other penalty</i> or <i>make any other order</i> it might have made in a normal trial.</p> <p>If Court has nominated a limiting term, the Court: (a) must refer the person to Tribunal, and (b) may make such order with respect to custody as Court considers appropriate (s 24(1)).</p> <p>The Tribunal must then determine whether or not: (a) person is suffering from mental illness, or (b) person is suffering from a mental condition for which treatment is available in a mental health facility and, where person is not in a mental health facility, whether or not the person objects to being detained in a mental health facility (s 24(2)).</p> <p>The Court may: (a) If the Tribunal has determined that person is suffering from mental illness or that the person is suffering from a mental condition for which <u>treatment</u> is available in a mental health facility and that the person <u>does not object</u> to being detained in a mental health facility—<i>order that the person be taken to and detained in a mental health facility</i>, or (b) if the Tribunal has determined that the person is <u>not</u> suffering from mental illness or from a mental condition referred to in paragraph (a) or that the person is suffering from such a mental condition but that the person <u>objects</u> to being detained in a mental health facility—<i>order that the person be detained in a place other than a mental health facility</i> (s 27).</p>		<p>patient;</p> <ul style="list-style-type: none"> the care, treatment and review of the patient by persons referred to in paragraph (a), including home visits to the patient; medication. <p>What treatment is available?</p> <p>After determination, the Tribunal must notify the Court which referred the person to it of its determination and may also make a recommendation to the Court as to the <u>care or treatment</u> of the person (s 16(3),(3A)).</p> <p>Secyion 76B provides that the principles in s 68 of the <i>Mental Health Act 2007</i> (NSW) apply to forensic patients. Section 68 of the <i>MHLA</i> includes, relevantly, that:</p> <ul style="list-style-type: none"> people with a mental illness or mental disorder should receive the best possible care and treatment in the least restrictive environment enabling the care and treatment to be effectively given; people with a mental illness or mental disorder should be provided with timely and high quality treatment and care in accordance with professionally accepted standards; people with a mental illness or mental disorder should be provided with appropriate
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			<p>If verdicts are ‘not guilty by reason of mental illness’ or ‘not guilty’, the person is to be dealt with as if the person had been found not guilty at a normal trial: ss 25 and 26.</p> <p><u>For proceedings before Magistrate:</u></p> <p>By s 32, if, at any time, it appears to the Magistrate:</p> <p>(a) that the defendant is (or was at the time of alleged commission):</p> <ul style="list-style-type: none"> (i) developmentally disabled, or (ii) suffering from mental illness, or (iii) suffering from a mental condition for which treatment is available in a mental health facility, <p>but is not a <i>mentally ill person</i>, and</p> <p>(b) that, on an outline of the facts alleged or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,</p> <p>the Magistrate may take the action set out in s 32(2) or (3).</p> <p>Section 32(2) provides that the Magistrate may do any one or more of the following:</p> <ul style="list-style-type: none"> (a) adjourn the proceedings, (b) grant bail, (c) make any other order considered appropriate. <p>Section 32(3) provides that the Magistrate may make an order <u>dismissing the charge</u> and discharge the defendant:</p> <ul style="list-style-type: none"> (a) into the care of a responsible person, unconditionally or subject to conditions, or (b) on the condition that the defendant attend on a person or at a place specified by the Magistrate for assessment of mental condition or treatment or 		<p>information about treatment, treatment alternatives and the effects of treatment.</p> <p>However, there are no <i>rights</i> or entitlements to treatment conferred by these provisions: s 76B(5), and s 195 of the <i>MHA</i>.</p>
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			<p>both, or (c) unconditionally.</p> <p>By s 32(4), a decision to dismiss charges does not constitute a finding that the charges against the defendant are proven or otherwise.</p> <p>Section 33 provides for options regarding <i>mentally ill persons</i>: if, at any time, it appears to the Magistrate that the defendant is a <u>mentally ill person</u>, the Magistrate (without derogating from any other order the Magistrate may make) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or, may discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.</p>		
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>NORTHERN TERRITORY</p> <p><i>Mental Health and Related Services Act</i> (NT)</p> <p>Applies in the case of courts dealing summarily with matters (see s 73A(2)).</p>	<p>Definition of “complex cognitive impairment and related terms” provided in s 6A: A person has a <i>complex cognitive impairment</i> if the person has a cognitive impairment with a behavioural disturbance.</p> <p>A person has a <i>cognitive impairment</i> if the person has an intellectual</p>	<p>Section 73A(1) provides that the division entitled “Assessment and admission of person” applies to a person who is <u>charged</u> with an offence in proceedings before a court; and in the opinion of the court, <u>may require treatment or care under the MHRS Act</u>.</p> <p>By s 73A(2), the court may: (a) make one or more orders under this Division for the person; or</p>	<p>As outlined in adjacent column, s 73A provides that the court may:</p> <p>(a) make one or more orders under this Division for the person; or (b) dismiss the charge at any time if:</p> <p>(i) the court is exercising summary jurisdiction in the proceedings; and (ii) the proceedings are not proceedings for a committal or preliminary hearing; and (iii) the court is of the opinion that, if the person were found guilty, under the <i>Sentencing Act</i> the court would dismiss the charge</p>	<p>There does not appear to be any specific provision for young people.</p>	<p>The provisions allowing for detention appear only to relate to persons with a <u>mental illness</u> or <u>mental disturbance</u>, who might, on the order of the court, be detained and treated in a mental health facility to receive appropriate treatment (see ss 74A, 75).</p> <p>An authorised psychiatrist or the Tribunal may subsequently determine that the person does not fulfil the criteria for involuntary admission: s</p>

<p>impairment, neurological impairment or acquired brain injury (or any combination of these) that:</p> <p>(a) is, or is likely to be, permanent; and</p> <p>(b) results in substantially reduced capacity in at least one of the following:</p> <p>(i) self-care or management;</p> <p>(ii) decision making or problem solving;</p> <p>(iii) communication or social functioning.</p> <p>A person has a <i>behavioural disturbance</i> if the person's mental condition has deteriorated to the extent the person is behaving in an aggressive manner or in engaging in seriously irresponsible conduct.</p>	<p>(b) dismiss the charge at any time if:</p> <p>(i) the court is exercising summary jurisdiction in the proceedings; and</p> <p>(ii) the proceedings are not proceedings for a committal or preliminary hearing; and</p> <p>(iii) the court is of the opinion that, if the person were found guilty, under the <i>Sentencing Act</i> the court would dismiss the charge unconditionally or otherwise decline to record a conviction.</p> <p>If the offence is one to which section 121A(1)(b) of the <i>Justices Act</i> applies, such that court may hear and determine the charge summarily, providing (amongst other things) that the person <i>consents</i> to it being so disposed of, a person's legal representative may consent to the charge being heard summarily: s 73A(3) and (4).</p> <p>In forming opinion as to whether or not charges should be dismissed, and whether or not person lacks capacity to consent to charge being heard summarily, court may have regard to:</p> <p>(a) the appearance and behaviour of the person when brought before the court;</p> <p>(b) information given to the court during the proceedings (s</p>	<p>unconditionally or otherwise decline to record a conviction.</p> <p>Following assessment and consideration of the relevant expert report, if court is satisfied that:</p> <p>(a) the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance; and</p> <p>(b) resources are available at a specified approved treatment facility to diagnose and treat the person,</p> <p>the court may adjourn the proceedings for a period specified and order the person be detained in the approved treatment facility for examination and assessment of the person, and, if the person is admitted to the facility, for <u>diagnosis and treatment</u> for a limited time only (s 75(1),(2),(3)).</p> <p>By s 77(1),(2) and (4), if the court is exercising summary jurisdiction, court may request from the Chief Health Officer a certificate stating whether person was suffering from mental illness or mental disturbance at the time of alleged offence, and if so, whether the condition is likely to have materially contributed to conduct. The court <u>must</u> then dismiss the charge if satisfied that at the time:</p> <p>(a) the person was suffering from a mental illness or mental disturbance; and</p> <p>(b) as a consequence of the mental illness or disturbance, the person:</p> <p>(i) did not know the nature and quality of the conduct; or</p> <p>(ii) did not know the conduct was wrong; or</p> <p>(iii) was not able to control his or her actions.</p> <p>However, this does not apply to other forms of cognitive impairment.</p>	<p>75A.</p>
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		<p>73A(5)).</p> <p>By s 74(1) and (2), court may request from the Chief Health Officer advice regarding the availability of resources to assess the person in order to determine whether the person is in need of treatment under this Act and may adjourn proceedings to allow preparation of advice.</p> <p>The court may then adjourn proceedings and order person be assessed by a practitioner and a report of the assessment be prepared for the court: s 74A(1),(2).</p> <p>Relevantly, if practitioner is not satisfied the person fulfils the criteria for involuntary admission on the grounds of mental illness or mental disturbance, the report must state:</p> <p>(a) whether the person requires:</p> <p>(i) involuntary treatment in the community; or</p> <p>(ii) other treatment under this Act; and</p> <p>(b) if so – the form of the treatment (s 74A(8)).</p>	<p><u>Voluntary treatment plan</u></p> <p>The following applies if:</p> <p>(a) in proceedings before a court (other than proceedings for a committal or preliminary hearing) the person:</p> <p>(i) has pleaded guilty to an offence; or</p> <p>(ii) has been found guilty of an offence; and</p> <p>(b) the court is exercising summary jurisdiction (s 78(1)).</p> <p>By s 78(2), court may request from Chief Health Officer an assessment of, and if appropriate a voluntary treatment plan for, the person if:</p> <p>(a) court considers that person suffers from a <i>mental illness or mental disturbance</i> that is likely to have contributed to the conduct constituting the offence; and</p> <p>(b) the court is satisfied the person:</p> <p>(i) recognises that he or she suffers from a mental illness or mental disturbance; and</p> <p>(ii) has made, or is willing to make, a conscientious effort to address problems associated with the mental illness or mental disturbance; and</p> <p>(c) the court considers it appropriate for offence to be dealt with in this way having regard to the <u>nature and seriousness</u> of offence; and</p> <p>(d) the prosecution and the person consent to the offence being dealt with in this way.</p> <p>If appropriate to treat person under a voluntary treatment plan, the court may:</p> <p>(a) adjourn the proceedings for a period not exceeding 6 months; and</p> <p>(b) grant bail to the person on the condition that the person enters into an agreement to participate in the treatment plan (s 78A(3)).</p> <p>If it is not appropriate to treat the person under a voluntary treatment plan, the court must deal with the</p>		
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			<p>person under the <i>Sentencing Act</i> (s 78(4)).</p> <p>Under s 78B(3), if the person has completed the treatment plan, the court may dismiss the charge; or deal with the person under the Sentencing Act.</p>		
<p>NORTHERN TERRITORY</p> <p><i>Criminal Code Act 1983</i> (NT), Schedule 1, Pt IIA</p> <p>(for proceedings in the Supreme Court only – see s 43A definition of “court”).</p>	<p><u>Mental impairment</u></p> <p>By s 43A, <i>mental impairment</i> includes senility, intellectual disability, mental illness, brain damage and involuntary intoxication.</p> <p>A defence of <i>mental impairment</i> is also set out in s 43C(1) - defence is established if the court finds that a person charged with an offence was, at the time of carrying out the conduct constituting the offence, suffering from a mental impairment and as a consequence:</p> <p>(a) he or she did not know the nature and quality of the conduct;</p> <p>(b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the</p>	<p>A person is presumed to be fit to stand trial; the presumption is rebutted only if established by investigation that person is unfit: s 43K(1),(2).</p> <p>If one of the parties to proceedings raises the question of fitness, the party raising the question bears the onus of rebutting the presumption: s 43K(3).</p> <p>If court raises the question, prosecution has carriage of the matter but no party bears the onus: s 43K(4).</p> <p>If question arises at committal proceeding, the committal proceeding is to be completed and if the accused person is committed for trial, the question is to be reserved for consideration by court during trial: s 43M(1).</p> <p>The question may be raised at any time after the presentation of the indictment: s 43N.</p> <p><u>When investigation must be ordered</u></p> <p>The court <u>must</u> order an</p>	<p><u>If jury finds person unfit after investigation</u></p> <p>If the jury finds a person unfit, Judge must determine whether there is a reasonable prospect that the accused person might, <u>within 12 months</u>, regain necessary capacity: s43R(1).</p> <p>If Judge determines that it is <u>not likely</u> that person will become fit within 12 months, court must hold a <i>special hearing</i> within 3 months after this determination: s 43R(3).</p> <p>If Judge determines that there is a reasonable prospect that person might become fit within 12 months, Judge must adjourn the matter for a period not exceeding 12 months: s 43R(4).</p> <p>If the matter is adjourned under s 43R(4), the Judge may make the interim orders, including:</p> <p>(a) orders for bail;</p> <p>(b) order that person be remanded in custody (whether in a custodial correctional facility or another place the Judge considers appropriate): s 43R(5).</p> <p>However, order must not be made for person to be in custody in a custodial correctional facility unless Judge is satisfied that there is no practicable alternative: s 43R(6).</p> <p>At expiry of adjournment, accused person is presumed fit unless a party or court raises a real and substantive question as to fitness: s 43R(7).</p>	<p>There does not appear to be any specific provision for young people.</p>	<p>Where is the person detained? Who makes decision?</p> <p>The court, in making a supervision order, may commit the accused person to custody in a custodial correctional facility or in another place (an “appropriate place”) court considers appropriate: s 43ZA.</p> <p>Can they be released? By whom? On what grounds?</p> <p>By s 43ZD(1), any of the following may apply to court for an order varying or revoking a supervision order:</p> <p>(a) DPP;</p> <p>(b) supervised person;</p> <p>(c) person with custody, care, supervision of supervised person;</p> <p>(d) any other person who has an interest recognised by the court.</p> <p>On hearing the application, the court may confirm the order, revoke the order and released the person, or vary the conditions of the order: s 43ZD(4).</p> <p><u>Major reviews</u></p>

