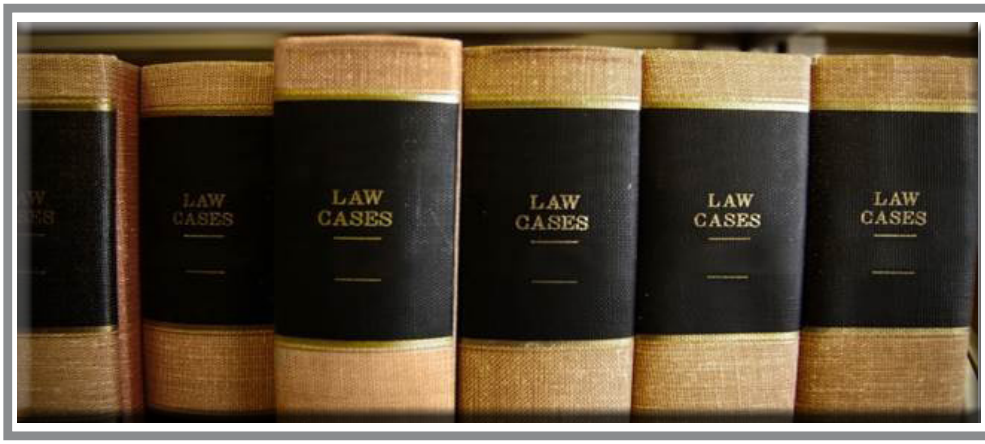
Consensus Statement on **Legal Issues of Fetal Alcohol Spectrum Disorder (FASD)** Edmonton, Alberta



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Acknowledgement

The Honourable Ian Binnie

CC, QC, Former Justice of the Supreme Court of Canada, led a panel of distinguished citizens and experts to develop recommendations and suggestions of policy improvements in addressing the unique position of people with FASD within the legal system.

The Honourable Marguerite Trussler

QC, Retired Justice of the Court of Queen's Bench; Chairperson - Alberta Liquor and Gaming Commission, chaired the Steering Committee for Alberta Initiatives on FASD.

Disclosure Statement

All of the jury members who participated in this conference and contributed to the writing of this statement were identified as having no financial or scientific conflict of interest.

About the Consensus Statement

This consensus statement on Legal Issues of Fetal Alcohol Spectrum Disorder is the product of a unique IHE Consensus Development Conference held in September 2013. The event was a three-day juried hearing of evidence and scientific findings that allowed for the engagement and collaboration of citizens and decision makers in government and the justice system in addressing a specific set of key questions on legal issues related to FASD.

Conference Questions

1. What are the implications of FASD for the legal system?
2. How can efforts to identify people with FASD in the legal system be improved?
3. How can the criminal justice system respond more effectively to people with FASD?
4. How can family courts and the family/child welfare legal system address the specific needs of people with FASD?
5. What are best practices for guardianship, trusteeship and social support in a legal context?
6. What legal measures are there in different jurisdictions to contribute to the prevention of FASD, and what are the ethical and economic implications of these measures?

Consensus Statement Introduction

Fetal alcohol spectrum disorder (FASD) refers to a range of physical, neurodevelopmental, and behavioural impairments resulting from damage to the brain of the fetus caused by maternal alcohol use during pregnancy. These impairments may include growth retardation, malformations of the face, neurological disorders, and deficiencies such as problems with memory, learning, attention and social communication. The facial abnormalities associated with prenatal alcohol exposure are not always present, and, therefore, FASD is frequently invisible and undiagnosed. Nonetheless, the brain trauma that alcohol causes in the developing fetus is irreparable, lifelong, and devastating for the individual, the family and other caregivers. In Canada, at least one of every one hundred newborns is affected by FASD (an estimated 3,800 newborns in 2010-11).

Although alcohol is the primary explanatory factor in the neurological profile of FASD individuals, we also recognize the impact of variables such as early childhood trauma, genetics, maternal nutrition, adverse environment and brain development. These factors tend both to confound and to mask the neurological deficits caused by the diffuse brain injury that exists in all cases of FASD regardless of where the person falls across the fetal alcohol spectrum.

FASD is present throughout Canadian society although accurate studies of prevalence in different segments of the population are not available. For reasons almost certainly related to their historical treatment in Canada, it is generally assumed, whether accurately or not, that Aboriginal people who are disproportionately represented in the criminal justice system are also likely overrepresented among the populations that have neurological impairments associated with FASD. We stress, however, that FASD also affects other populations in Canada.

The recommendations in the 2009 Consensus Statement on Fetal Alcohol Spectrum Disorder (FASD) – Across the Lifespan remain relevant today. While we have been asked to focus on FASD in the legal context, we recognize that FASD and its implications are issues of broader societal concern and that society has a corresponding responsibility to provide support to these affected individuals in all aspects of their lives.

This 2013 consensus statement explores the implications for the justice system when the needs of FASD-affected individuals go unmanaged in the broader community and ultimately surface in the legal context. Our recommendations should be read, however, in light of our strong support for a holistic community-based approach that gives primacy to the rights and voice of the child, while fostering a collaborative community response to the child's individual needs.

Our recommendations should also be read in the context of the recent amendments to the federal FASD Framework for Action, the August 2013 Canadian Bar Association call for legislative change to recognize the unique position of FASD individuals in the criminal justice system, and the upcoming review of the Canadian Diagnostic Guidelines definition of FASD.

We must also stress our recognition of the needs of the broader society. FASD is a possible explanation for behaviour. It does not provide absolution for misconduct. At the same time, people who have FASD suffer from neurodevelopmental disorders and, in some cases, serious functional deficiencies that in all fairness must be recognized and taken into account in the administration of justice.

During the course of this conference the jury has been presented with a great deal of evidence which demonstrates the immense problems and challenges that FASD presents to the justice system. This consensus statement attempts to respond to those problems and challenges and thus the focus of this statement tends to be on the problems associated with FASD. The jury wishes to acknowledge, however, that the evidence we heard also includes many stories of triumph and success. There are signs of hope. There is good reason to believe that, with determination and with properly allocated resources, the huge cost of FASD to both the individuals affected by it and to society at large, can be alleviated.

FASD is not a problem that will go away. The fact that its effects are believed to be concentrated so heavily in already disadvantaged Aboriginal communities adds to the urgency of finding solutions or at least alleviating the associated hardships.

The jury heard evidence that Albertans spend, on average, $721 per person each year on alcohol. There is also evidence of increasing alcohol consumption, including binge drinking among some young people. We also heard evidence that a woman's consumption of alcohol has a serious potential to adversely affect an embryo at the very early stages of development, even before a woman would know definitely that she was pregnant.

All of these factors suggest that while more resources should be devoted to the prevention of FASD, the problem is also one of better allocating existing resources. In this field, as elsewhere, an ounce of prevention is worth a pound of attempted remedies.

Question 1: What are the implications of FASD for the legal system?

The FASD challenge to the legal system

The neurodevelopmental deficits associated with FASD present a fundamental challenge to the Canadian criminal justice system, which is premised on assumptions that people act in a voluntary manner that is determined by free will and that they can make informed and voluntary choices with respect to both the exercise of their rights and the decision to commit crimes. It is presumed that a person intends the natural consequences of his or her actions, and that, for example, an individual would never make a statement against his or her interest unless it was either true or coerced.

The evidence we have heard is compelling that those with FASD are likely to have a diminished capacity to foresee consequences, make reasoned choices or learn from mistakes. Therefore, their actions are likely to clash with assumptions about human behaviour at almost every stage of the justice system.

Throughout their lives, individuals with FASD are more likely to be involved in the legal system than individuals without FASD. Children with FASD are overrepresented in the foster care and group care systems, and their special needs and developmental issues have been identified by the courts in all aspects of the law from criminal prosecutions to guardianship, family violence and child protection applications.