<p>conduct, as perceived by reasonable people, was wrong); or</p> <p>(c) he or she was not able to control his or her actions.</p> <p>If defence of mental impairment is established, the person must be found not guilty because of mental impairment: s 43C(2).</p> <p>The party raising the defence of mental impairment bears the onus of rebutting the presumption that person not suffering mental impairment: s 43D(1),(2).</p> <p><u>Unfitness to plead</u></p> <p>Under s 43J(1), a person is unfit to stand trial if the person is:</p> <p>(a) unable to understand the nature of the charge;</p> <p>(b) unable to plead to the charge and to exercise the right of challenge;</p> <p>(c) unable to understand the nature of the trial (that is that a trial is</p>	<p>investigation into the fitness of the accused person to stand trial if:</p> <p>(a) the question of fitness was reserved during committal proceedings; or</p> <p>(b) Judge is satisfied that there are reasonable grounds on which to question fitness (s 43N(2)).</p> <p><u>Procedure for investigation</u></p> <p>Before or at time court makes order for an investigation, court may also make the interim orders it considers just, including:</p> <p>(a) order for bail; or</p> <p>(b) order that the person be remanded in custody (whether in custodial correctional facility or another place (s 43O).</p> <p>At the commencement, Judge must explain to the jury:</p> <p>(a) the reason for the investigation;</p> <p>(b) the findings that may be made and consequences of those; and</p> <p>(c) the standard of proof required (s 43P(1)).</p> <p>If Judge considers it in the interests of justice, the court may call evidence on its own initiative, require the accused person to undergo examination by an expert: s 43P(3).</p>	<p>Where a real and substantial question as to fitness has been raised under s 43R(7), court must:</p> <p>(a) if adjournment was less than 12 months – adjourn the matter for a further period that, when added together with the first period of adjournment, <u>does not exceed 12 months</u>; or</p> <p>(b) hold a special hearing within 3 months after the date the adjournment expires.</p> <p><u>Special hearing</u></p> <p>By s 43V(1), the purpose of special hearing is to determine whether an accused person found not fit to stand trial:</p> <p>(a) is not guilty;</p> <p>(b) is not guilty because of mental impairment; or</p> <p>(c) committed the offence.</p> <p>A special hearing is to be conducted as nearly as possible as if it were a trial: s 43W(1).</p> <p>At a special hearing:</p> <p>(a) person is taken to plead not guilty;</p> <p>(b) person's legal representative (if any) may exercise person's right of challenge;</p> <p>(c) person may raise any defence (including the defence of mental impairment) that he or she could raise at a criminal trial;</p> <p>(d) rules of evidence apply;</p> <p>(e) person may give evidence; and</p> <p>(f) any alternative finding of guilt available for a jury at a criminal trial is available at special hearing (s 43W(2)).</p> <p>Judge must explain to the jury:</p> <p>(a) that a real and substantial question has been raised as to fitness;</p> <p>(b) the meaning of unfit to stand trial;</p> <p>(c) purpose of special hearing;</p>	<p>Section 43ZG also provides for major review of supervision orders.</p> <p>When court makes supervision order, court must fix a term in accordance with subs (2), (3) or (4) that is appropriate for the offence: s 43ZG(1).</p> <p>Subject to subs (3) and (4), term fixed under s 43ZG(1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the court's opinion, have been the appropriate sentence to impose on person if he or she had been found guilty of offence charged (s 43ZG(2)).</p> <p>By s 43ZG(3), if the offence carries a mandatory penalty of life imprisonment or court is of the view that life imprisonment would have been an appropriate penalty the court must fix the period it would have set as the non-parole period for the offence under the <i>Sentencing Act</i>.</p> <p>If person was charged with multiple offences, court must fix the term by reference to the offence carrying the longest maximum period of imprisonment: s 43ZG(4).</p> <p>Important, by s 43ZG(5), at least <u>3 months (but not more than 6 months)</u> before expiry of the term fixed, court must <u>conduct a review</u> to</p>
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	<p>an inquiry as to whether the person committed the offence);</p> <p>(d) unable to follow the course of the proceedings;</p> <p>(e) unable to understand the substantial effect of evidence; or</p> <p>(f) unable to give instructions to legal counsel.</p> <p>However, a person is not unfit to stand trial only because he or she suffers from memory loss: s 43J(2).</p>	<p>Parties may agree at any time that person is unfit and court may dispense with an investigation: s 43T(1).</p>	<p>(d) standard of proof required (s 43W(3)).</p> <p>If jury at special hearing finds person <u>not guilty because of mental impairment</u>, the court <u>must</u>:</p> <p>(a) declare that person is liable to supervision; or</p> <p>(b) order that person be released unconditionally (s 43X(2)).</p> <p>If jury at special hearing finds that person <u>committed the offence</u>, the finding:</p> <p>(a) is taken to be a <i>qualified</i> finding of guilt;</p> <p>(b) constitutes a bar to further prosecution in respect to the same conduct; and</p> <p>(c) is subject to appeal in the same manner as if it were a finding of guilt at a criminal trial, and court <u>must</u> declare that person is liable to supervision or discharge person unconditionally (s 43X(3)).</p> <p>If court declares person liable to supervision, the appropriate person must, within 30 days, prepare and submit a report to the court on the mental impairment/condition of the person: s 43ZJ(1).</p> <p>Note: “<i>appropriate person</i>” means (s 43A):</p> <p>(a) in relation to person detained or in custody in, or receiving treatment, services or assistance in or from an approved treatment facility within the meaning of the <i>Mental Health and Related Services Act</i> – the CEO (Health);</p> <p>(b) in relation to person detained or in custody in, or receiving treatment, services or assistance in, at or from, a prescribed person, organisation or facility or a person, organisation or facility who or which is a member of a class of prescribed persons, organisations or facilities – the CEO (Health);</p> <p>(c) in relation to person who is a represented person within the meaning of the <i>Adult Guardianship Act</i> – the CEO (Health); or</p> <p>(d) in relation to person held in custody in a custodial</p>	<p>determine whether to release the person from the order.</p> <p>On completing review under s 43ZG(5), unless court considers that the safety of the person or the public is likely to be seriously at risk if person is released, court must release the supervised person unconditionally: s 43ZG(6).</p> <p><u>Periodic review</u></p> <p>By s 43ZK(1), if court makes supervision order, the appropriate person must, at intervals of not more than 12 months, until the supervision order is revoked, prepare and submit a report to the court on the treatment and management of the supervised person's mental impairment, condition or disability.</p> <p>This s 43K report is to contain:</p> <p>(a) details of the treatment, therapy or counselling that person has received, and the services that have been provided to the supervised person, since the supervision order was made or the last report was prepared; and</p> <p>(b) details of any changes to the prognosis of person's mental impairment, condition or disability and to the plan for managing the mental impairment (s 43K(2)).</p> <p>By s 43ZH(1), after considering a</p>
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			<p>correctional facility or under supervision of a probation and parole officer under the <i>Parole Act</i> – the chief executive officer of the Agency administering that Act.</p> <p>“CEO (<i>Health</i>)” means the chief executive officer of the Agency administering the <i>Medical Services Act</i>.</p> <p>The report under s 43ZJ(1) must contain:</p> <ul style="list-style-type: none"> (a) a diagnosis and prognosis of person's mental impairment, condition or disability; (b) details of person's response to any treatment, therapy or counselling received and any services provided; and (c) a suggested treatment plan (s 43ZJ(2)). <p><u>Supervision orders</u></p> <p>A supervision order may:</p> <ul style="list-style-type: none"> (a) if it is a custodial supervision order – commit the accused person to custody: <ul style="list-style-type: none"> (i) subject to subs (2) – in a custodial correctional facility; or (ii) subject to subs (3) – in another place (an “appropriate place”) court considers appropriate; or (b) if it is a non-custodial supervision order – release person (s 43ZA(1)). <p>However, court <u>must not</u> make custodial supervision order committing person to custody in a custodial correctional facility unless satisfied that there is no practicable alternative (s 43ZA(2)).</p> <p>By s 43ZA(3), unless court receives a certificate from the CEO (Health), court must not make a supervision order:</p> <ul style="list-style-type: none"> (a) committing person to custody in an appropriate place; or (b) providing for person to receive treatment or other 		<p>report submitted under s 43ZK, if court considers it appropriate, court <u>may</u> conduct a review to determine whether person may be released from supervision order.</p> <p><u>Grounds for release</u></p> <p>The court must consider the matters set out in s 43N(1) (see previous column).</p> <p>Further, court must not make an order releasing a person from custody (whether conditionally or otherwise) or significantly reducing the supervision to which a person is subject unless:</p> <ul style="list-style-type: none"> (a) the court has: <ul style="list-style-type: none"> (i) obtained and considered 2 expert reports; and (ii) considered the reports submitted to the court under ss 43ZJ and 43ZK and received under s 43ZL, if any; and (b) the court is satisfied that the victim of the offence, the next of kin of the supervised person and, if applicable, the Aboriginal community, were given reasonable notice of the proceedings concerned (s 43ZN(2)). <p>What treatment is available?</p> <p>Treatment is clearly contemplated for a person subject to a supervision order: see ss 43ZJ, 43ZA.</p>
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			<p>services in, at or from an appropriate place.</p> <p>Certificate of the CEO (Health) must state:</p> <p>(a) facilities or service available in the appropriate place for custody, care or treatment of person; and</p> <p>(b) if place is security facility, person fulfils criteria for involuntary treatment under <i>Disability Services Act</i>.</p> <p><u>Principles to be applied when making order</u></p> <p>Court must apply principle that restrictions on person's freedom and personal autonomy are to be kept to the minimum consistent with maintaining and protecting the safety of the community: s 43ZM.</p> <p>Section 43ZN(1) provides that court must have regard to following matters in making order:</p> <p>(a) whether person is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;</p> <p>(b) the need to protect people from danger;</p> <p>(c) the nature of the mental impairment, condition or disability;</p> <p>(d) the relationship between the mental impairment, condition or disability and the offending conduct;</p> <p>(e) whether there are adequate resources available for treatment and support of person in the community;</p> <p>(f) whether person is complying or is likely to comply with conditions of supervision order...</p>		<p>It appears that this is so even if the person is detained in a custodial correctional facility. While a Certificate of the CEO (Health) is not required for such a person (by s 43ZA(3)), it appears that a s 43J report will still be prepared in respect of that person before a supervision order is made, which includes a diagnosis and <u>suggested treatment plan</u>: s 43J(2).</p> <p>Similarly, a report under s 43K (see above) clearly contemplates regular reporting on the progress of treatment and the provision appears to apply to those subject to a custodial supervision order.</p>
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge makes decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)

<p>QUEENSLAND</p> <p><i>Mental Health Act 2000</i> (Qld)</p> <p>Note: the issue of fitness to plead/stand trial is dealt with in two separate statutes: the MHA, and the <i>Criminal Code 1899</i> (see below).</p> <p>Note also: relevant article of which use has been made in preparation of this part of table: Suzie O’Toole, Jodie O’Leary and Bruce D Watt, ‘Fitness to plead in Queensland’s youth justice system: The need for pragmatic reform’ (2015) 39 Crim LJ 40.</p>	<p><i>fit for trial</i>, for a person, means fit to plead at the person’s trial and to instruct counsel and endure the person’s trial, with serious adverse consequences to the person’s mental condition unlikely (Dictionary in Schedule).</p> <p>The MHA provides a definition for mental illness only, and no definition for “intellectual disability” or “cognitive disability”.</p> <p>The <i>Forensic Disability Act 2011</i> provides the following definitions (ss 11 and 12): A cognitive disability is a condition that is— (c) attributable to a cognitive impairment; and (d) a disability within the meaning of the Disability Services Act.</p> <p>An intellectual disability is a disability within the meaning of the Disability Services Act that— (i) is characterised by significant</p>	<p>The Mental Health Court (MHC) is a specialist, superior court: s 381.</p> <p>The MHC (constituted by a Supreme Court judge – s 385) must be assisted by 2 psychiatrists: s 382(2).</p> <p>In exercising jurisdiction, MHC must inquire into the matter before it, and may inform itself in any way it considers appropriate (s 383(2)). It is not bound by the rules of evidence (s 404).</p> <p><u>Procedure for person pleading guilty to indictable offence in Supreme and District Court – referral to MHC</u></p> <p>The following procedure applies if:</p> <p>(a) the person <u>pleads guilty</u> to indictable offence at trial and it is alleged or appears that person is mentally ill, or may have been when alleged offence committed; or (b) on appearance for sentence of a person who has pleaded guilty to an indictable offence, it is alleged or appears that person is mentally ill, or may have been at the time when alleged offence was committed (s 61).</p> <p>The Supreme or District Court may order a plea of <u>not guilty</u> be</p>	<p>If MHC decides a person is unfit for trial but unfitness is not permanent, proceedings are stayed until, on a review, the tribunal decides the person is fit for trial (s 280).</p> <p>If MHC decides a person is unfit for trial and unfitness is permanent, proceedings against the person for the offence are discontinued and further proceedings cannot be taken against person for the same act/omission: s 283.</p> <p>If MHC decides a person charged with an <u>indictable offence</u>— (a) was of unsound mind when alleged offence committed; or (b) is unfit for trial and the unfitness is permanent;</p> <p>the court may make an order (a "forensic order (Mental Health Court)" or a "forensic order (Mental Health Court – Disability)") that the person be detained for involuntary treatment or care (s 288(1),(2)).</p> <p>For such an order, MHC must have regard to — (a) the seriousness of the offence; (b) the person’s treatment or care needs; (c) the protection of the community.</p> <p>If MHC finds person is unfit for trial and the unfitness is not permanent, the MHC must make an order that person be detained for involuntary treatment or care (s 288(1),(3)).</p> <p><u>Reviews by Mental Health Review Tribunal if not permanent</u></p> <p>If MHC decides person is unfit for trial but unfitness is not permanent, Tribunal must review the person’s mental condition— (a) at least once every 3 months for the year starting</p>	<p>There does not appear to be any specific provision for young people.</p> <p>Section 412 provides that if a young person is the subject of a hearing in the MHC, the hearing is not open to the public.</p>	<p>Where is the person detained?</p> <p>If MHC <u>does not</u> consider the person’s unsoundness of mind or unfitness for trial is a consequence of an <i>intellectual disability</i>, the order— (a) must be a forensic order (Mental Health Court); and (b) must state that the person is to be detained in a stated authorised mental health service for involuntary treatment or care (s 288(6)).</p> <p>If MHC considers the person’s unsoundness of mind or unfitness for trial is a consequence of an <i>intellectual disability</i>, the order— (a) must be a forensic order (Mental Health Court—Disability); and (b) must state which of the following services the person is to be detained in for care— (i) the forensic disability service; (ii) a stated authorised mental health service.</p> <p>In deciding whether person is to be detained in the <u>forensic disability service</u> for care, MHC must have regard to: (a) whether the person has an intellectual or cognitive disability within the meaning of the <i>Forensic Disability Act 2011</i> but does not require involuntary treatment for a mental illness under this Act; (b) whether the person is likely to</p>
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	<p>limitations in intellectual functioning and adaptive behaviour; and</p> <p>(ii) originates in a person before the age of 18.</p> <p>The <i>Disability Services Act 2006</i> provides (s 11): a disability is a person's condition that is attributable to intellectual, psychiatric, cognitive, neurological, sensory or physical impairment; or a combination of impairments mentioned; and results in substantial reduction of person's capacity for communication, social interaction, learning, mobility or self care or management; and the person needing support.</p> <p>In addition, the impairment may result from an acquired brain injury; the disability must be permanent or likely to be permanent; and the disability may be, but need not be, of a chronic episodic nature (s 11(2), (3) and (4)).</p>	<p>entered for a person for an indictable offence and, if under the <i>Criminal Code</i> s 651 a charge of a summary offence laid against the person is to be heard and decided by the court, the summary offence (s 62(1)).</p> <p>On making such an order, the court must:</p> <p>(a) adjourn the trial; and (b) refer the matter of person's mental health condition to the MHC; (c) remand person in custody or grant bail (s 62(2)).</p> <p><u>Person already involuntary patient; simple or indictable offence – referral to MHC</u></p> <p>The following procedure applies if:</p> <p>(e) person is charged with simple or indictable offence; and (f) an involuntary treatment or forensic order is made for the person, irrespective of which happened first (s 236).</p> <p>Note: a “forensic order” is an order made by the MHC that the person be detained for involuntary treatment or care (on grounds of mental health or disability) (see s 288).</p> <p>Following awareness by the treatment providers that a person</p>	<p>on the day of the MHC's decision; and</p> <p>(b) afterwards at intervals of not more than 6 months (ss 208, 209).</p> <p>Tribunal must decide whether the person is fit for trial: s 212(1).</p> <p>If Tribunal decides person unlikely to be fit for trial in a reasonable time, must give written report to Attorney-General: s 212(3).</p> <p>Attorney-General must then either order that proceedings be discontinued, or defer a decision and order that Tribunal continue to carry out reviews: s 214(2).</p> <p>Proceedings are discontinued at the end of:</p> <p>(a) for proceedings for an offence for which offender is liable to life imprisonment – 7 years; (b) for other proceedings – 3 years;</p> <p>if the Attorney-General has not ordered proceedings to be discontinued and Tribunal has not decided person is fit for trial (s 215(1),(2)).</p> <p><u>Community treatment</u></p> <p>MHC may also order/approve limited community treatment subject to the reasonable conditions the court considers appropriate: s 289(1).</p> <p>However, MHC must not order or approve limited community treatment unless satisfied patient does not represent an unacceptable risk to the safety of the patient or others: s 289(4).</p> <p>In deciding whether to order or approve limited community treatment, MHC must have regard to—</p>	<p>benefit from care and support within the meaning of the <i>Forensic Disability Act 2011</i> provided in the forensic disability service (s 288(8)).</p> <p>Person must not be detained in the forensic disability service for care unless a certificate given to MHC under section 288AA states that the forensic disability service has the capacity for the person's detention and care (s 288(9)).</p> <p>Note: s 288(8) and (9) only apply to orders made under s 288(3) – where unfitness not permanent.</p> <p>Who makes decision?</p> <p>The MHC (see above).</p> <p>Can they be released? By whom? On what grounds?</p> <p><u>Tribunal must review and may release</u></p> <p>Section 293 provides that person may be detained in the authorised mental health service stated in the forensic order <u>until patient ceases to be a forensic patient</u>.</p> <p>Pursuant to s 133 of <i>Forensic Disability Act 2011</i>, this provision also applies to “forensic disability clients charged with offences”.</p> <p>By s 207, if <u>Mental Health Review</u></p>
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		<p>may fall within these provisions and various notice procedures and examinations and reports (see ss 236 – 239A), the director (either director under the <i>Forensic Disability Act 2011</i>, or the Director of Mental Health) must:</p> <p>(a) refer the matter of patient’s mental to the MHC or DPP; and</p> <p>(b) if reference is to MHC —give written notice to DPP.</p> <p><u>However</u>, director must not refer the matter to MHC if patient is charged only with a simple offence.</p> <p>If <u>indictable offence</u>, director may refer to DPP only—</p> <p>(a) if director (of mental health) satisfied the offence is not of a serious nature; or</p> <p>(b) if the director (of mental health) satisfied the offence is of a serious nature and believes the patient—</p> <p>(i) is <u>fit</u> for trial; and</p> <p>(ii) was not of unsound mind when the alleged offence committed (s 240(4)).</p> <p>Notice must be accompanying by original psych report and any s 239A report: s 242(2). If reference is to DPP, notice must be accompanied by assessment of matter by director, including any recommendation: s 242(2A).</p>	<p>(a) patient’s mental state and psychiatric history;</p> <p>(b) offence leading to the making of the forensic order;</p> <p>(c) patient’s social circumstances;</p> <p>(d) patient’s response to treatment and willingness to continue treatment or care (s 289(6)).</p>		<p><u>Tribunal</u> revokes the forensic order for the patient, the patient ceases to be a forensic patient.</p> <p>The majority of provisions for review by the Tribunal under the MHA also apply to “forensic disability clients”: s 131 <i>Forensic Disability Act 2011</i>.</p> <p>Tribunal must review a forensic patient’s mental condition—</p> <p>(a) within 6 months after the forensic order is made and afterwards at intervals of <u>not more than 6 months</u>; and</p> <p>(b) on application (s 200(1)).</p> <p>Tribunal may also do so on its own initiative (s 200(3)).</p> <p>Tribunal must conduct a hearing for reviewing: s 200(6).</p> <p>In making a decision in relation to a patient whose most recent forensic order is a “forensic order (Mental Health Court—Disability)”, Tribunal must have regard to:</p> <p>(a) patient’s mental state;</p> <p>(b) patient’s intellectual disability;</p> <p>(c) each offence leading to the forensic order;</p> <p>(d) patient’s social circumstances;</p> <p>(e) patient’s treatment plan;</p> <p>(f) patient’s behaviour in response to that plan, including behaviour that places the patient’s health or safety or the safety of others at risk;</p> <p>(g) any report by the director</p>
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		<p>Proceedings then suspended until DPP decides that the proceedings continue or be discontinued; or MHC has made a decision.</p> <p>DPP may also refer to MHC, unless patient charged only with simple offence: s 247(1)(c), (2).</p> <p><u>References to MHC generally (indictable offences only)</u></p> <p>The provisions concerning referral generally to MHC said to apply if there is reasonable cause to believe a person alleged to have committed an indictable offence—</p> <p>(a) is mentally ill or was mentally ill when alleged offence was committed; or</p> <p>(b) has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by MHC (s 256).</p> <p>The matter of the person’s mental condition relating to the offence may be referred to MHC by—</p> <p>(a) person or legal representative; or</p> <p>(b) the Attorney-General;</p> <p>(c) DPP; or</p> <p>(d) if the person is receiving treatment for mental illness—the director; or</p> <p>(e) if the person is receiving care under this Act for an intellectual disability—the</p>			<p>(forensic disability) under the <i>Forensic Disability Act 2011</i>, s141. (s 203(6A)).</p> <p>Tribunal must not revoke forensic order unless satisfied the patient does not represent an unacceptable risk to the safety of the patient or others, having regard to the patient’s mental illness or intellectual disability: s 204.</p> <p><u>MHC inquiries</u></p> <p>MHC may also inquire into detention of patients in authorised mental health services (Ch 11, Part 9 of MHA) → this also applies (by s 137 of <i>Forensic Disability Act 2011</i>) to detention in disability service.</p> <p>An inquiry into detention may occur on the basis of an application (s 427) or on MHC’s own initiative (s 428).</p> <p>If satisfied the patient is unlawfully detained, MHC must, by order, direct the patient be immediately discharged from the health service: s 433(1).</p> <p>What treatment is available?</p> <p>An individual development plan must be prepared for every “forensic disability client”: s 14 <i>Forensic Disability Act 2011</i>.</p> <p>The plan must contain (s 15 <i>FDA</i>):</p> <p>(a) outline of proposed</p>
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		<p>director (s 257(1)).</p> <p>However, director may make a reference for a person who is not under an involuntary treatment or forensic order only if person <i>agrees</i> to the reference, or director declares that the director is satisfied the person does not have capacity to agree (s 257(2)).</p> <p><u>Inquiries on references to MHC</u></p> <p>On the hearing of the reference, the MHC must—</p> <p>(a) decide whether the person was of unsound mind when alleged offence committed; and</p> <p>(b) if the person is alleged to have committed murder and the court decides the person was <u>not of unsound mind</u>, decide whether the person was of diminished responsibility (s 267).</p> <p>If finding of unsound mind is made, proceedings are discontinued: s 281.</p> <p>However, MHC must not make a decision under s 267 if satisfied there is reasonable doubt the person committed the alleged offence (s 268(1)).</p> <p>The MHC must decide whether the person is <u>fit for trial</u> if—</p> <p>(a) the court decides the person</p>			<p>arrangements for provision of services for:</p> <p>(i) promoting client’s development, habilitation, rehabilitation and quality of life;</p> <p>(ii) reducing intensity, frequency and duration of the client’s behaviour that places the client’s health or safety or the safety of others at risk; and</p> <p>(iii) when appropriate, supporting the client’s reintegration into the community.</p> <p>(b) outline of the proposed plan for the client’s transition to participation and inclusion in the community;</p> <p>(c) intervals for regularly reviewing and, if necessary, changing the plan to ensure its continued appropriateness;</p> <p>(d) the intervals for the client’s regular assessment.</p> <p>Plan must also include any medication prescribed by doctor: s 15(3).</p> <p>As stated in s 4, the <i>Forensic Disability Act 2011</i> aims to provide for a multidisciplinary model of care and support, designed to promote continual development, independence and quality of life.</p>
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		<p>was <u>not of unsound mind</u>; or</p> <p>(b) under ss 268 or 269, the court must not decide whether the person was of unsound mind when the alleged offence was committed (s 270(1)).</p> <p>The court must also decide whether the unfitness for trial is permanent: s 271.</p>			
<p>QUEENSLAND</p> <p><i>Criminal Code 1899</i> (Qld)</p> <p>Note: O’Toole, O’Leary and Watt suggest that the regime for determining unfitness under the <i>Criminal Code</i> has fallen into disuse in favour of the MHC regime: Suzie O’Toole, Jodie O’Leary and Bruce D Watt, ‘Fitness to plead in Queensland’s youth justice system: The need for pragmatic reform’ (2015) 39 Crim LJ 40, 44.</p>	<p>No definition of fitness to plead.</p> <p>Section 613 describes “<i>Want of understanding of accused person</i>” as being when a person is incapable of “understanding the proceedings at the trial, so as to be able to make a proper defence”.</p>	<p><u>Indictable offences in superior criminal courts</u></p> <p>If, when accused person is called to plead to indictment, it appears uncertain, for any reason, whether person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence, a <u>jury</u> is to find whether the person is capable: s 613(1).</p> <p>There does not appear to be any provision dealing with considerations in determining whether or not an accused is capable of understanding.</p> <p>Section 645 concerns finding an accused to be of “unsound mind”. If, on the trial of a person charged with an indictable offence, it is alleged or appears that the person is not of sound mind, the <u>jury</u> must consider the matter.</p>	<p><u>Indictable offences in superior criminal courts</u></p> <p>If jury finds person is not capable, they must say whether the reason is that the accused person is of unsound mind, or if it is for some other reason which they must specify (s 613(3)).</p> <p>If person is found not capable, the court may order the accused person to be <u>discharged</u>, or may order the person to be kept in <u>custody</u> in such place and in such manner as the court thinks fit, <u>until the person can be dealt with according to law</u>: s 613(3).</p> <p>If the jury finds that the person is not of sound mind under s 645, the court must order that person be kept in strict custody, in such place and in such manner as the court thinks fit, until the person is dealt with under the MHA.</p> <p><u>Procedure under the MHA following s 613/645 finding</u></p> <p>The following procedure applies if a s 613/645 finding is made, and the court has made a order for detention (either in mental health service (“forensic order (Criminal Code)”) or elsewhere (“custody order”) under the <i>Criminal Code</i>: s 299 MHA.</p>	<p>There does not appear to be any specific provision for young people.</p> <p>Sections 613 and 645 only apply for matters proceeding upon indictment.</p> <p>Matters proceeding summarily in Childrens Court are governed by the <i>Justices Act 1886</i> (Qld) - no provisions on issue of fitness to plead.</p> <p>See, in this regard, Suzie O’Toole, Jodie O’Leary and Bruce D Watt, ‘Fitness to plead in Queensland’s youth justice system: The need for pragmatic reform’ (2015) 39 Crim LJ 40, 44.</p>	<p>Where is the person detained? Who makes decision?</p> <p>Pursuant to s 613, if a jury finds a person incapable of understanding, the court <i>may</i> order a person be kept in custody “in such place and in such manner as the court thinks fit”. Very broad provision.</p> <p>The decision may then fall to the Minister pursuant to ss 301, 302 MHA: if Minister satisfied it is necessary for the proper treatment or care of the person, the Minister may direct the person be detained in a stated high security unit or in an authorised mental health service.</p> <p>A public sector mental health service may be declared to be a high security unit: s 496 MHA.</p> <p>There does not appear to be express provision for the circumstance where person is not suffering from mental illness.</p>