Conflicting consequences

The diagnosis of FASD may have multiple and conflicting consequences. Privacy issues are at stake. In the criminal context, courts in some (but certainly not all) cases recognize that FASD is a disability that reduces the moral culpability or voluntariness of a person's actions and may result in a lesser criminal sentence; but the same disability may result in a deemed inability to care for a child, leading to state intervention in the family or a change in custody, or deny a person's ability to rely on their insurer in a motor vehicle claim if they failed to disclose their FASD diagnosis.

The elusive nature of FASD

One fundamental problem is that FASD represents a broad spectrum of symptoms of greatly varied severity giving rise to a range of disorders/disabilities and, consequently, varying degrees of diminished responsibility and capacity.

It would be relatively simple if individuals with FASD could be located on an index from 1 to 10 and the court could be told this suspect/applicant is a "3" or a "7" in terms of severity, but given the highly individualized symptoms and diagnoses such a simple one-dimensional categorization is impossible. While the elements of the neurological damage associated with FASD are well established, their expression and intensity vary from one individual to another.

In the absence of a simplified method of categorization, the legal system must adapt to individualized, context-specific diagnoses, and formulate manageable criteria or standards to deal with many different interactions with FASD sufferers.

Secondary disabilities and adverse outcomes

As a result of permanent brain damage and other factors, a person with FASD is vulnerable to a number of secondary disabilities and adverse outcomes. These include leaving school, family and placement breakdown, homelessness, alcohol and drug abuse and related infectious diseases. Many youth with FASD have been taken into care and are being raised in foster families or group homes, often with several placements and possibly inadequately trained caregivers. These populations may overlap with the disproportionate apprehension of Aboriginal children in the child welfare system. Unemployment, mental illness, and involvement with the criminal justice system are common. We were told that a majority (about 60%) of individuals with FASD come into conflict with the law.

Underdiagnosis: the invisible population

Only a small portion of individuals with FASD show physical signs and the cognitive disabilities associated with FASD are often not apparent on standard intelligence tests. Without an awareness of other signs that may be symptomatic of FASD, the person affected by FASD can easily fall through the cracks.

Recommendations

Recommendations to tackle the implications of FASD in the legal system do not fit easily into a tidy framework. Recognizing that the context for some of the jury's recommendations will become more apparent later in this Statement, the jury begins with the following:

1. The ability of communities and families must be strengthened to deal – outside of the traditional criminal justice system – with "offending behaviour" of youths and adults.

2. Services must be provided within communities that would help create more stable homes and placements for those in care. The goal should be to help communities manage the problems associated with FASD so that those with FASD from that community can remain in the community as productive members of society.

3. FASD must be assessed using a multidisciplinary team approach; no one specialty is sufficient.

4. The development of biomarkers appears to be the most promising area of research to identify FASD affected individuals and should be pursued, although the use of them raises important legal and ethical issues.

5. Greater effort must be made to make the public aware of the cost of dealing with FASD in the legal system.[1]

6. Where at all possible those affected by FASD should be kept out of the criminal justice system. In 2010/11 it cost an average of about $114,000 per year to keep a prisoner in federal prison, much more than it costs to provide services – criminal justice or otherwise - in the community. Studies suggest that between 10% and 25% of prisoners have FASD. It is estimated that each person with FASD costs governments $1.5 – 2.0 million over their lifetime including education, health and other services.[2] These costs, as well as the difficulties that people with FASD may experience in custodial institutions, include but are not limited to:

   - support for community-based housing (such as the At Home Chez-Soi / Housing First Program) and transition housing programs;

   - community education programs starting with children and youth; and

   - community support and intervention programs that are evidence-based in supporting individuals affected by FASD throughout their lifespan, particularly in key transition periods.

7. More resources should be focused on family and community supports that will allow those with FASD to live under supervision outside of the criminal justice system. The jury heard evidence about a cross-sectoral program in Alberta that supports people with FASD in the community for costs below $5,000 per person served per year or $1.63 per capita, a figure that is far below correctional costs.

1. The jury heard evidence that each person charged in the criminal justice system costs over $16,000 in policing, prosecutorial, court and correctional costs. In what is described as the revolving door phenomena, many people with FASD re-offend, often because they are unable to comply with various conditions placed upon them by bail orders, conditional sentences or parole.
2. Governments benefit greatly through the taxation of alcohol, but spend only a tiny portion of these revenues on dealing with its adverse consequences. We heard evidence that Alberta collects $578 million in taxes on alcohol each year or $158 per capita but that the government spends only $3 per capita on the health effects of alcohol. There is a need for governments to devote more of those funds to education, research and services about the dangers of alcohol, including FASD.

Training

8. Mandate training for all players in the legal system, including judges, crown, defence, corrections, police, probation officers, parole officers, and community frontline workers so that when they encounter a citizen, in a home or on the street, they have the background knowledge that will sensitize them to the cues that may suggest that the person they are dealing with has FASD.

9. Support innovative training programs that promote inter-sectoral dialogue and partnerships, and sustain longitudinal educational curriculums in order to ensure continuing education for all major stakeholders in Canada (such as corrections, health, social development, mental health, RCMP, provincial and federal court officials, education, and First Nations).

10. Training needs to be carried out on an ongoing basis to ensure that people know not only the up-to-date best practices but also the services that are available in their communities to those who suffer from FASD.

Other Recommendations

11. Every child going into care of the state should receive a full medical examination and a full psychological examination that would include a screen for FASD to assist with the planning and implementation of appropriate services for the family. However, should this policy be implemented, the purpose of the assessment should be clearly stated to avoid the misuse of the FASD diagnosis against the mother. Similarly, admission procedures in correctional centres (either on remand or on sentence) should include screening for possible FASD to ensure that prisoners are dealt with appropriately by staff trained in the problems associated with FASD. Again, the FASD diagnosis should not be used against the prisoner, but should be used to help better accommodate and manage such persons within the correctional system.

12. Consideration should be given to the legal, ethical, and practical issues surrounding policies related to the sharing of a positive FASD diagnosis. For example, the suggestion that positive FASD diagnoses be kept on police files (e.g., CPIC) or child protection files to ensure that it is shared with others who may have contact with that individual in the future raises important issues of privacy. Nevertheless, if this information were known to police officers and child protection authorities – under certain specified conditions and with the appropriate training of those officials – it might help alleviate problems and promote just and fair outcomes.

13. Individuals with FASD often get into conflict with the law when they are not involved in a structured program. There is a need to build relationships between an individual with FASD or other

neurological impairment and a circle of support that could include family members and social service workers to ensure that the individual has a therapeutic environment in which to live.

14. Housing stability and wraparound support are critical. Government should undertake to examine whether it might be more economical to develop small (e.g., 10-bed) housing units with 24/7 support from social service agencies to ensure that those people with FASD have established circles of support and therapeutic environments in which to live. The value and costs of such an approach need to be compared to the existing practice of revolving door processing by justice systems and incarceration.

15. FASD screening tools such as the Asante Centre's FASD Screening and Referral Tool for Youth Probation Officers should be examined in order to determine the best way in which they can be used to trigger a formal diagnosis in the court system or in other areas including but not limited to correction and child protection services.

16. There is a need for increased capacity for multidisciplinary diagnostic teams that can provide timely diagnosis at critical stages of the justice process (e.g., sentencing, child protection proceedings) and at other points in the individual's life when decisions are made that might affect his/her welfare or that of his/her child. Care should be taken, however, not to divert diagnostic resources from the general population such that only those youths or adults who are caught up in the youth or adult criminal justice systems receive diagnostic services. In many locations, but perhaps especially in remote communities, mechanisms need to be developed to ensure that resources are both available and used most effectively to diagnose and create support plans for those with FASD.

Question 2: How can efforts to identify people with FASD in the legal system be improved?

The jury heard from many speakers about the importance of diagnosing people with FASD. At the same time, each diagnosis can cost in excess of $3,000 and it is an intensive process with a potential to stigmatize those identified with FASD. The jury also heard that there are severe resource restraints on the availability of diagnosis in Canada, and in some parts of Canada, especially in remote areas including many First Nations, it is impossible to obtain a diagnosis.

While the jury has recommended increased screening and diagnosis, there is a corresponding need to ensure that those with FASD are supported in their efforts to live useful rather than disadvantaged lives in the community because they are so diagnosed.

Diagnostic imaging

There is no imaging "signature" under current imaging methods that is specific to diagnosing FASD. However, advanced functional MRI, still in the research phase and not yet available for diagnostic purposes, does show significant reductions in brain volume, white and grey matter, and cortical abnormalities that, although not specific to FASD, are typical of those with neurological impairments associated with FASD.

Need for early identification and intervention

There are promising models currently in place in Canada that could be used to effectively identify individuals who show signs of FASD and other neurodevelopmental disorders at an early stage. Integrated strategies can then be developed to manage these young children effectively before they come into conflict with the justice system. The Hub and COR (Centre of Responsibility) model that was started in Prince Albert, Saskatchewan, and has now spread to several other communities in the province, as well as communities across Canada, provides a promising model for approaching FASD in a multi-disciplinary and proactive manner. The Hub is a forum where individuals from corrections, health, social services, education and the police meet twice weekly to discuss cases in specific detail (within the limits of relevant information-sharing rules and regulations) in order to determine solutions for individuals assessed to be at acutely elevated risk.

Any member of the Hub may bring forward a case that has passed through their internal processes and has been deemed to be too complex or at too high a level of risk to be handled by the originating agency alone. The Hub provides immediate, coordinated and integrated responses through the mobilization of resources to address the situations facing individuals and/or families with acutely elevated FASD risk factors, as recognized across a range of service providers.

An individual suspected of having FASD or other neurological impairment may be identified by any participating agency, including the police service, prior to

involvement with the justice system should he or she exhibit a level of acutely elevated risk. Once identified, the Hub mobilizes the necessary agencies or resources to address the risks facing the individual at that time, thereby potentially preventing the need to engage the legal system. The benefit of the Hub process is that it brings together individuals from multiple agencies to work collaboratively to resolve problems before they reach the justice system. This model is ideally suited to bring a quick response when someone suspects an individual may have signs of FASD or another neurodevelopmental impairment.

The Youth Criminal Defence Office program and the Youth Justice Advocacy program are also examples of effective intervention programs, launched in Alberta, to keep affected individuals out of the traditional legal system.

Identification of FASD in court proceedings

The reality of the court process (both civil and criminal) is that many decisions will have to be made without the provision of a full diagnosis. In some cases there may be indications but there will not be expert opinion evidence; the cases in which there are both are the exception. Those affected by FASD suffer disproportionately when decisions are taken on the basis of stereotypes, misinformation, or lack of relevant information. Decision-makers should have as much accurate information as is available and be aware of the practical limits on their knowledge.

Judicial reluctance to take "judicial notice" of the symptoms and attributes of FASD

"Judicial notice" is a doctrine that allows courts to find facts without expert or other evidence, provided the "facts" are notorious or capable of immediate and unarguable verification (for example that Christmas falls on December 25 every year).

If available, judicial notice is a shortcut to help solve the lack of courtroom resources, including the presence at trial of expert witnesses. However, appellate courts have stated that trial judges cannot simply take judicial notice of FASD.[3] Hence the individual with FASD is in a bind. No resources. No diagnosis. No evidence. No judicial notice. Therefore no fair and appropriate FASD-related accommodation is available within the usual rigours of the legal system.

Judicial authority to order assessments

As one aspect of addressing the over-representation of Aboriginal people in the prison system, the Supreme Court of Canada has identified the importance of obtaining a report, providing background context, before imposing any sentence upon an Aboriginal offender.[4] Such contextual

3. *R. v. Harris*, 2002 BCCA 152 involved the sentencing of a 43-year-old with 62 convictions for breaking and entering and break of probation. A pre-sentence report included information about possible FASD. The British Columbia Court of Appeal said the sentencing Judge erred by taking judicial notice of Mr. Harris' situation and making a diagnosis. Levine J.A. stated that "it is wrong in principle…for a sentence to be based on a conclusion about the mental capacity of an individual offender derived from assumptions and general knowledge." This conclusion was reached despite the Court of Appeal's recognition "that it is practically impossible for an adult to be assessed for FAS/FAE/ARND in this province" because of an unwillingness of the province to pay for such multidisciplinary and specialized assessments. See also *R v. Joamie*, 2013 NUCJ 19.
4. *R v. Gladue*, [1999] 1 SCR 688.

background information would be of equal importance to the court in the case of an accused person with FASD, not just in matters of sentencing. In youth matters, there is express authority in s. 34 of the Youth Criminal Justice Act for a court to order assessments where appropriate. There is no express parallel authority in the Criminal Code of Canada.

The jury is of the view, having particular regard to the restrictions on the scope of 'judicial notice', any ambiguity concerning the court's ability to order an FASD or other neuropsychological assessment as needed, should be resolved and if necessary, a provision similar to s. 34 of the YCJA should be incorporated into the Criminal Code.

Recommendations

17. The Supreme Court of Canada has recognized that the over-representation of Aboriginal persons among the inmate population constitutes a crisis in the criminal justice system. In the jury's view, the over-representation of people with FASD in correctional facilities and in care of child protection agencies is of overlapping and equal concern.

18. Federal, provincial and territorial governments should continue to support research that provides estimates of the prevalence of persons with FASD in correctional settings and in child protection care.

19. Federal, provincial and territorial governments, through the Heads of Corrections Committee, should explore effective case-management strategies for offenders with FASD who are serving their sentences in the community or in custody.

20. Child protection authorities should explore effective case-management strategies for parents with FASD and children with FASD to ensure the functional needs of the parent or child are being provided for and adequate services are in place.

Question 3: How can the criminal justice system respond more effectively to people with FASD?

The neurological impairments associated with FASD are likely to collide with the law, which generally assumes a level of intent, foresight and awareness. The evidence shows that, unless diagnosed, those with FASD are likely to be disadvantaged at the point of initial contact with police, in relation to the understanding of legal rights and options as well as the ability to respond to investigative processes (particularly interrogations), at the bail stage, the trial stage, the sentencing stage (where it is assumed by way of deterrence that the risk of adverse consequences will lead to an avoidance of those consequences), and the post-sentencing stage. At each of these stages, it is assumed that offenders are capable of making choices, understanding the consequences of their action, and learning from their mistakes. These assumptions do not accord with what is known about the functional disabilities associated with FASD.

A great risk created by the interaction of individuals with FASD and the legal system is a wrongful conviction. This danger is enhanced by the suggestibility of many people with FASD and the consequent risk of false confessions and guilty pleas of convenience.

The failure to have a full diagnosis of FASD should not be an excuse for ignoring relevant neurological impairments that may be associated with FASD. The imprisonment of an innocent man or woman, because of misunderstandings created by a condition over which an accused has no control, should shock the conscience of society.

FASD and the pre-trial process

Those with FASD facing criminal charges may often not fully appreciate the criminal nature and consequences of their actions, nor may they fully understand the legal proceedings and potential outcomes of their cases. Problems with memory, organizing, and contextualizing may make it difficult for them to remember or to relate important facts that would assist counsel in presenting a proper defence. It is characteristic of individuals with FASD to be suggestible and to have a desire to please others, and, therefore, to agree with leading questions. They may believe that a confession (true or false) is required and may therefore face an increased risk of giving false confessions and being wrongfully convicted.