			<p>The matter of the person's mental condition must be referred to the Mental Health Review Tribunal: ss 300, 301.</p> <p><u>Minister may make forensic order</u></p> <p>If a <i>custody order</i> has been made, and the Minister satisfied it is necessary for the proper treatment or care of the person, the Minister may (a "forensic order (Minister)") direct the person be detained in—</p> <p>(c) a stated high security unit; or</p> <p>(d) if the Minister is satisfied the person can be safely detained in an authorised mental health service that is not a high security unit—a stated authorised mental health service (s 301(1),(2)).</p> <p><u>Tribunal review following s 613/645 finding</u></p> <p>If on the trial of a person charged with an indictable offence a jury has made a ss 613 or 645 finding and proceedings have not been discontinued or the person has not been found fit for trial, Tribunal must review the person's mental condition—</p> <p>(a) at least once every 3 months for the year starting on the day of jury's finding; and</p> <p>(b) afterwards at intervals of not more than 6 months (ss 208, 209 of <i>Mental Health Act</i>).</p>		<p>Can they be released? By whom? On what grounds?</p> <p>By s 204(3), Tribunal must not revoke the forensic order for the patient if—</p> <p>(a) a jury has made a section 613 or 645 finding for the patient or MHC has decided the patient is unfit for trial; and</p> <p>(b) proceedings against the patient have not been discontinued.</p> <p>However, following Tribunal review under MHA (see above and see s 208ff), proceedings may be discontinued.</p> <p>What treatment is available?</p> <p>It appears that treatment is only contemplated for those suffering a mental illness.</p>
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge makes decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>SOUTH AUSTRALIA</p> <p><i>Criminal Law Consolidation Act 1935</i> (SA), Part 8A</p>	<p><i>Mental impairment</i> is defined in s 269A as including—</p> <p>(a) a mental illness; or</p> <p>(b) an intellectual disability; or</p> <p>(c) a disability or</p>	<p>A person's mental fitness to stand trial is presumed unless it is established, on an investigation, that the person is mentally unfit to stand trial: s 269I.</p> <p>If there are reasonable grounds to</p>	<p>By s 269O(1), the court by which a defendant is declared to be <u>liable to supervision</u> may—</p> <p>(a) release the defendant unconditionally; or</p> <p>(b) make an order (a supervision order)—</p> <p>(i) committing the defendant to detention; or</p> <p>(ii) releasing the defendant on licence on the following conditions:</p>	<p>There does not appear to be any specific provision for young people.</p>	<p>Where is the person detained? Who makes decision?</p> <p>If defendant committed to detention, the defendant is in the custody of the Minister and the <u>Minister may give directions for the custody,</u></p>

<p>The following provisions apply to superior courts and to courts of summary jurisdiction.</p> <p>Section 5 provides that court means, except where a contrary intention is indicated or appears from the context, the Supreme Court, the District Court or a court of summary jurisdiction.</p>	<p>impairment of the mind resulting from senility, but not intoxication.</p> <p><i>Mental unfitness to stand trial</i> is defined in s 269H as follows: If the person's mental processes are so disordered or impaired that the person is—</p> <p>(a) unable to understand, or to respond rationally to, the charge or allegations; or</p> <p>(b) unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as the right to challenge jurors); or</p> <p>(c) unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.</p>	<p>suppose that a person is mentally unfit, the court may order an investigation of the defendant's mental fitness: s 269J(1).</p> <p>The power to order investigation may be exercised on the application of prosecution or defence, or on judge's own initiative: s 269J(2).</p> <p>If investigation ordered after trial begins, the court may adjourn or discontinue the trial to allow for investigation: s 269J(3).</p> <p>If a court before which a preliminary examination of an indictable offence is conducted takes the view that defendant may be mentally unfit, the preliminary examination may continue but the court must raise for consideration by the trial court the question of whether or not there should be an investigation: s 269J(4).</p> <p>Before the investigation into fitness, the relevant court may order the release of the defendant on bail OR may commit the defendant to an appropriate form of custody (but not a prison unless the court is satisfied that there is no practicable alternative): s 269X(2).</p> <p>Before formally embarking on investigation, court may require production of a report or may itself</p>	<p>(A) the conditions imposed by s 269O(1a); (B) any other conditions decided by the court and specified in the licence.</p> <p>However, every licence under s 269O(1)(b)(ii) is subject to the following conditions: (a) a condition prohibiting the defendant from possessing a firearm or ammunition; (b) a condition requiring the defendant to submit to such tests (including testing without notice) for gunshot residue as may be reasonably required (s 269O(1)(a)).</p> <p>If court makes a supervision order, the court must fix a term (a limiting term) equivalent to the period of imprisonment or supervision (or the aggregate period of imprisonment and supervision) that would, in the court's opinion, have been appropriate if the defendant had been found guilty and convicted of the offence (and without taking into account mental impairment): s 269O(2).</p> <p>At the end of the limiting term, a supervision order lapses: s 269O(3).</p> <p><u>Reports</u></p> <p>If defendant is declared liable to supervision, the Minister must, within 30 days after the date of declaration, prepare and submit to the court a report, prepared by a psychiatrist or other appropriate expert, on the mental condition of the defendant containing— (a) a diagnosis and prognosis of the condition; and (b) a suggested treatment plan for managing the defendant's condition (s 269Q(1)).</p> <p>If supervision order is made against defendant, the Minister must arrange to have prepared and submitted to the court, at intervals of not more than 12 months</p>	<p><u>supervision and care</u> of the defendant the Minister considers appropriate: s 269V(1).</p> <p>Note: "Minister" means the Minister responsible for the administration of the <i>Mental Health Act 1993</i>: s 269A.</p> <p>By s 269V(2), the Minister may— (a) place the defendant under the custody, supervision and care of another; and (b) if there is no practicable alternative—direct that a defendant be kept in custody <u>in a prison</u>.</p> <p>Can they be released? By whom? On what grounds?</p> <p><u>Variation or revocation of supervision order</u></p> <p>At any time during the <i>limiting term</i>, the court may, on the application of the Crown, the defendant, Parole Board, the Public Advocate or another person with a proper interest, <u>vary or revoke</u> a supervision order and, if the order is revoked, make, in substitution, any other order that the court might have made in the first instance: s 269P(1).</p> <p>If the court refuses an application by or on behalf of a defendant for variation or revocation of a supervision order, a later application for variation or revocation of the</p>
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		<p>have a report prepared as to defendant's mental condition: s 269K(1).</p> <p>If it appears from report that defendant is mentally unfit but there is a reasonable prospect defendant will <i>regain</i> necessary mental capacity over next 12 months, the court may adjourn the trial for not more than 12 months: s 269K(2).</p> <p>Trial judge may decide that question of fitness is to be tried first, but may also decide to proceed first with trial of objective elements of offence: see ss s 269L, 269M, 269N.</p> <p>An investigation the Supreme Court or the District Court into—</p> <p>(a) a defendant's mental competence to commit an offence or a defendant's mental fitness to stand trial; or</p> <p>(b) whether elements of the offence have been established, is to be conducted before a <u>jury</u> unless the defendant has elected to have the matter dealt with by a judge sitting alone (s 269B(1)).</p> <p>However, any other powers or functions conferred on a court by this Part are to be exercised by the</p>	<p>during the limiting term, a report containing—</p> <p>(a) a statement of any treatment that the defendant has undergone since the last report; and</p> <p>(b) any changes to the prognosis of the defendant's condition and the treatment plan for managing the condition.</p> <p>(s 269Q(2)).</p> <p>The Crown must provide the court with a report setting out, so far as reasonably ascertainable, the views of—</p> <p>(a) the next of kin of the defendant; and</p> <p>(b) the victim (if any) of the defendant's conduct; and</p> <p>(c) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim</p> <p>(s 269R(1)).</p> <p>However, report not required under s269R(1) if the purpose of proceeding is—</p> <p>(a) to determine whether a defendant who has been released on licence should be detained or subjected to a more rigorous form of supervision; or</p> <p>(b) to vary, in minor respects, the conditions on which a defendant is released on licence.</p> <p>If court is fixing a limiting term relating to an alleged <u>indictable offence</u> or <u>prescribed summary offence</u>, a person who has suffered injury, loss or damage resulting from the defendant's conduct may furnish the court with a statement of a kind referred to in s 7A of the <i>Criminal Law (Sentencing) Act 1988</i> (a victim impact statement), as if the defendant had been convicted of the offence and the court was determining sentence: s 269R(3).</p> <p>Similarly, if court is fixing a limiting term in proceedings under this Division, the Crown or the Commissioner for Victim's Rights may furnish the court with a statement of a kind referred to in s 7B of</p>		<p>order cannot be made by or on behalf of the defendant for six months or such greater or lesser period as the court may direct: s 269P(2).</p> <p>By s 269T(2), the court cannot release a defendant, or significantly reduce degree of supervision to unless the court—</p> <p>(a) has considered at least three expert reports (or one or two reports if s 269T(2a) applies), each prepared by a different psychiatrist or other appropriate expert who has personally examined the defendant, on—</p> <p>(i) the mental condition of the defendant; and</p> <p>(ii) the possible effects of the proposed action on the behaviour of the defendant; and</p> <p>(b) has considered the report most recently submitted to the court by the Minister; and</p> <p>(c) has considered the report on the attitudes of victims and next of kin prepared; and</p> <p>(d) is satisfied that—</p> <p>(i) the defendant's next of kin; and</p> <p>(ii) the victim (if any) of the defendant's conduct; and</p> <p>(iii) if a victim was killed as a result of the defendant's conduct—the next of kin of the victim,</p> <p>have been given reasonable</p>
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		<p>court constituted of a judge sitting alone: s 269B(2).</p> <p><u>Where question of fitness tried first: s 269M</u></p> <p>If question of fitness is to be tried first, the court—</p> <p>(a) must hear relevant evidence and representations put by the prosecution and the defence on question of mental fitness; and</p> <p>(b) may require the defendant to undergo an examination by relevant expert: s 269M(A)(1).</p> <p>At the conclusion of the trial of the defendant's mental fitness, the court must decide whether it has been established, on the balance of probabilities, that defendant is mentally unfit and—</p> <p>(a) if so—must record a finding to that effect;</p> <p>(b) if not—must proceed with the trial in the normal way (s 269M(A)(3)).</p> <p>The court may, if the prosecution and the defence agree—</p> <p>(a) dispense with, or terminate, an investigation into a defendant's fitness to stand trial; and</p> <p>(b) record a finding that the defendant is mentally unfit to stand trial (s 269M(A)(5)).</p>	<p>the <i>Criminal Law (Sentencing) Act 1988</i> (a neighbourhood impact statement or a social impact statement) as if the court were determining sentence for an offence: s 269R(5).</p> <p>Note: “prescribed summary offence” means—</p> <p>(a) a summary offence that results in the death of a victim or a victim suffering total incapacity; or</p> <p>(b) a summary offence (other than a summary offence of assault) that results in a victim suffering serious harm;</p> <p>and “serious harm” means—</p> <p>(a) harm that endangers a person's life; or</p> <p>(b) harm that consists of loss of, or serious and protracted impairment of, a part of the body or a physical or mental function; or</p> <p>(c) harm that consists of serious disfigurement; total incapacity—a victim suffers;</p> <p>and “total incapacity” - if the victim is permanently physically or mentally incapable of independent function</p> <p>(s 269R(6), read with s 7A <i>Criminal Law (Sentencing) Act 1988</i>).</p> <p><u>Matters to which regard must be had</u></p> <p>In deciding whether to release defendant, court must apply principle that restrictions on defendant's freedom and personal autonomy should be kept to minimum consistent with the safety of the community: s 269S.</p> <p>By s 269T, court should have regard to –</p> <p>(a) the nature of the defendant's mental impairment;</p> <p>(b) whether defendant is, or would if released be, likely to endanger another person, or other persons generally;</p>		<p>notice.</p> <p>What treatment is available?</p> <p>While the Act does not appear to contain any express provision for the type of treatment to be administered to a person detained pursuant to a supervision order, treatment is certainly contemplated:</p> <ul style="list-style-type: none"> • By s 269Q(1), if defendant is declared liable to supervision, the Minister must submit to the court a report on the mental condition of the defendant containing— <ul style="list-style-type: none"> (c) a diagnosis and prognosis of the condition; and (d) a <u>suggested treatment plan</u> for managing the defendant's condition; and • A report must be submitted at intervals of not more than 12 months during the limiting term containing— <ul style="list-style-type: none"> (c) a statement of <u>any treatment that the defendant has undergone since the last report</u>; and (d) any changes to the prognosis of the defendant's condition and the treatment plan for managing the condition (s 269Q(2)).