Factors that make them more likely to give false confessions also make them less reliable as witnesses and complainants. When they are the victims of crime, those who have victimized them are therefore less likely to be convicted, an equally problematic outcome.

Taking statements from suspects or witnesses with FASD

Alerting the authorities to an FASD issue

Section 10(b) of the Charter of Rights and Freedoms requires the police to inform people who are detained or arrested of their "right to retain and instruct

counsel without delay." Some people with FASD, and no doubt others, may have trouble understanding this complex language.

Special rules of interrogation of suspects with known or suspected FASD

Although section 146 of the Youth Criminal Justice Act (YCJA) provides some special rules for the taking of statements from youths, the Criminal Code does not.

Videotaping statements would allow judges to better apply existing rules and safeguards that require valid waivers of Charter rights and allow only voluntary statements to be used as evidence. Videotaping would also help reduce the risk that a suggestible person with FASD might make a false confession that could possibly result in a serious miscarriage of justice.[5] In *R. v. Henry* it was held that statements taken from an individual with FASD who functions at the level of a seven-and-a-half-year-old should be excluded as involuntary.[6]

Recent judicial decisions that allow persistent or deceptive questioning of suspects by the police or that do not allow meaningful resort to counsel while an accused is being questioned by police may operate with great unfairness when applied to people with FASD.

Victims and witnesses in criminal trials may also have FASD. Videotaped police interviews with important witnesses who may have FASD would help determine whether misleading or otherwise problematic suggestions were made to the witness by the police.[7]

Waiver of Charter rights

In recognition of FASD disabilities, some courts have held that suspects with FASD lack the capacity to knowingly and voluntarily waive their Charter right to counsel.[8]

Recommendations

21. Parliament should give consideration to adding special rules to govern the questioning of suspects with known or suspected serious neurodevelopmental disabilities such as FASD.
22. Statements by a suspect should be videotaped.
23. The videotape requirement should extend to victims and witnesses as well as suspects with known or suspected serious neurodevelopmental disabilities such as FASD.

5. This concern is not hypothetical. A false confession by Simon Marshall, a person with similar mental disabilities, led to a notorious miscarriage of justice in Quebec.
6. *R. v. Henry*, 2002 YKTC 62 (CanLII)
7. *R. v. C.M.S.*, 2004 YKSC 2
8. *R. v. Sawchuck*, (1997), 117 Man. R. (2d) 282, [1997] M.J., No. 186 (QL).

Exercise of prosecutorial discretion and diversion

In many locations, a significant number of cases in court relate to "administration of justice" charges such as failure to appear, breach of probation, or failure to comply with a court order (typically bail conditions). Looking at all court cases for 2010/11, the proportion of all youth and all adult court cases involving an "administration of justice" charge as the most serious offence in the prosecution was as follows:

Jurisdiction	**Youth**	**Adult**
Canada	10.6%	21.0%
Manitoba	14.3%	30.5%
Saskatchewan	13.7%	28.8%
Alberta	11.8%	25.8%
Yukon	6.2%	28.6%
NWT	22.3%	34.4%
Nunavut	8.1%	26.8%

We heard evidence that a leading characteristic of people with FASD is an inability to organize their lives, meet deadlines, keep appointments, learn from experience and understand the consequences of failure to do any of these things. Accordingly, what are called "administration of justice" charges in effect criminalize those with FASD by setting the person up for further charges ("the revolving door"). These problems – e.g., the missing of court dates or other court-required appointments – can be addressed in three ways: (a) by the largely ineffective punishing of those with FASD for the violation, (b) by developing supports (e.g., reminders or by providing structures) so that the person does not violate conditions that are necessary, and (c) by ensuring that conditions required of all those involved in the youth/criminal justice system are necessary and useful for all those before the courts, especially those with FASD. Clearly the second two approaches are better both for the accused person and for society more generally.

Recommendations

24. Action should be taken – in legislative policy or in training – to reduce the number of "administration of justice" charges laid against FASD youths and adults. This might start immediately by ensuring that the nature and number of conditions (at pretrial release, on probation, etc.) placed on those apparently with FASD be realistic both in terms of the number and nature of the conditions.

25. Prosecutor's information sheets should be modified so that when a charge is laid against a person whom police suspect of having FASD or another neurodevelopmental disorder, the indications that the person may have FASD or some neurodevelopmental disorder can be noted.

Judicial interim release (bail)

Persons with FASD will often have a history of non-appearance or of re-offending and are thus poor candidates for release based on past behaviour. This can lead to a likelihood of pretrial detention, guilty pleas based on convenience or, where release is granted, reliance upon numerous, stringent and unrealistic conditions.

Recommendations

In an application for judicial interim release where FASD is known or suspected:

26. Ready access by the court to rapid screening services should be routine. This is particularly important in bail matters as time will often be of the essence.

27. Bail conditions should be tailored to ensure the public safety and the attendance of the accused at trial, of course, but also with the recognition of the nature of FASD and tailored to the capacity and understanding of the person with FASD, who will likely not be able to perform conditions to the standard of the ordinary applicant.

28. Risk reduction strategies based on external supports rather than complex conditions should be considered. This may involve targeted use of sureties and/or the development of bail supervision programs appropriately tailored to the capabilities of accused with FASD.

Fitness to stand trial (Criminal Code s. 2)

The issue of fitness to stand trial can be raised by the judge or any party,[9] but as one judge has observed, the exceptions to criminal responsibility both with respect to fitness to stand trial and the mental disorder defence "were developed by judges several hundred years ago . . . when nothing was known about the complexity of the permanent brain damage that is Fetal Alcohol Spectrum Disorder."[10]

The standard for determining fitness to stand trial is very restrictive. A person is unfit to stand trial under s. 2 of the Criminal Code if he or she is "unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel." The courts have accepted that FASD is a mental disorder, but there are concerns that the other requirements of fitness to stand trial may be interpreted too restrictively in relation to an accused with permanent neurological disabilities.

Many speakers at the conference spoke about the difficulties in obtaining assessments of accused with possible FASD in the adult system and of the utility of s. 34 of the Youth Criminal Justice Act which enables judges to order the assessment of a young person by "a qualified person" at "any stage of proceedings." Such assessments can under s. 34(1)(b)(i) be ordered when the court has reasonable grounds to believe that the young person "may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability".

Recommendations

29. Judges in the adult system should have similar powers as are available under s. 34 of the Youth Criminal Justice Act to order assessments of accused, especially when there are reasonable grounds to believe that the accused suffers from FASD or any other intellectual impairment or neurodevelopmental disorder.

9. People with FASD who have been found unfit to stand trial have been subject to strict and long standing judicially imposed conditions, but s. 672.851 Criminal Code now provides that proceedings should be halted by a stay of proceedings if an unfit accused "does not pose a significant threat to the safety of the public" and if "a stay is in the best interests of the proper administration of justice." A person with FASD who satisfies such criteria would appropriately not be subject to a criminal trial or court-ordered conditions in the community.
10. *R. v. Harper* 2009 YKTC 18 at para. 29

Guilty pleas

The evidence raised a concern that there may be an enhanced need to ensure that where an accused with FASD pleads guilty, particular attention is paid to the voluntariness of the plea, the accused's understanding of the facts upon which the plea is based, his or her understanding of the consequences and the other options available.

FASD and the trial

There is a need to ensure that appropriate information about the FASD condition is presented at trial so that proper legal safeguards are applied to protect an accused with FASD or facilitate the giving of accurate evidence by a victim or witness with FASD.[11] The issue is not only to prevent a wrongful conviction of an accused with FASD, but the wrongful acquittal in the case of a victim with FASD.

Consideration of innovative trial courts

In some jurisdictions special courts have been established to deal with special subject matters (e.g., drugs) or people (family courts) or commercial matters (the commercial list in a trial court).

Recommendations

30. Consideration should be given to the establishment of special processes within the existing court structures to bring to bear the combined expertise and training of judges, prosecutors and defence counsel knowledgeable about FASD. This would serve the interest of fairness as well as efficiency.

Assessment of credibility

A characteristic frequently associated with FASD is the inability to retrieve facts from memory in a coherent way, to remember the source of the information thus retrieved, to communicate what is remembered, and to respond to cross-examination in the stress of a courtroom. These characteristics may, unless understood in context by the trier of fact, unfairly affect an evaluation of the FASD individual's credibility.

11. *R. v. P.D.T.*, 2012 ABCA 68 admitting statements in the face of an allegation but absence of evidence that accused has FASD

Availability of *mens rea* defences

FASD can be relevant to the assessment of whether the accused has the requisite fault or *mens rea* to be convicted of a criminal offence. With respect to offences that require subjective intent, the focus must be on the accused's own subjective awareness and purposes, and triers of fact should be alert to the relevance of evidence that the accused has FASD or other forms of intellectual impairments or neurodevelopmental disorders. These factors will, of course, likely be more relevant with respect to the higher forms of subject intent and knowledge. Even with respect to objective forms of fault, an incapacity to appreciate the relevant risk caused by FASD or other factors may be relevant.

Defences of diminished responsibility such as *provocation, duress* and *self-defence*

These defences require that the accused act reasonably. The proper question is would a reasonable person with a form of FASD similar to that of the accused be considered to have acted reasonably? The assumption that people intend the ordinary and natural consequences of their actions may not apply to someone who, because of a neurological disability, is unable to anticipate what the effects will be, or control the impulse to react in a way not to be expected from an ordinary accused.

The mental disorder defence (Criminal Code s. 16)

Accused who are found fit to stand trial may still raise the mental disorder defence. This defence has not been changed in any substantive way since the mid-1800s. Section 16 of the Criminal Code requires that an accused have a mental disorder that renders him or her incapable of appreciating the nature and quality of the act or knowing that it is wrong. Although courts have recognized FASD as a mental disorder, they have been reluctant to hold that it renders the FASD accused incapable of appreciating the nature and quality of the act or knowing that it is wrong.[12]

The availability of a better-tailored defence of diminished responsibility for those with mental disabilities could provide the legal system with more flexibility in dealing with the diverse circumstances of offenders with FASD.

12. Kent Roach and Andrea Bailey "The Relevance of fetal alcohol spectrum disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 41 University of British Columbia Law Review 68; Mansfield Mela and Glen Luther "Fetal alcohol spectrum disorder: Can diminished responsibility diminish criminal behaviour?" (2013) 36 International Journal of Law and Psychiatry 46.

Recommendations

31. A more refined approach to diminished responsibility might properly be considered by Parliament under its policies to assist people with disabilities, or by the courts under their powers under s. 8(3) of the Criminal Code to create new common law defences that are not inconsistent with statutes.

    In some cases a diminished responsibility defence could produce early release under tight controls, something that conditional sentences were intended to facilitate but which are now subject to increasing legislative restrictions from Parliament for reasons entirely unrelated to the particular disabilities of FASD individuals or others with neurological disorders.

Sentencing offenders who have FASD

Section 718 of the Criminal Code instructs sentencing courts to consider certain objectives including denunciation, deterrence of the offender and others from committing offences, separating offenders from society, rehabilitation, reparations, and instilling a sense of responsibility in the offender.

Proportionality

Criminal justice is based on the principle that people who offend should be held accountable in proportion to what was done and the offender's responsibility for the offence. The principles are laid out more explicitly in the YCJA than they are in the Criminal Code. However, it is reasonable that this general principle holds for adults as well as youths.

Proportionality is required for sentencing both in the adult and the youth justice systems.[13]

The Criminal Code provides that:

718.1 A sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. (Emphasis added.)

13. The YCJA states that purposes such as rehabilitation are limited by the proportionality principle:
    s. 38 (2)….
    (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
    (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
    (e) subject to paragraph (c), the sentence must
    (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
    (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
    (iii) Promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community….

Proportionality is not defined explicitly. It could, however, accommodate various forms of diminished responsibility related to impulsivity and suggestibility associated with FASD.[14] In particular, there is little judicial authority on how the "degree of responsibility of the offender" should be defined for those with disorders like FASD, but there is a developing judicial consensus that determining the offender's degree of responsibility requires more than a determination that the offender has committed a crime with the subjective or objective fault that is necessary for guilt and requires a judicial examination of relevant background factors that may be particular to the offender.[15]

Recommendations

32. Sentencing courts should take into account the challenges faced by those with an intellectual impairment or neurodevelopmental disorder such as FASD. This could be accomplished by deciding that for those with an intellectual impairment or neurodevelopmental disorder such as FASD, courts shall give primary consideration to the objective of rehabilitation and the imposition of a community sanction. Rehabilitation should be defined as including a reasonable prospect of managing the offender in the community.

33. For greater certainty, Parliament might enact a provision dealing with "diminished responsibility due to an intellectual impairment or neurodevelopmental disorder such as FASD." This functional approach would avoid senseless litigation about whether a particular case did or did not fall within a particular definition of a disorder (such as FASD). Instead it would focus on whether there was diminished responsibility and its immediate causes ("intellectual impairment or neurodevelopmental condition or disorder"). Although the meaning of the words "degree of responsibility of the offender" is not defined in the Criminal Code (or the YCJA), we recommend adoption of the following definition by judicial interpretation:

    Degree of responsibility includes consideration of the offender's diminished capacity to comply with the law due to any intellectual impairment or neurodevelopmental disorder.

34. For greater certainty, it is recommended that Parliament consider adopting the definition mentioned above as an amendment to s. 718.1 (b) of the Criminal Code and a parallel addition to s. 38(2)(c) of the YCJA and that Parliament make it clear that for such offenders primary consideration be given to rehabilitation.

14. *R. v. Ipeelee* [2012] 1 S.C.R. 433 at para 73, 96; R. v. Arcand 2010 ABCA 363 at para. 58
15. ibid.

35. While we believe there is ample scope under the existing legislation to achieve a fair and balanced result, consideration might also be given by Parliament to enact as follows:

    Evidence that an offender suffers from any intellectual impairment or neurodevelopmental disorder which impairs or diminishes the offender's ability to make judgments, foresee consequences, or perceive risks shall be deemed to be a relevant factor in determining whether alternative measures/extrajudicial measures should be made available to the accused.

36. When considering alternative measures under s. 717 (for adults) and under Part I of the YCJA, it be provided that

    If there is evidence that the offender suffers from any intellectual impairment or neurodevelopmental disorder, the police and crown attorney shall give primary consideration to the objective of rehabilitation of the offender and special efforts should be made to identify an appropriate set of alternative measures (or extrajudicial measures for youths) commensurate with the accused person's diminished responsibility for the offence. In crafting alternative measures/extrajudicial measures, the focus should be on those measures most likely to provide opportunities for the offender to be rehabilitated and reintegrated peacefully into society.

37. It should be made clear here and elsewhere – preferably in legislation – that the term "rehabilitation" in the Criminal Code and in the YCJA includes a "reasonable prospect of management in the community."

38. In line with the analysis previously outlined, in judicial interim release, consideration be given to the following amendment:

    For those who are charged with criminal offences, the police and/or the judge or justice at a judicial interim release hearing shall make special efforts to find structures that will ensure that the accused will appear in court and desist from committing offences. At the same time, for all accused, but in particular those with an intellectual impairment or neurodevelopmental disorder, police, judges and justices should ensure that conditions placed on the accused as part of a release order are ones that it is plausible to expect that the accused can comply with.