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		<p>If court records a finding that the defendant is mentally unfit, the court must hear evidence and representations put by the prosecution and the defence relevant to the question whether a finding should be recorded under this section that the objective elements of the offence are established: s 269M(B)(1).</p> <p>If court satisfied BRD that the objective elements of the offence are established, the court must record a finding to that effect and declare the defendant to be liable to <u>supervision</u> under this Part; but otherwise the court must find the defendant not guilty of the offence and discharge the defendant: s 269M(B)(2).</p> <p>On trial of objective elements of an offence under s 269M, the court must exclude from consideration any question of whether the defendant's conduct is defensible: s 269M(B)(3).</p> <p><u>Where objective elements tried first: s 269N</u></p> <p>If court satisfied BRD that the objective elements of the offence are established, the court must record a finding to that effect, but otherwise the court must find the defendant not guilty of the offence and discharge the defendant: s</p>	<ul style="list-style-type: none"> (c) whether there are adequate resources available for treatment and support of the defendant in the community; (d) whether the defendant is likely to comply with conditions of a licence; and (e) other matters the court thinks relevant. 		
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		<p>269N(A)(2).</p> <p>On the trial of the objective elements, court is to exclude from consideration any question of whether the defendant's conduct is defensible: 269N(A)(3).</p> <p>If court records a finding that the objective elements are established, the court—</p> <ul style="list-style-type: none"> (a) must hear relevant evidence and representations put by the prosecution and the defence on the question of the defendant's mental fitness; and (b) may require the defendant to undergo an examination (s 269N(B)(1)). <p>If court is satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must record a finding to that effect and declare the defendant to be liable to supervision under this Part: s 269N(B)(3).</p> <p>If court is not satisfied on the balance of probabilities that the defendant is mentally unfit to stand trial, the court must proceed with the trial of the remaining issues (or may, at its discretion, re-start the trial): s 269N(B)(4).</p> <p>However, the court may, if the prosecution and the defence agree—</p>			
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		(a) dispense with, or terminate, an investigation into a defendant's mental fitness to stand trial; and (b) declare that the defendant is mentally unfit to stand trial, and declare the defendant to be liable to supervision (s 269N(B)(5)).			
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge makes decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>TASMANIA</p> <p><i>Criminal Justice (Mental Impairment) Act 1999</i> (Tas)</p> <p><u>Note:</u> s 4 provides that the Act applies to all courts.</p>	<p>Pursuant to s 8(1), a person is <i>unfit to stand trial</i> for an offence if, because the person's mental processes are disordered or impaired or for any other reason, the person is –</p> <p>(a) unable to understand the nature of the charge;</p> <p>(b) unable to plead to the charge or to exercise the right of challenge;</p> <p>(c) unable to understand the nature of the proceedings;</p> <p>(d) unable to follow the course of the proceedings; or</p> <p>(e) unable to make a</p>	<p>A person's fitness to stand trial is presumed unless it is established, on an investigation, that the person is unfit: s 9(1). The question of unfitness is to be determined on the balance of probabilities: s 9(2). A court may, on the application of the prosecutor, the defendant or on its own initiative, reserve the question of the defendant's fitness to stand trial for investigation: s 10(1).</p> <p>If, at preliminary proceedings for <u>an indictable offence</u>, the question of fitness arises, the question is to be reserved for determination by the Supreme Court and the proceedings are to be completed in accordance with appropriate criminal procedures: s 10(2).</p> <p>If, after a trial begins, the court</p>	<p>If, on an investigation, court finds that the defendant is unfit or records a finding to that effect under s 19, the court must determine whether or not the defendant is likely to <i>become fit</i> to stand trial during next 12 months: s 14(1).</p> <p>If court determines that the defendant is likely to become fit to stand trial during the next 12 months, court must adjourn the proceedings for a period not exceeding 12 months: s 14(2).</p> <p>By s 39(2) if –</p> <p>(a) proceedings are adjourned after a court determines that a defendant is likely to become fit; or</p> <p>(b) court orders that a defendant is liable to supervision but wishes to reserve the question as to how the court is to deal with the defendant – the court may exercise any of the powers conferred under s 39(1) (set out in adjacent column).</p> <p><u>Special hearing</u></p> <p>A court must hold a <u>special hearing</u> if –</p>	<p>Section 39A provides a limitation on making certain orders in respect of youth.</p> <p>By s 39A, a court may not make a restriction order or any other order under this Act that commits a person who has not attained the age of 18 years to a secure mental health unit unless the court has received a report from the Chief Forensic Psychiatrist to the effect that –</p> <p>(a) adequate facilities and staff exist at the secure mental health unit for the appropriate care and treatment of the person; and</p> <p>(b) the secure mental health unit is the most appropriate place</p>	<p>Where is the person detained? Who makes decision?</p> <p>A person subject to a “restriction order” is detained in a secure mental health unit until the order is discharged by the Supreme Court: s 24.</p> <p>By s 3, <i>secure mental health unit</i> has the same meaning as in the <i>Mental Health Act 2013</i> (which is a facility approved as a secure mental health unit pursuant to s 140).</p> <p>The decision is made by the Court: s 18(2).</p> <p>Can they be released? By whom? On what grounds?</p> <p>A restriction order requires detention <u>until the order is discharged by the</u></p>

	<p>defence or answer the charge.</p> <p>However, memory loss is insufficient: s 8(2).</p>	<p>decides that the question of fitness to stand trial should be investigated, the court may adjourn or discontinue the trial: s 10(3).</p> <p>If the question of a defendant's fitness is reserved for investigation under this Act, court may –</p> <p>(a) admit the defendant to bail –</p> <p>(i) on condition that he or she will appear subsequently for the purposes of the investigation; and</p> <p>(ii) on any other condition considered appropriate; or</p> <p>(b) if court considers that bail would not be appropriate –</p> <p>(i) remand the defendant in custody; or</p> <p>(ii) order that the defendant be detained in a secure mental health unit; or</p> <p>(iii) make any other order that the court thinks appropriate for the custody or detention of the defendant.</p> <p>(c)</p> <p>(d)</p> <p>(s 39(1)).</p> <p>By s 39(1A), a court may only make an order that the defendant be detained in a secure mental health unit if –</p> <p>(a) defendant appears to be suffering from a <u>mental illness</u> within the meaning of the</p>	<p>(a) the court determines that the defendant is not likely to become fit within 12 months; or</p> <p>(b) the defendant does not become fit to stand trial within 12 months after a determination in s 14(2) (s 15(1)).</p> <p>The purpose of the special hearing is to determine whether, despite the unfitness, on the limited evidence available the defendant is not guilty of the offence: s 15(2).</p> <p>In the Supreme Court, the question whether a defendant is not guilty must be determined by a <u>jury</u>: s 15(3).</p> <p>A special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings: s 16(1).</p> <p>Without limiting the generality of s 16(1), at a special hearing –</p> <p>(a) the defendant is taken to have pleaded not guilty;</p> <p>(b) the defendant's legal representative may exercise the defendant's rights to challenge jurors or the jury;</p> <p>(c) the defendant may raise any defence that could be properly raised as if the special hearing were an ordinary trial; and</p> <p>(d) the defendant is entitled to give evidence (s 16(3)).</p> <p>The findings available at a special hearing are:</p> <p>(a) not guilty of the offence charged or of any offence available as an alternative;</p> <p>(b) not guilty of the offence charged or of any offence available as an alternative, but a finding cannot be made that the defendant is not guilty of a specified offence or specified offences available as an alternative;</p> <p>(c) not guilty of the offence charged on the ground of</p>	<p>available to accommodate the youth in the circumstances.</p> <p>Otherwise, there does not appear to be any specific provision relating to young people.</p>	<p><u>Supreme Court</u>: s 24.</p> <p>A defendant subject to a restriction order, the Secretary of the responsible Department in relation to the <i>Mental Health Act 2013</i> or the Chief Forensic Psychiatrist may apply to the Supreme Court for discharge of the restriction order if –</p> <p>(a) the first such application is not less than 2 years after the order was made; and</p> <p>(b) each subsequent application is made not less than 2 years after the preceding application (s 26(1)).</p> <p>The Supreme Court may, on an application under ss 26 or 37(3)(b), discharge a restriction order: s 26(2).</p> <p>If Supreme Court discharges a restriction order, it may make any other order in respect of the defendant that it could have made under s 18: s 27.</p> <p>As well as having regard to matters in ss 34 and 35, a court <u>may not discharge</u> a restriction order, release a defendant under s 18(2) or 21(1) or this Part or significantly reduce the degree of supervision unless the court –</p> <p>(a) has considered the reports of the Chief Forensic Psychiatrist, or a medical practitioner nominated by the Chief Forensic Psychiatrist, and one other psychiatrist, each of</p>
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		<p><i>Mental Health Act 2013</i>;</p> <p>(b) court considers that the defendant should be admitted to a secure mental health unit for his or her own health or safety or for the protection of others; and</p> <p>(c) the Chief Forensic Psychiatrist has provided a report to the effect that –</p> <p>(i) the admission of the defendant to the secure mental health unit is necessary for his or her care or treatment;</p> <p>(ii) adequate facilities and staff exist at the secure mental health unit for appropriate care and treatment; and</p> <p>(iii) in the case of a defendant who is under 18, the secure mental health unit is the most appropriate place available in the circumstances having regard to the objectives and general principles set out in sections 4 and 5 of the <i>Youth Justice Act 1997</i>.</p> <p>A court must not conduct an investigation into fitness unless it appears that there is a real and substantial question as to fitness: s 10(5).</p> <p>On an investigation into fitness, a court –</p> <p>(a) must hear evidence and representations put by the prosecutor or the defendant;</p> <p>(b) may call evidence on its own</p>	<p>insanity or a finding to the same effect;</p> <p>(d) a finding cannot be made that the defendant is not guilty of the offence charged or any offence available as an alternative (s 17).</p> <p>A defendant found not guilty of an offence at a special hearing is taken to have been found not guilty at an ordinary trial of criminal proceedings: s 18(1).</p> <p>If a defendant is found not guilty of the offence charged on the ground of insanity or on a finding being made to that effect, or a finding <u>cannot be made</u> that the defendant <u>is not guilty</u> of an offence, the court is to –</p> <p>(a) make a restriction order; or</p> <p>(b) release the defendant and make a supervision order; or</p> <p>(c) make a treatment order; or</p> <p>(d)</p> <p>(e) release the defendant on such conditions as the court considers appropriate; or</p> <p>(f) release the defendant unconditionally (s 18(2)).</p> <p>Despite s 18(2), only the <u>Supreme Court</u> may make a <u>restriction order</u> or <u>supervision order</u>: s 18(3).</p> <p>A <u>restriction order</u> is an order requiring the person to be admitted and detained in a secure mental health unit until the order is discharged by the Supreme Court: s 24.</p> <p>A <u>supervision order</u> is an order releasing the person to whom it applies under the supervision of the Chief Forensic Psychiatrist and on such conditions as to the supervision of that person and such other conditions as the court considers appropriate: s 29A(1).</p> <p>A supervision order may include conditions such as a</p>		<p>whom has personally examined the defendant, on –</p> <p>(i) the condition of the defendant; and</p> <p>(ii) the possible effects of the proposed action on the behaviour of the defendant; and</p> <p>(b) has considered the report on the attitudes of victims, if any, and next of kin; and</p> <p>(c) is satisfied that the defendant's next of kin and the victims, if any, of the offence with which the defendant was charged have been given reasonable notice of the proceedings.</p> <p>Section 37 also provides for the review of persons detained under forensic orders.</p> <p>A “forensic order” is a restriction order or supervision order: s 3.</p> <p>A forensic order is to be reviewed under the <i>Mental Health Act 2013</i> by the Mental Health Tribunal within 12 months after the order was made and at least once in each period of 12 months afterwards: s 37(1).</p> <p>In reviewing a forensic order, the Tribunal is to apply the principle in s 34 and to have regard to the matters set out in s 35(1): s 37(2).</p> <p>If the Tribunal, on review, determines that a forensic order is no longer warranted or that conditions</p>
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		<p>initiative; and</p> <p>(c) may require the defendant to undergo an examination by appropriate expert.</p> <p>At an investigation, the defendant is entitled to be legally represented: s 11(2).</p> <p>In the Supreme Court, the question whether a defendant is fit to stand trial must be determined by a jury: s 12(1).</p> <p>If jury determines that the defendant is unfit, it must also determine whether or not the defendant is likely to become fit during next 12 months: s 12(4).</p> <p>By s 19, a court may, if prosecutor and defendant agree, dispense with or terminate an investigation into fitness and -</p> <p>(a) record a finding that the defendant is unfit to stand trial; or</p> <p>(b) proceed under s 13 as if, after investigation, the court had made a finding that defendant not unfit.</p>	<p>condition requiring the defendant to take medication or to submit to the administration of medical treatment as specified in the order or as determined by the Chief Forensic Psychiatrist: s29A(2)(a).</p> <p>The Supreme Court may, on the application of the Secretary of the responsible Department in relation to the <i>Mental Health Act 2013</i>, the Chief Forensic Psychiatrist, the defendant or any other person with a proper interest in the matter, vary or revoke the supervision order and, if the order is revoked, make, in substitution, any other order that the Supreme Court might have made under s18(2): s 30(1).</p> <p><u>Matters to which court must have regard</u></p> <p>To assist court to determine proceedings under this Part, the Attorney-General must provide a report stating, so far as reasonably ascertainable, the views of the next of kin of the defendant and the victims, if any, of the defendant's conduct: s 33(1).</p> <p>A court is to apply, where appropriate, the principle that restrictions on the defendant's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community when determining –</p> <p>(a) which order to make under ss 18(2) or 21(1) or this Part;</p> <p>(b) whether to discharge or vary such an order;</p> <p>(c) the conditions of such an order (s 34).</p> <p>A court must, in addition to applying the principle in s 34, have regard to –</p> <p>(a) the nature of the defendant's mental impairment or other condition or disability;</p> <p>(b) whether the defendant is, or would if released be, likely to endanger another person or other persons generally;</p>	<p>are now inappropriate –</p> <p>(a) the Tribunal must issue the defendant with a certificate to that effect; and</p> <p>(b) the defendant may apply immediately, despite any other provision, to the Supreme Court for discharge, revocation or variation of the forensic order (s 37(3)).</p> <p>If the Tribunal issues a certificate in respect of the discharge of a restriction order, the certificate may include the recommendation of the Tribunal that, should the order be discharged –</p> <p>(a) a supervision order or treatment order be made in respect of the defendant; or</p> <p>(b) the defendant be released either unconditionally or on the conditions specified in the recommendation (s 37(4)).</p> <p>What treatment is available?</p> <p>There does not appear to be any express provision for types of treatment available.</p> <p>However, treatment is clearly contemplated for those detained by restriction order: one of the matters to which the court must have regard is whether adequate <i>treatment</i> would be available in the community (s 34) (and if not, this would presumably be</p>