39. Parliament should consider adding balance to s. 718.2 by indicating mitigating as well as aggravating factors to be taken into account in the sentencing process. The Criminal Code currently lists a number of factors that are specifically to be considered aggravating. Although it indicates that judges should take into account mitigating factors (s. 718.2(a)) as well, no mitigating factors are listed. It is recommended, therefore, that the following words be added to this section to make it clear

that the presence of FASD and similar intellectual impairments or neurodevelopmental disorders are mitigating factors in sentencing:

Evidence that an offender suffers from an intellectual impairment or neurodevelopmental disorder which impairs or diminishes the offender's ability to make judgments, foresee consequences, or perceive risks shall be deemed to be a mitigating factor.

Release from custody/prison

The YCJA requires correctional staff to develop a release plan for all youths given "custody and supervision orders." In addition, the YCJA provides for a system of reviews (s. 94) of youth custody sentences whereby the youth can be brought back before the sentencing judge (or another judge) to determine if there should be a change in the sentence. Reviews for those with an intellectual impairment or neurodevelopmental condition or disorder can be especially important as a way of reintegrating the youth at the most opportune time when that youth – or circumstances in the community – has changed in such a manner that the youth can be best reintegrated into society by way of community supports rather than continuing to stay in custody.

Mandatory minimum sentences and preservation of judicial discretion

Judges should have the fullest range of sentencing discretion in dealing with the diverse circumstances of offenders with FASD. The application of mandatory minimum sentences or offence-based restrictions on the availability of conditional sentences is intended to fetter discretion. The increasing use of such statutory restrictions will have a disproportionate and harmful impact on offenders with FASD. The courts cannot generally issue exemptions from mandatory sentences.[16]

16. *R. v. Ferguson*, [2008] 1 S.C.R. 96.

Recommendations

40. Parliament should craft a statutory exemption that allows judges to justify departures from mandatory sentences where such exemptions are necessary to provide a fit sentence on an offender with a mental disability such as FASD. Such an amendment would allow the courts to develop an appropriate and case-sensitive sentencing jurisprudence for offenders with FASD.

Conditional sentences

The Criminal Code permits a judge who would otherwise sentence an offender to a term of imprisonment to order a sentence to be served in the community (typically involving some form of "house arrest"), subject to strict conditions. In the last few years, Parliament has progressively restricted the availability of conditional sentences, resulting in imprisonment of FASD sufferers, which may aggravate rather than alleviate their difficulties in eventually being able to live useful lives in the community. Unlike a breach of parole, a breach of conditional sentence will likely result in the offender serving the balance of the sentence in prison. Given the tendency of FASD sufferers to fail to perform conditions in a reliable and timely way, the conditions should not be "designed to fail," but be appropriate to the circumstances to the offence and the offender. Necessary conditions must be imposed, but none that are not necessary.

Recommendations

41. Parliament should consider greater availability of conditional sentences for persons with an intellectual impairment or neurological disorder such as FASD by allowing exceptions, with reasons, from the statutory exclusions that presently exist. Conditions should be crafted in such a way that they take into account the special challenges faced by those with FASD.

    Special attention should be paid to the use of the various forms of temporary or conditional release reviews for youths as well as temporary absence, day parole, parole, etc. for adults, designed to reintegrate the offender safely into society. We understand that short-term risk management might suggest to some judges and releasing authorities that inmates who suffer from an intellectual impairment or neurodevelopmental disorder such as FASD be left in custody. But the reality is that these offenders are, eventually, going to be back in the community and it is in the public interest to use special efforts to develop and implement release strategies for these offenders that will be most effective in the long run.

A final word on sentencing objectives

The neurodevelopmental deficits associated with FASD challenge the basic principles of sentencing, which assume that offenders are capable of making choices, understanding the consequences of their actions, and learning from their mistakes so as not to repeat them. General deterrence, meaning that the punishment given to one person for breaking the law will operate to deter other persons, presupposes the ability of an FASD sufferer to process and translate information as well as to remember it.

Similarly, rehabilitation, as it is conventionally understood, is largely a neurodevelopmental process premised on the ability to understand, to learn, to remember, and to make choices. As none of these assumptions fits well with what is known about FASD, failure to take FASD into account during sentencing constitutes an injustice to offenders and to society at large. The offenders fail because they are held to a standard that they cannot possibly attain, given their disabilities.

Traditionally calculated sentences, calibrated for a non-disabled individual, may have a substantially more severe effect on someone with FASD. As one judge put it, “One cannot but question what social policy is served by the use of

the hard penal machinery of the criminal justice system to deal with the most chronic mentally disabled youth of our society."[17]

Problems in the correctional system

Offenders with intellectual impairments or neurodevelopmental disorders such as FASD who are serving their sentences in custody are particularly vulnerable to exploitation and manipulation by other inmates. If corrections officials know that an inmate has FASD there are measures that can be taken to house the inmate on a secure range. In addition, knowing that an offender has FASD could help correctional officers understand the inmate's behaviour in prison and could result in fewer disciplinary charges for the inmates.

Knowledge of an offender's FASD status is also critically important in developing an effective correctional plan. This is true for offenders who are serving their sentences in custody as well as offenders who are serving their sentence in the community. It makes little sense to have a correctional plan that involves a treatment modality that relies heavily on neurodevelopmental reasoning for an offender who has reduced executive functioning. Even more important, however, is developing an evidenced-based approach to effective correctional programming for offenders with FASD.

The jury heard about a recent study that found that 9-10% of 91 participants/inmates at Stony Mountain Penitentiary were identified with FASD, while another 16-18% were possibly affected by FASD. These data suggest that not enough is done to diagnose and provide treatment for FASD in prisons. As one judge noted, if more residential facilities were available for people with FASD:

Fewer of these offenders would be incarcerated in jail; those who were incarcerated would not be incarcerated for as long, and, in the end, there is a very real likelihood that the revolving door of offending, often with increasing severity, would slow or be closed altogether for the individual FASD offender. In the end, society would be better protected and would also benefit from the knowledge that its youngest victims were now being assisted to find a meaningful life, despite the crime visited upon them in the womb.

17. *R. v. D.* (W.), 2001 CanLII 380 at para 35 (SK PC)

Recommendations

42. There should be broader access to multidisciplinary diagnostic services for individuals suspected of FASD in the federal correctional system. Present standardized intake screening tools used in the federal corrections context do not explicitly address FASD.

43. Diagnostic clinics in all correctional facilities in the provinces and territories should ensure timely and accurate diagnosis.

44. Mandated specialized training for correctional staff should be implemented to ensure that staff appreciate the response styles of inmates with FASD to ensure that unnecessary confrontations are eliminated by staff being adequately equipped to respond without further escalation of the situation.

The recommendations related to sentencing and corrections (Recommendations 32 to 44) could have the effect of reducing, somewhat, levels of imprisonment. This should not raise concerns about public safety since various jurisdictions have found that levels of imprisonment can be strategically reduced without any reduction in public safety.[18]

18. *R. v. D.* (W.), 2001 CanLII 380 at para 35 (SK PC)

Question 4: How can family courts and the family/child welfare legal system address the specific needs of people with FASD?

Given that the first point of contact for many individuals with FASD is within the family law system, special considerations to the unique challenges posed to parenting with FASD, or parenting children with FASD, are necessary to ensure that parents are not disproportionately disadvantaged in the child protection and family law context, based on their own neurological impairments associated with FASD or those of their child.

As individuals with FASD are likely to have diminished capacity to foresee consequences, make reasoned choices, or learn from their mistakes, their neurodevelopmental limitations associated with FASD present a fundamental challenge in the family law context.

Aside from the neurodevelopmental deficits associated with FASD, the jury heard evidence of the increased vulnerability of individuals with FASD to secondary disabilities such as leaving school, family and placement breakdowns, homelessness, alcohol and substance abuse, unemployment, and mental health problems. As child protection concerns generally mimic the secondary disabilities of FASD, it is not uncommon for parents with FASD to come to the attention of child protection authorities.

Although FASD presents challenges to parenting, the jury heard success stories which confirm that many parents with FASD, who might otherwise not be able to parent, could manage with appropriate supports.

Parents with FASD

The family is the basic unit of society and efforts should be made to maintain the familial bond. Resources should be provided to the family in a manner that supports the family unit and prevents the need to remove the child from the family.

Given the neurodevelopmental impairments often associated with FASD, many FASD parents may struggle with providing for the daily routine of their child. This is caused by difficulties with memory, difficulties in using consequences in an appropriate manner, problems in understanding the sensory cues of their child, and challenges in learning from similar situations. It is therefore easy to be critical of the parenting skills of a parent with FASD. However, to over-estimate a parent's abilities in light of their neurodevelopmental neurological impairment is to set them up to fail in their capacity to parent. Access to supports and resources can help with these struggles and should remain accessible to parents with FASD throughout their child's upbringing in order to adequately support their family unit.

Should intervention services be necessary, the manner in which they are carried out must be sensitive to the physical, behavioural and emotional consequences to the child that could result from apprehension. Research has shown that trauma surrounding stressful events may lead to structural changes in the child's brain. Where a child is apprehended, resources must be

provided to ensure continued parent-child relationship in circumstances where the child is apprehended. This is the responsibility of the state.

When a parent with FASD becomes involved with the child protection authority, there are a number of stages when a parent may be disproportionately disadvantaged should the parent's neurological impairment associated with FASD be unrecognized.

There is a real possibility for parents with FASD to be unfairly disadvantaged at the initial contact with child protection authorities based on their inability to genuinely appreciate their legal rights and options.

The jury heard evidence that individuals with FASD are susceptible to suggestion and have a desire to please others. In light of these characteristics, the parent with FASD may inadvertently agree to insurmountable, unrealistic and unnecessary tasks in order to avoid confrontation with the person in authority and in an effort to expedite the return of their child(ren) to their care. This may be done without the parent with FASD ever speaking to a lawyer or being advised of his or her right to challenge the alleged child protection concerns. As a result, special measures must be taken to ensure that a parent with FASD provides an informed consent.

Given the evidence presented surrounding the memory impairments of individuals with FASD and their difficulties with organization and contextualization, when the parent with FASD agrees to an unrealistic list of tasks and appointments, they may be setting themselves up for failure. Their impaired reasoning and social judgment, impulsivity, suggestibility and low empathy may lead to responses that are perceived as contrary to a desire to comply with the child protection authority to have their children returned to their care. It is these very contrary response styles coupled with their failure to follow through that may result in further involvement with the system. The difficulty is that the parent with FASD may lack the capacity to understand or appreciate the specific direction or order.

Mandated training for frontline child protection workers is necessary to appreciate response styles of the parent with FASD, and to de-escalate unnecessary confrontations or limit the potential disadvantages associated with the parent's neurological impairment.

The terms with which the parent with FASD must comply in order for their child to be returned to parental care should therefore be specific to the child protection concerns, expressed in plain language, and unique to the parent's particular pattern of strengths and weaknesses.

Given that individuals with FASD have different learning difficulties and challenges, their unique learning styles must be taken into account when establishing their capacity to parent. Hands-on and experiential learning should be implemented as alternatives to traditional programming.

Finally, at the trial stage, problems with memory and in particular an inability to retrieve facts from memory in a coherent way, to link the information thus retrieved with its source, to communicate what is remembered, and to respond to cross-examination in the stress of a courtroom may impede their ability to properly instruct counsel and provide an alternative version of events, contrary to the position presented by the child protection agency, that would be accepted by the courts as valid given their apparent credibility. Steps must be taken to ensure that the trier of fact understands the unique limitations of this particular parent with FASD to avoid an unfair evaluation of the parent with FASD's credibility.

Where the family unit has been reunited, sufficient resources should be provided for long-term support. These should not be time-limited. Resources should include access to respite services for all caregivers, including parents with FASD.

The jury heard evidence of the direct impact of secondary disabilities on parents with FASD and how many decisions made on behalf of the family are incomplete, fragmented, and coming from multiple sources. It was suggested that timely and collaborative decision-making that is trauma-informed as well as training that anticipates the needs of individuals with FASD would assist the process. In addition, wraparound services should be established or expanded to help parents with FASD to navigate their way through the legal system. The jury supports the implementation of these suggestions and recommends that extra resources should be directed, or present resources reallocated, to provide for these suggestions.

The Family Law Office, a project of Legal Aid Alberta, is an example of an exemplary wraparound service. It offers a unique quality of service by offering a legal team comprised of a social worker and lawyer. The social worker attends with, and advocates for, the parent in the meetings with the child protection authorities, connects them to resources, and supports them to address all secondary disabilities, such as housing, addictions, employment, programming, mental health. The social worker then relays the information to the lawyer to ensure that what is expected of the parent is not misconstrued or forgotten. This team approach ensures that the legal process is understood by the parent and the parent is not unnecessarily disadvantaged based on the parent's neurological limitations.

CATCH (Collaborative Assessment and Treatment for Children's Health) is another innovative option of wraparound services presented. It consists of a comprehensive multidisciplinary case management team that is assembled to create relational informed decisions with respect of child protection matters. It involves cross-agency collaboration with mental health, developmental services, child protection, and community partners.

However, these services are limited, for various reasons, to certain parents. For example, they may be limited according to the parent's place of residence, ability to qualify for Legal Aid, and association with a specific child protection

office. Inequities in access to these types of services should be overcome through expansion of these and similar services. Alternatively, additional resources should be allocated to programs that link parents with FASD to an advocate who can help them navigate through the legal process while addressing the secondary concerns of FASD.

Although a complete diagnosis is helpful to establish the strengths and needs of a parent with FASD as well as to inform service delivery, the absence of a complete diagnosis should not be an excuse for child protection authorities, lawyers, and judges to ignore the relevant neurological impairments that may be associated with FASD. Nor should a diagnosis of FASD be the basis for an apprehension of the children of a parent with FASD or a change in their custody.

If an apprehension is necessary and an accurate FASD diagnosis has not been made, an immediate diagnosis of the parent should be facilitated. A delay in the diagnosis could be detrimental to the family unit. The purpose of the diagnosis should be to inform service delivery, to structure appropriate assistance and programming for the parent, and to provide the child protection worker with alternative approaches to helping the parent with FASD to parent.

Access to FASD assessments should not be denied based on budgetary constraints or available resources. Parents should be entitled to an assessment in a timely fashion. Consequently, if the child protection agency denies the request for services or is unable to provide adequate services in a timely fashion, then the court should order that such services be provided from private contractors.

We heard that litigation delay may be problematic, but at the same time we recognize that sufficient time and opportunity must be provided to the FASD parent to access supports and acquire the skills necessary to continue to parent independent of child protection involvement. We recommend that sufficient resources be redirected to this purpose.

Should adequate services not be put into place to provide meaningful opportunities to the FASD parent, the cycle of multiple FASD births within a family as well as in successive generations will continue. It is the jury's position that unnecessary and repetitive expenditures can be curbed if adequate services are provided at the point of first contact with child protection.

Child with FASD

If an apprehension is necessary, each child going into the care of the government should receive a full medical and psychological assessment that would include a screen for FASD. This screen should occur independent of the mother's admission of any consumption of alcohol during pregnancy. Should a diagnosis of FASD be confirmed, its sole use should be for planning and implementing appropriate services and not used against the mother as another child protection concern.

Children with FASD need to be given adequate care and services based on their functional need.

Foster parents and group home staff as well as prospective adoptive parents need to be properly trained and should be willing to work collaboratively with the parents and the child welfare system to the benefit of the child.

Parents of a child with FASD should receive training equivalent to that given to foster parents and group home staff specialized in caring for children with FASD. If a child is in the care of the government, such training should be provided to the parent by the child protection agency.