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			<p>(c) whether there are adequate resources available for the treatment and support of the defendant in the community;</p> <p>(d) whether the defendant is likely to comply with the conditions of a supervision order; and</p> <p>(e) other matters that the court thinks relevant (s 35(1)).</p>		<p>a matter in favour of a restriction order).</p> <p>Further, for a facility to be approved as a “secure mental health unit” under the <i>Mental Health Act 2013</i>, the Minister must be satisfied that the relevant premises are properly built, equipped and staffed to, as the case requires, assess or <u>treat</u> forensic patients: s 140(3)(b) <i>Mental Health Act 2013</i>.</p> <p>Also, by s 39A, a court may not make a restriction order or any other order under this Act that commits a person under 18 years to a secure mental health unit unless the court has received a report from the Chief Forensic Psychiatrist including a report that adequate facilities and staff exist at the secure mental health unit for the <u>appropriate care and treatment</u> of the person.</p>
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>VICTORIA</p> <p><i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic)</p> <p><u>Note:</u> s 4 provides that except as provided by ss 5,</p>	<p><i>Unfitness to stand trial</i> (s 6):</p> <p>A person is unfit to stand trial for an offence if, because person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be—</p> <p>(g) unable to</p>	<p>By s 7(3), the question of fitness to stand trial is a question of fact and is to be determined on the balance of probabilities by a jury empanelled for that purpose.</p> <p>If question raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness (s 7(4)).</p>	<p>By s 12(2), if the jury finds that the accused is not fit to stand trial and the judge determines that the accused is likely to <i>become fit</i> within the next 12 months, the judge must adjourn the matter for the period specified under section 11(4)(b) and may—</p> <p>(a) grant bail; or</p> <p>(b) remand accused in custody in an appropriate place for a specified period (not exceeding the period specified under section 11(4)(b)); or</p> <p>(c) remand accused in custody in a prison for a specified period (not exceeding the period</p>	<p>Specific provision <u>is</u> made for young people: see Part 5A.</p> <p>By s 5A(3), if the Children's Court finds a child not guilty because of mental impairment of a summary offence, the Children's Court <u>must</u> discharge the child.</p>	<p>Where is the person detained?</p> <p>By s 3, <i>appropriate place</i> means:</p> <p>(a) a designated mental health service; or</p> <p>(b) a residential treatment facility; or</p> <p>(c) a residential institution.</p> <p>Also under s 3, <i>designated mental health service</i> has the same meaning as in</p>

<p>5A and 25(1) and Parts 5A, 7A and 7B, this Act applies only in relation to <u>trials of indictable offences in the Supreme Court or the County Court</u> and proceedings <u>ancillary</u> or <u>incidental</u> to, or connected with or arising out of, those trials, including committal proceedings.</p> <p>Therefore, not applicable to adults charged with summary offences in Magistrates' Court.</p>	<p>(h) understand the nature of the charge; or unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or</p> <p>(i) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or</p> <p>(j) unable to follow the course of the trial; or</p> <p>(k) unable to understand the substantial effect of any evidence given in support of the prosecution; or</p> <p>(l) unable to give instructions to legal practitioner.</p> <p>However, a person is not unfit to stand trial only because he or she is suffering from memory loss.</p> <p>A defence of <i>mental impairment</i> is set out in s 20, although there is no definition of mental</p>	<p>If question raised by the judge, prosecution has carriage of the matter, but no party bears any onus of proof (s 7(5)).</p> <p>Investigation into fitness:</p> <p>(a) court must hear any relevant evidence and submissions;</p> <p>(b) trial judge may—</p> <p>(i) call evidence on his or her own initiative;</p> <p>(ii) require the accused to undergo an examination by a registered medical practitioner or registered psychologist;</p> <p>(iii) require the results of any examination to be put before court.</p> <p>(s 11(1)).</p> <p>By s 11(3), at commencement, judge must explain to jury—</p> <p>(a) reason for the investigation; and</p> <p>(b) findings which may be made; and</p> <p>(c) that the standard of proof required = balance of probabilities.</p> <p>If the jury finds that the accused is <u>unfit</u> to stand trial, the judge must—</p> <p>(a) determine whether or not the accused is likely to <i>become</i> fit to stand trial within the next 12 months; and</p> <p>(b) if the judge determines that</p>	<p>specified under section 11(4)(b)); or</p> <p>(d) make any other order the judge thinks appropriate.</p> <p>The judge must not remand an accused in custody in an appropriate place unless it has received a certificate under section 47 stating that the facilities or <u>services</u> necessary for that order are available (s 11(3)).</p> <p>The judge must not remand an accused in custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances (s 11(4)).</p> <p>If the jury finds that the accused is not fit to stand trial and the judge determines that the accused <i>is not likely</i> to become fit within the next 12 months, the court must proceed to hold a special hearing under Part 3 <u>within 3 months</u> (s 11(5)).</p> <p>At the end of the period of adjournment under s 12(2), the accused is presumed to be fit to stand trial unless a real and substantial question of fitness is raised again (s 14(1)).</p> <p>If a real question of fitness is raised again, the judge must extend the period of adjournment (but not so that the total period since the first finding of unfitness exceeds 12 months) or proceed to hold a special hearing under within 3 months (s 14(2)).</p> <p>Special hearing</p> <p>By s 15, the purpose of a special hearing is to determine whether, on the evidence available, the accused—</p> <p>(a) is not guilty of the offence; or</p> <p>(b) is not guilty of the offence because of mental impairment; or</p> <p>(a) committed the offence charged or an offence available as an alternative.</p>	<p>Part 5A concerns proceedings in the Children's Court and appeals from those proceedings.</p> <p>Part 5A applies to—</p> <ul style="list-style-type: none"> • indictable offences heard and determined summarily by Children's Court; and • committal proceedings in the Children's Court; and • appeals from— <ul style="list-style-type: none"> ○ a finding by the Children's Court that a child is unfit to stand trial; and ○ a finding by the Children's Court that a child is not guilty of an indictable offence because of mental impairment; and ○ the making of a supervision order by the Children's Court; and • appeals by the Director of Public Prosecutions against an order by the Children's Court for unconditional release of a child found not guilty because of mental impairment of an indictable offence (s 38G(1)). <p>If the question of the fitness of a child to stand trial arises</p>	<p>s3(1) of the <i>Mental Health Act 2014</i>, and <i>residential institution</i> and <i>residential treatment facility</i> have the same meaning as in s 3(1) of the <i>Disability Act 2006</i>.</p> <p>Under the <i>Disability Act 2006</i>, the purpose of a <i>residential treatment facility</i> is to provide compulsory treatment to persons with an intellectual disability (s 151).</p> <p>Under s 87 of the <i>Disability Act 2006</i>, a person with an intellectual disability may be admitted to a residential institution</p> <p>the person requires services which can be provided by admission to the residential institution; and one or more of the following is satisfied:</p> <p>(a) admission to a residential institution provides the best possible choice of services for enhancing the <u>person's independence</u> and self-sufficiency and is least likely to produce regression, loss of skills or other harm to that person; or</p> <p>(b) admission to a residential institution is the option which is the least restrictive of the person as is possible in the circumstances; or</p> <p>(c) unless the person is admitted to a residential institution the person or any person with whom he or she resides will <u>suffer serious physical or emotional harm</u>.</p>
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<p>impairment. Section 20 provides: the defence of mental impairment is established if, at the time of engaging in conduct constituting the offence, person was suffering from a mental impairment that had the effect that—</p> <p>(a) he or she did not know the nature and quality of the conduct; or</p> <p>(b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).</p> <p>By s 21, a person is presumed not to have been suffering from a mental impairment until the contrary is proved (s 21(1)) and the question whether a person was suffering from a mental impairment is a question of fact and is to be determined by a jury on</p>	<p>the accused is <i>likely</i> to become fit within 12 months, specify the period by the end of which the accused is likely to be fit to stand trial (s 11(4)).</p> <p>For the purposes of s 11(4) the judge may call further evidence on his or her own initiative.</p>	<p>A special hearing is to be conducted as if it were a criminal trial. The <i>Juries Act 2000</i> applies (s 16(1)).</p> <p>At a special hearing (s 16(2)) —</p> <p>(a) the accused must be taken to have pleaded <u>not guilty</u> to the offence; and</p> <p>(b) the legal representative (if any) of the accused may exercise the rights of the accused to challenge jurors or the jury;</p> <p>(c) the accused may raise any defence that could be raised if the special hearing were a criminal trial, including mental impairment;</p> <p>(d) the rules of evidence apply;</p> <p>(e) s 197 of the <i>Criminal Procedure Act 2009</i> (allows court to make orders for legal representation for accused) applies;</p> <p>(f) any alternative verdict that would be available if the special hearing were a criminal trial is available to the jury</p> <p>At commencement of a special hearing, the judge must explain to the jury that the accused is unfit to be tried and the meaning of being unfit to stand trial, as well as the purpose of the special hearing; and the findings available and the standard of proof required (s 16(3)).</p> <p>The findings available to the jury at the special hearing are:</p> <p>(a) not guilty;</p> <p>(b) not guilty because of mental impairment; and</p> <p>(c) the accused committed the offence (must be satisfied BRD on evidence available) (s 17).</p> <p>A finding that the accused committed the offence constitutes a <u>qualified finding</u> of guilt and does not constitute a basis in law for any conviction for the offence; and constitutes a bar to further prosecution in respect of the same circumstances: s 18(3).</p>	<p>or the defence of mental impairment is raised—</p> <ul style="list-style-type: none"> • if offence is punishable by level 2 imprisonment (25 years maximum), Children's Court must be constituted by the President or, if the President is unavailable, a magistrate nominated by President; or • in any other case, Children's Court must be constituted by President or a magistrate (s 38I). <p>For summary offences</p> <p>Divisions 1 and 4 apply to summary offences heard and determined by the Children's Court; and appeals from a finding by the Children's Court that a child is not guilty of a summary offence because of mental impairment (s 38G(2)). These Divisions do NOT include the provisions concerning the question of unfitness to stand trial and procedure for investigation. Division 1 is principally definitions, application of Part etc, while Division 4 concerns defence of mental impairment.</p>	<p>For children</p> <p>By s 38H, “custody” means detention in a youth justice centre or a youth residential centre.</p> <p>Who makes decision?</p> <p>The Court decides, following a special hearing and a jury verdict of not guilty because of mental impairment/that the accused committed the offence (see ss 18(4), 23, 26) – unless the defence of mental impairment was raised before jury empanelment, in which case it seems that no special hearing occurs (see s 21(4)).</p> <p>For children</p> <p>The Children’s Court decides upon whether or not a <i>custodial</i> supervision is ordered: see s 38ZH(5).</p> <p>By s 38H, a custodial supervision order will mean detention in a youth justice centre or a youth residential centre.</p> <p>There does not appear to be provision for how the Children’s Court is to decide between facilities.</p> <p>Can they be released? By whom? On what grounds?</p> <p><u>Application to vary or revoke</u></p>
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<p>the balance of probabilities (s 21(2)).</p> <p>The party raising the defence bears the onus of rebutting the presumption (s 21(3)).</p> <p>If the defence is raised on an indictable offence and before jury empanelment, the trial judge may hear the evidence and, if satisfied that the defence is established, may direct that a verdict of “not guilty because of mental impairment” be recorded, or if not satisfied, must direct that the person be tried by a jury (s 21(4)).</p> <p>Definition of <i>mental impairment</i> applies to summary offences or indictable offences determined summarily in Magistrates’ Court, but not to Children’s Court (s 5).</p> <p><u>Children’s Court (indictable or summary offences)</u></p> <p>Defence of <i>mental impairment</i> (s 38ZA): defence of mental impairment is established</p>	<p>By s 18(4), if the jury makes the finding that the accused committed the offence, the judge must:</p> <ol style="list-style-type: none"> declare that the person is liable to supervision under Part 5; or order the person to be released unconditionally. <p>By s 23, if a person is found not guilty because of mental impairment, the court must:</p> <ol style="list-style-type: none"> declare that the person is liable to supervision under Part 5; or order the person to be released unconditionally. <p><u>Supervision orders</u></p> <p>If a court declares that a person is liable to supervision, the court must make a supervision order in respect of the person (s 26(1)).</p> <p>A supervision order may—</p> <ol style="list-style-type: none"> commit the person to custody (custodial supervision order) in an appropriate place or in a prison; or release the person on conditions decided by the court and specified in the order (non-custodial supervision order) (s 26(2)). <p>By s 26(3), the court must not make a supervision order—</p> <ol style="list-style-type: none"> committing a person to custody in an appropriate place; or providing for a person to receive services in an appropriate place or from a disability service provider, the Secretary to the Department of Human Services or the Secretary to the Department of Health unless it has received a certificate under s 47 stating that the facilities or services necessary for the order are <u>available</u>. 	<p>For indictable offences</p> <p>Sections 39, 40(1) [matters to which the court is to have regard in deciding whether or not to make supervision order etc] and 47 [certificate of available services] also apply to orders made under Part 5A (s 38G(3)).</p> <p>Definition of <i>unfitness to stand trial</i> for children for indictable offences (s 38K (see also s 38G(3))):</p> <p>a child is unfit to stand trial for an indictable offence if, because child’s mental processes are disordered or impaired, the child is or, at some time during the hearing, will be:</p> <ol style="list-style-type: none"> unable to understand nature of the charge; or unable to enter a plea; or unable to understand the nature of the hearing (namely that it is an inquiry as to whether child committed the offence); or unable to follow the course of the hearing; or unable to understand the substantial effect of any evidence given in support of the 	<p>Under s 31, an application for variation or revocation of the supervision order may be made to the Court by:</p> <ol style="list-style-type: none"> the person subject to the order; a person with custody, care, control or supervision of that person; the DPP; and the Attorney-General. <p>However, the Court must not vary a custodial supervision order to a non-custodial supervision order during the <u>nominal term</u> unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will not be seriously endangered as a result of the release of the person on a non-custodial supervision order: s 32(2).</p> <p>In the case of a “forensic patient” or “forensic resident” (which includes a person committed to custody in a residential treatment facility or a residential institution by a supervision order), the court must not vary a custodial supervision order to a non-custodial supervision order (whether during or after the nominal term) unless the forensic patient or forensic resident has completed <u>a period of at least 12 months extended leave granted</u> by the court; and in deciding an application to vary a custodial supervision, the court must take into account whether or not the person</p>
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	<p>for a child charged with an offence if, at the time of engaging in conduct constituting the offence, the child was suffering from a <i>mental impairment</i> that had the effect that—</p> <p>(a) he or she did not know nature and quality of the conduct; or</p> <p>(b) he or she did not know that conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).</p> <p>If defence of mental impairment is established, child must be found not guilty because of mental impairment: s 38ZA(2).</p> <p>By s 38ZB, a child is presumed not to have been suffering from a mental impairment until the contrary is proved (s 38ZB(1)) and the question whether a child was suffering from a</p>		<p>The court must not make a supervision order committing a person to custody <u>in a prison</u> unless it is satisfied that there is no practicable alternative in the circumstances (s 26(4)).</p> <p>A supervision order is for an indefinite term. When making a supervision order, the court may direct that the matter be brought back to the court for review at the end of the period specified by the court (s 27(1) and (2)).</p> <p>By s 28, the court must set a nominal term for a supervision order in accordance with the table set out under s 28, which includes, for example, a nominal term of 25 years for murder.</p> <p>A person the subject of a non-custodial order may have that order varied and may be apprehended in the event of failure to comply with the order: see ss 29 and 30.</p> <p><u>Considerations by court re supervision orders</u></p> <p>By s 39(1), in deciding whether to make, vary or revoke a supervision order, to remand a person in custody, to grant a person extended leave or to revoke a grant of extended leave, court must apply principle that restrictions on a person's freedom and personal autonomy should be kept to the <u>minimum consistent with the safety of the community</u>.</p> <p>Section 40 (1) sets out matters to which the court is to have regard in deciding whether or not to make, vary or revoke a supervision order, to grant extended leave to a person or to revoke a grant of extended leave etc:</p> <p>(a) the nature of the person's mental impairment or other condition; and</p> <p>(b) the relationship between the impairment, condition or disability and the offending conduct; and</p>	<p>prosecution; or</p> <p>(f) unable to give instructions to legal practitioner.</p> <p>Memory loss is not alone sufficient to render child unfit: s 38K(2).</p> <p>As with adults, a child is presumed to be fit and presumption rebutted only if established, on an investigation, that the child is unfit to stand trial: s 38L(1) and (2).</p> <p>If question of fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting: s 38L(4).</p> <p>If the question is raised by the Children's Court, the prosecution has carriage of the matter, but no party bears any onus: s 38L(5).</p> <p><u>Investigation into fitness:</u></p> <p>An investigation into the fitness of a child must be completed as soon as possible after the question is reserved and in any event within 3 months: s 38O.</p> <p>Children's Court must hear any relevant evidence and</p>	<p>has complied with any conditions of their extended leave (s 32(3)).</p> <p>Appeal against a decision to confirm or vary a supervision order is also available: see s 34.</p> <p>Note: Part 7 deals with the application process and decision-making procedure for leave of absence.</p> <p><u>Review by court</u></p> <p>Pursuant to s 35, the court that made a supervision order must undertake a major review of the order—</p> <p>(a) at least 3 months before the end of the nominal term of the order; and</p> <p>(b) thereafter at intervals not exceeding 5 years for the duration of the order.</p> <p>The purpose of a major review is to determine whether the person subject to the order is able to be released from it.</p> <p>On a major review, in the case of a custodial order, the Court must vary the order to a <i>non-custodial</i> supervision order, unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order, OR if so satisfied, must confirm the order or vary the place of custody (s 35(3)).</p>
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	<p>mental impairment is a question of fact and is to be determined on the balance of probabilities (s 38ZB(2)).</p> <p>The party raising the defence bears the onus of rebutting the presumption: s 38ZB(3).</p>		<p>(c) whether the person is, or would be, likely to endanger themselves, another person, or other people generally; and</p> <p>(d) the need to protect people from such danger; and</p> <p>(e) whether there are adequate resources available for the treatment and support of the person in the community; and</p> <p>(f) any other matters the court thinks relevant.</p> <p><u>Reports</u></p> <p>If person is declared to be liable to supervision, the appropriate person must arrange to have prepared and filed a report, prepared by a registered medical practitioner or registered psychologist, on the mental condition of the person containing—</p> <ul style="list-style-type: none"> • a diagnosis and prognosis of the condition or an outline of the person's behavioural problems; and • the person's response to treatment, therapy or counselling (if any); and • a suggested treatment or other plan for managing the condition <p>(s 41(1)).</p> <p>If a supervision order is made, the appropriate person must arrange to have prepared and filed, at intervals of <u>not more than 12 months</u> for the duration of the order, a report containing a statement of any treatment, therapy or counselling that the person has undergone, or any services received, since the making of the order or last report, and any changes to the prognosis or the person's behavioural problems and the plan for managing the condition or problems (s 41(3)).</p> <p>Note: “appropriate person” in this section means:</p> <ul style="list-style-type: none"> • if the person is in custody in a prison - the Secretary to the Department of Justice; • if the person is in custody in a residential treatment facility or a residential institution, or receiving treatment or services under a supervision 	<p>submissions put to the court and if it is of the opinion that it is in the interests of justice to do so, the Children's Court may call evidence on its own initiative; and require the child to undergo an examination by a registered medical practitioner or registered psychologist (s 38Q(1)).</p> <p>If Children's Court finds that the child is unfit, the court must—</p> <p>(a) determine, by reference to any relevant evidence and on the balance of probabilities, whether or not the child is likely to become fit within 6 months; and</p> <p>(b) if court determines that the child is likely to become fit within 6 months, specify the period by the end of which the child is likely to be fit to stand (s 38Q(3)).</p> <p>If the Children's Court finds that a child <u>is not fit</u> and determines that the child is likely to become fit within 6 months, the court must adjourn the matter and may—</p> <ul style="list-style-type: none"> • grant bail • remand the child in 	<p>Unless the court orders that a person not attend because it would be detrimental to the person's health, a person has the right to appear before the court at any hearing in which the court is considering—</p> <p>(a) making, varying or revoking a supervision order in respect of the person; or</p> <p>(b) granting extended leave to the person; or</p> <p>(c) revoking a grant of extended leave to the person.</p> <p>On a major review, the court is not bound by rules or practice as to evidence but may inform itself in relation to any matter in such manner as it thinks fit (s 38(1)(a)).</p> <p><u>Grounds for release</u></p> <p>By s 40(2), the court cannot order a person to be released or significantly reduce the degree of supervision to which a person is subject, unless it—</p> <p>(a) has obtained and considered the report of at least one registered medical practitioner or psychologist, who has personally examined the person, on—</p> <p>(i) the person's mental condition; and</p> <p>(ii) the possible effect of the order on behaviour; and</p> <p>(ab) in the case of a person who is subject to a supervision order, has obtained and considered the report of a person having the supervision of the person</p>
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			<p>service etc. In such a case, it is the Secretary to the Department of Health who must provide the certificate.</p> <p>A certificate of available services must state whether or not there are facilities or services available for the custody, care or treatment of the person (as the case requires); and if there are, give an outline of those facilities or services (s 47(2)).</p>	<p>of a special hearing is said to be (s 38V) to determine whether the child:</p> <p>(a) is not guilty;</p> <p>(b) is not guilty of the offence because of mental impairment; or</p> <p>(c) committed the offence charged or an offence available as an alternative.</p> <p>A special hearing is to be conducted as nearly as possible as if it were a hearing and determination of a charge for an offence: s 38W(1).</p> <p>At a special hearing (s 38W(2)) —</p> <ul style="list-style-type: none"> • child must be taken to have pleaded not guilty; • child may raise any defence that could be raised if the special hearing were a hearing of the charge, including the defence of mental impairment; • the rules of evidence apply; and • subject to 524 of the <i>Children, Youth and Families Act 2005</i>, the child must be legally represented; and • any alternative finding that would be available if the special hearing were a hearing and determination 	<p>(c) the Chief Commissioner of Police.</p> <p>However, Children's Court must not vary a custodial supervision order to non-custodial supervision order unless satisfied that safety of the child subject to the order or public will not be seriously endangered as a result of the release of the child: at s 38ZO(2).</p> <p>What treatment is available?</p> <p>There does not appear to be any provision in the Act for the type of treatment to be provided in the designated facilities, although treatment is clearly contemplated.</p> <p>However, it seems that treatment is not contemplated for adults in custody in a prison. No certificate is required under s 47 in such a case.</p>
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				<p>of the charge is available.</p> <p>The findings available to the Children’s Court at the special hearing are:</p> <ul style="list-style-type: none"> (a) not guilty; (b) not guilty because of mental impairment; and (c) the child committed the offence (must be satisfied BRD on evidence available) (s 38X(1) and (2)). <p>A finding that the child committed the offence constitutes a <u>qualified finding</u> of guilt and does not constitute a basis in law for any conviction for the offence; and constitutes a bar to further prosecution in respect of the same circumstances: s 18(3).</p> <p>If court makes a finding under section 38X(1)(c) (that child committed offence), court must—</p> <ul style="list-style-type: none"> (a) declare that child is liable to supervision under Div 5; or (b) order the child to be released unconditionally (s 38Y(4)). <p>If a child is found <i>not guilty because of mental impairment</i> of indictable offence heard and determined summarily in</p>	
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				<p>Children's Court, court must (s 38ZD(1)):</p> <ul style="list-style-type: none"> (a) declare that child is liable to supervision under Div 5; (b) order child to be released unconditionally. <p><u>Supervision orders: indictable offences</u></p> <p>By ss 38Y(5) and 38ZD(2), the Children's Court must not declare a child liable to supervision unless court considers that the declaration is necessary in all the circumstances including—</p> <ul style="list-style-type: none"> (a) whether adequate supervision is available in the community; and (b) whether the child has complied with community supervision and extent of compliance; and (c) whether a declaration is required for the protection of the child or community. <p>Children's Court must not order a child to be released unconditionally unless the court is satisfied that, if necessary, the child is receiving appropriate treatment or support for the child's mental health or</p>	
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				<p>disability: ss 38Y(6) and 38ZD(3).</p> <p>If Children's Court declares that child is liable to supervision Div 5, court must make a supervision order in respect of the child (s 38ZH(1)).</p> <p>The purpose of a supervision order is to ensure that a child receives treatment, support, guidance and assistance for the child's mental impairment or other condition or disability: s 38ZH(2). A <i>custodial</i> supervision order has an additional purpose of protecting the child or the community while the child receives the treatment, support, guidance and assistance: s 38ZH(3).</p> <p>Duration: A child may be subject to a custodial supervision order only for as long as is required for the protection of the child or the community: s 38ZH(4).</p> <p>A supervision order may commit the child to custody (custodial supervision order); or release the child on conditions decided by the Children's Court and specified in the order (non</p>	
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				<p>custodial supervision order): s 38ZH(5).</p> <p>The Children’s Court must not make a supervision order unless the court finds that:</p> <ul style="list-style-type: none"> (a) there is no practicable alternative; and (b) the order is required for the protection of the child or community (s 38ZH(7)). <p><u>Term of supervision order</u></p> <p>A supervision order is for a term <u>not exceeding 6 months</u> that is specified by the Children's Court: s 38ZI(1).</p> <p>When making supervision order, court must direct that matter be brought back to the court for review at the end of the period specified by the court: s 38ZI(2).</p> <p>Term of supervision order may be extended more than once by maximum of <u>6 months</u> but so that the total period of the order (including custodial supervision orders and non-custodial supervision orders) <u>does not exceed—</u></p> <ul style="list-style-type: none"> (a) in the case of a child aged 10 years or more but under 15 years at the time of the making 	
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				<p>of the supervision order, 12 months; and (b) in the case of a child aged 15 years or more but under 21 years at the time of the making of the supervision order, 24 months (s 38ZI(3)).</p> <p><u>Reports</u></p> <p>If court declares that child is liable to supervision, the court—</p> <p>(a) must, before making a supervision order, order that a report as to supervision be submitted and adjourn the hearing to enable its preparation; and</p> <p>(b) may remand the child in custody or grant bail or make any other order that the court considers appropriate.</p> <p>Depending on the needs of the child and the services that the child may require, a report is to be prepared by the Secretary to the Department of Human Services, the Secretary to the Department of Health or the Secretary to the Department of Health jointly with the Secretary to the Department of Human Services: s 38ZS.</p>	
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				<p>Content of the report (s 38ZT(1)):</p> <ul style="list-style-type: none"> • whether the child has a mental impairment or other condition or disability and, if so, specify the services which are available and appropriate; • the services currently being made available to the child, whether or not by a government department, and whether the child has complied with those services; • if the court so requests, the services that would be made available to the child if a custodial supervision order were to be made in respect of the child. 	
Legislation (and jurisdiction)	Definition of <i>mental impairment</i> and <i>unfitness to plead</i>	Procedure/ basis upon which Magistrate/Judge decision	Options following finding of unfitness	Specific provisions for young people?	Effect of a custody order (or like order)
<p>COMMON-WEALTH</p> <p><i>Crimes Act 1914</i> (Cth)</p>	<p>There does not appear to be any definition of “unfit to be tried”, other than to state that it includes “unfit to plead”: s 16.</p> <p>There does not appear to be any definition of</p>	<p><u>For matters to be tried before superior courts on indictment</u></p> <p>Where question of fitness to be tried is raised by the prosecution, the person or the person’s legal representative, in proceedings for the commitment for trial of a federal offence on <u>indictment</u>, the</p>	<p><u>For superior courts</u></p> <p><u>Orders dismissing charge and releasing defendant</u></p> <p>By s 20BA, where court determines that there has <u>not been established a prima facie case</u> that the person committed the offence, the court <u>must</u>, by order, dismiss the charge against the person and, if the person is in custody, order the release of the person from</p>	<p>There does not appear to be any specific provision for young people.</p>	<p>Where is the person detained? Who makes decision?</p> <p>If the court has determined that person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that person does not object to being detained in a</p>

	<p>mental impairment, intellectual disability, or similar.</p>	<p>magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person <u>been committed</u> for trial: s 20B(1).</p> <p>Where a magistrate refers proceedings to a court, the magistrate may order the person charged to be detained in prison or in hospital for so long only as is reasonably necessary to allow the court to determine whether it will make an order remitting the person to the magistrate, an order under s 20BA dismissing the charge or an order under s 20BB detaining the person in prison or hospital or granting the person bail: s 20B(4).</p> <p>If the court to which proceedings have been referred finds the person charged to be fit to be tried, the court must remit the proceedings to the magistrate and proceedings for the commitment must be continued: s 20B(2).</p> <p>Where a court to which proceedings have been referred <u>or</u> before which a person appears for trial of a federal offence <u>on indictment</u> finds the person charged unfit to be tried, the court must determine whether there has been established <u>a prima facie case</u> that the person committed the offence: s 20B(3).</p> <p>Where a court finds a person,</p>	<p>custody: s 20BA(1).</p> <p>Where court determines that a prima facie case is established, but the court is of the opinion, having regard to:</p> <ul style="list-style-type: none"> (a) the character, antecedents, age, health or mental condition of the person; (b) the extent (if any) to which the offence is of a trivial nature; or (c) the extent (if any) to which the offence was committed under extenuating circumstances; <p>that it is inappropriate to inflict any punishment, or to inflict any punishment other than a nominal punishment, the court must, by order, dismiss the charge and, if the person is in custody, order the release of the person from custody.</p> <p><u>If court does not dismiss charge</u></p> <p>Where court determines that prima facie case established that the person committed the offence, but the court does not dismiss the charge, the court must, as soon as practicable after making that first-mentioned determination, determine whether, on the balance of probabilities, the person will <i>become</i> fit to be tried, within 12 months after the day the person was found to be unfit: s 20BA(4).</p> <p>A court must not make a determination under s 20BA(4) unless court has obtained, and considered, written or oral evidence from a duly qualified psychiatrist and one other duly qualified medical practitioner: s 20BA(5).</p> <p><u>If person likely to become fit</u></p> <p>Where a court determines, under s 20BA(4), that a person will become fit to be tried within 12 months,</p>		<p>hospital—the court must order that the person be taken to and detained in a hospital: s 20BC(2)(a).</p> <p>Otherwise, court must order that the person be detained in a place other than a hospital, including a prison: s 20BC(2)(b).</p> <p>However, the Attorney-General may, at any time vary the hospital or other place of detention at which a person is detained under this section: s 20BC(3).</p> <p>Can they be released? By whom? On what grounds?</p> <p>Detention is for the period specified in the order, but must not exceed the maximum period of imprisonment that could have been imposed if the person had been convicted of the offence charged: s 20BC(2).</p> <p><u>Review by AG</u></p> <p>Where court makes order under for detention s 20BC(2), the Attorney-General must, at least once in each period of 6 months after the day the person is detained under the order, consider whether or not the person should be released from detention: s 20BD(1).</p> <p>In considering whether the person should be released from detention the Attorney-General:</p> <ul style="list-style-type: none"> (a) must obtain and consider:
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		<p>other than a person in respect of whom proceedings have been referred to it by a magistrate, to be unfit to be tried, the court may order the person to be detained in prison or hospital for so long only as is reasonably necessary to allow the court to determine whether it will make an order under s 20BA dismissing the charge or an order under s 20BB detaining the person in prison or hospital or granting the person bail: s 20B(5).</p> <p>A prima facie case is established if there is evidence that would (except for the circumstances by reason of which the person is unfit to be tried) provide sufficient grounds to put the person on trial in relation to the offence: s 20B(6).</p> <p>To determine whether a prima facie case has been established:</p> <p>(a) the person may give evidence or make an unsworn statement; and</p> <p>(b) the person may raise any defence that could properly be raised if the proceedings were a trial for that offence; and</p> <p>(c) the court may seek such other evidence, whether oral or in writing, as it considers likely to assist.</p>	<p>the court must, at the time of making that determination, also determine:</p> <p>(a) whether person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and</p> <p>(b) if so—whether person objects to being detained in a hospital (s 20BB(1)).</p> <p>Where a court has made a determination under s 20BB(1), the court must:</p> <p>(a) where court has determined that person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that the person does not object to being detained in a hospital—order that the person be taken to and detained in a hospital; or</p> <p>(b) otherwise:</p> <p>(i) order person to be taken to and detained in a place other than a hospital (<u>including a prison</u>); or</p> <p>(ii) grant the person bail on condition that the person live at an address or in a place specified by the court;</p> <p>for a period ending:</p> <p>(c) when the person becomes fit to be tried; or</p> <p>(d) when, as soon as practicable after the end of the 12 months, the court makes an order under s 20BC(2) or (5) (court to order that person be detained in a hospital or place other than a hospital, or order release from custody),</p> <p>whichever happens first: s 20BB(2).</p> <p>Where court determines that a person will become fit to be tried within 12 months but the person <i>does not</i> become fit within that period, then, at the end of that period, s 20BC(2) and (5) apply (court to order that person be detained in a hospital or place other than a</p>		<p>(i) a report from a duly qualified psychiatrist or psychologist; and</p> <p>(ii) a report from another duly qualified medical practitioner;</p> <p>(b) may obtain and consider any other reports considered necessary; and</p> <p>(c) must take into account any representations made to the Attorney-General by the person or on the person's behalf (s 20BD(2)).</p> <p>The Attorney-General may, after considering whether or not the person should be released from detention, order that the person be released from detention: s 20BE(1).</p> <p>However, the Attorney-General must not order a person's release unless satisfied that the <u>person is not a threat or danger either to himself or herself or to the community</u>: s 20BE(2).</p> <p>An order may be subject to conditions (so 20BE(3)(c)), including any of the following:</p> <p>(a) a condition that the person reside at an address specified;</p> <p>(b) a condition that the person present for such medical or psychiatric treatment as is specified;</p> <p>(c) a condition that the person undertake such medical or mental health therapy as is</p>
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			<p>hospital, or order release from custody), as if the court had originally determined that the person would not become fit: s 20BB(4).</p> <p>Where court determines that a person who was found unfit to be tried will become fit to be tried within 12 months but the person <i>does not</i> become fit within that period, the finding that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings in respect of the offence: s 20BB(6).</p> <p><u>If person not likely to become fit</u></p> <p>Where court determines, under s 20BA, that a person who was found unfit to be tried <u>will not become fit</u> to be tried within 12 months, the court must, at the time of making that determination, also determine:</p> <p>(a) whether the person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital; and</p> <p>(b) if so—whether the person objects to being detained in a hospital</p> <p>(s 20BC(1)).</p> <p>By s 20BC(2), where a court has made a determination under s 20BC(1), the court must:</p> <p>(a) if court has determined that person is suffering from a mental illness, or a mental condition, for which treatment is available in a hospital and that person does not object to being detained in a hospital—order that the person be taken to and detained in a hospital; or</p> <p>(b) otherwise—order that the person be detained in a place other than a hospital, including a prison;</p> <p>for a period specified in the order, not exceeding the maximum period of imprisonment that could</p>		<p>specified;</p> <p>(d) a condition that the person undertake such social, vocational or educational counselling as is specified;</p> <p>(e) a condition that the person participate in such programs relating to financial management, behaviour modification or inter-personal relationships as are specified.</p> <p>What treatment is available?</p> <p>There does not appear to be any specific provision for the type of treatment available.</p> <p>It is not clear whether or not treatment is contemplated for those detained in a place other than a hospital.</p>
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			<p>have been imposed if the person had been convicted of the offence charged.</p> <p>The Attorney-General may, at any time vary the hospital or other place of detention at which a person is detained under this section: s 20BC(3).</p> <p>However, the court may, if in the court's opinion it is more appropriate to do so, order the person's release from custody either absolutely or subject to conditions to apply for such period as the court specifies in the order, not exceeding 3 years: s 20BC(5).</p> <p>The conditions may include:</p> <ul style="list-style-type: none"> (a) a condition that person remain in the care of a responsible person nominated in the order; (b) a condition that person attend upon a person nominated, or at a place specified, in the order for assessment of the person's mental illness, mental condition or intellectual disability and, where appropriate, for treatment; and (c) any other condition that the court thinks fit (so 20BC(6)). <p>Where court determines that a person who was found unfit to be tried will not become fit to be tried within 12 months, the finding that there is a prima facie case for the commission of the offence charged acts as a stay against any proceedings in respect of the offence: s 20BC(8).</p> <p><u>Other orders court may make – not connected with unfitness</u></p> <p>(1) Where a person is <u>convicted</u> in a State or Territory, on indictment, of a federal offence and the court before which the person is convicted is satisfied that:</p> <ul style="list-style-type: none"> (a) the person is suffering from a mental illness within the meaning of the civil law of that State or Territory; and 		
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			<p>(b) the illness contributed to the commission of the offence by the person; and</p> <p>(c) appropriate treatment for the person is available in a hospital in that State or Territory; and</p> <p>(d) the proposed treatment cannot be provided to the person other than as an inmate of a hospital in the State or Territory;</p> <p>the court may, without passing sentence on the person, make an order (in this section called a hospital order) that the person be detained in a hospital specified in the order for a period specified in the order for the purposes of receiving treatment specified in the order.</p> <p><u>For courts of summary jurisdiction</u></p> <p>By s 20BQ, where, in proceedings in a State or Territory <u>before a court of summary jurisdiction</u> in respect of a federal offence, it appears:</p> <p>(a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and</p> <p>(b) that it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;</p> <p>the court may, by order:</p> <p>(c) dismiss the charge and discharge the person:</p> <p>(i) into the care of a responsible person, unconditionally, or subject to conditions, for a period not exceeding 3 years; or</p> <p>(ii) on condition that the person attend on another person, or at a place, for an assessment of mental condition, or for treatment, or both, for a period not exceeding 3 years; or</p> <p>(iii) unconditionally; or</p> <p>(d) do one or more of the following:</p>		
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			<ul style="list-style-type: none"> (i) adjourn the proceedings; (ii) remand the person on bail; (iii) make any other order that the court considers appropriate. <p>An order that the charge be dismissed under s 20BQ(1)(c) acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence: s 20BQ(2).</p>		
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Note: procedures for appeal have not been included in this table.