In circumstances where the child has FASD, all efforts should be made to prevent the development of secondary disabilities related to continued trauma. If a placement is necessary, it should be stable and with trained caregivers. It should maximize a healthy environment for an already vulnerable brain; avoid trauma, support attachment and development.

Access to resources and services for a child with FASD should not be time-limited or conditional and should be available when the youth transitions into adulthood. The need for resources for a child with FASD remains strong, particularly as the child transitions into adulthood, so that the child is not denied needed assistance.

Training

FASD-specific training of parents, caregivers, and foster parents, as well as child protection workers, lawyers and judges is critical at all stages of the child protection process.

Given the complex nature of child protection cases, ongoing training on the behavioural, neurological, and health implications of FASD should be mandatory for everyone involved with the parent or child with FASD. Child protection workers need to be able to identify the FASD parent and/or child in order to appreciate the limitations and provide adequate services in light of the neurological impairments. Lawyers need appropriate and ongoing training on FASD, in order to provide adequate representation of their client and to draft terms of an order that will assist their client, not set them up for failure. Judges need the required training to ensure that the trial process as a whole is not unnecessarily disadvantaging the parent with FASD and that all evidence is assessed in light of the parent's neurological impairment.

The bottom line, from the perspective of the jury, is that the primacy of the child's rights should never be pitted against the rights of the parent in light of the needs of the community. All participants in the family law context are entitled to equal consideration and adequate resources to provide them with a meaningful opportunity to preserve the basic family unit.

Recommendations

45. FASD-specific training should be made available for parents, caregivers, and foster parents at all stages of the protection process.

46. Fund accurate and timely diagnosis through provincial and territorial governments.

47. Provide transition planning for FASD-affected youth moving into adult services, with consideration of an extension of the original care agreement.

48. Provide stable placements for FASD-affected youth.

49. Direct or re-direct funding to proactive intervention strategies that maintain the family unit.

50. Minimize the negative impact or implications of the diagnosis.

51. Ensure that timelines contained in child protection laws accommodate the parent with FASD and provide meaningful opportunities to parent with their disability.

52. Develop policies to enhance the lives of parents with FASD and to break the cycle as well as the overrepresentation of FASD children and adults in the child protection system.

53. Allocate additional resources to prevent the inequities inherent to the disability when interacting with the legal system.

54. Target existing resources to address the unique and specific needs of the parent with FASD.

55. Provide meaningful ongoing training for judges, lawyers, and child protection workers to adequately be supported in their roles.

56. Government funding should be allocated or redirected to expand the wrap-around and comprehensive services or provide for additional resources that pair parents with FASD with an advocate who can help them navigate through the legal process while addressing the secondary concerns of FASD.

Question 5: What are best practices for guardianship, trusteeship, and social support in a legal context?

Children with FASD who reach the age of majority often lose the support of social agencies, ending up on the street with no mechanisms of assistance. Youth and adults with FASD exhibit very poor social judgment, as reflected in their tendency to go along with potentially disastrous courses of action, and their failure to understand such choices. A guardianship arrangement could potentially alleviate the severity of such consequences by giving the guardian, or if necessary the court, the power to prevent a catastrophic course of action.

The social and neurodevelopmental deficits, as well as the capacities of individuals with FASD, should be considered in order to broaden the framework to grant guardianship protection and provide the social supports that are generally unavailable to them beyond the age of majority.

A capacity assessment may be used to appoint a guardian and trustee for specific areas such as health care, housing, education/training, employment, and legal decision-making depending on the gaps in the respective domains. It is important that the legal guardian and trustee take an active case-management role in assisting the FASD individual with personal decision-making. A trusteeship order addresses other minimal assets, as well as income support programs and employment income. Guardians and trustees can act as navigators through the complexities of the legal system.

Should no guardian be involved, then upon application, the court should appoint a guardian *ad litem* to ensure that the person with FASD is adequately represented in the present legal matter.

Recommendations

57. Guardianship and trusteeship programs should be considered for adults with FASD who are found to have diminished capacity and therefore require assistance to manage their affairs.

58. Given the characteristics of an individual with FASD, such as impulsivity, ongoing guardianship and trusteeship is particularly important for those individuals with FASD who have received social support during their adolescence as they transition into adulthood.

Question 6: What legal measures are there in different jurisdictions to contribute to the prevention of FASD, and what are the ethical and economic implications of these measures?

When thousands of babies are born every year with serious brain injuries with a known and preventable cause, there must be effective measures for prevention. Equally important are the development and implementation of appropriate social supports as well as legal processes for the majority of individuals with FASD who come into conflict with the law. In that regard, it becomes important not to confine ourselves too tightly to "legal measures" but to expand our attention to other types of measures (the most obvious being education and training) to help prevent FASD. When doing so, however, care should be taken to ensure that communities of different sizes (e.g., smaller reserve communities) also have access to these preventative programs.

A number of measures have been studied with regard to alcohol awareness and harm reduction in the general population and, in particular, in women of childbearing age. These include alcohol warning labels, attempts to limit alcohol consumption, measures to ban the sale and service of alcohol to pregnant women, designation of 'dry' communities, criminalization of alcohol and drug use by pregnant women, interventions targeted at pregnant women with addictions, and subsidization of contraception.

Alcohol and pregnancy warning labels have been found to be effective but lose their impact over time. More intensive interventions are needed to reduce in-pregnancy drinking over the longer term. The language of messages should be considered carefully so as to not create unintended consequences and stress among women who consume low levels of alcohol in the time around conception and only later become aware that they are pregnant. In addition, the jury heard that there are data to suggest that these measures are least effective with binge or heavy drinkers.

Measures to ban selling or serving alcohol to pregnant women have been perceived as discriminatory based on gender. A less coercive approach is to support alcohol servers in promoting the offer of non-alcoholic beverages along with information brochures on FASD.

Criminalization of alcohol and drug use by pregnant women.

There have been attempts in the United States of America to use or expand existing legal measures to target women's substance use during pregnancy. Pregnant women have been charged with offences ranging from delivering drugs to a minor, to child neglect and chemical endangerment, which have resulted in arrest and incarceration in some states. Apart from any constitutional issues, medical and public health groups are concerned that these measures deter women from seeking prenatal care, accessing addiction treatment, or speaking openly about their substance use with health care providers out of fear of losing their child.

Interventions targeted at pregnant women with addictions, including forced/involuntary addiction treatment for pregnant women and requirements by health professionals to report prenatal drug and alcohol use to child protection services.

These approaches, along with compulsory screening at birth, raise concerns that they may lead to or encourage under-reporting and may disproportionately impact marginalized women.

There are ethical issues surrounding some of the screening tools that have been suggested, such as meconium testing. It is this jury's opinion that ongoing research should address concerns with respect to informed consent, privacy, and appropriate follow-up once the results are obtained.

Issues surrounding prevention were considered at the IHE's First International Conference on Prevention of FASD in September 2013.

Recommendations

59. Develop a comprehensive FASD prevention strategy for Canada.

60. Develop gender-specific programs and create opportunities for women and men to discuss with their health care provider relationship issues, child care, and alcohol consumption.

61. Prevention programs should focus on those areas in which positive effects have been demonstrated. In particular, it may be worthwhile to examine interventions involving the mother-child unit. Such approaches might help reduce the likelihood of subsequent children with FASD after a child is found to suffer from an intellectual impairment or neurological disorder such as FASD.

62. Develop evidence-based mandatory training programs for front-line workers on how to talk to women in a secure, non-threatening fashion about the underlying causes of alcohol consumption.

A final word

It is clear that many complex legal issues associated with FASD remain to be resolved in order to ensure that FASD-affected individuals receive fair and equitable treatment in the justice system. Although there is higher awareness of the challenges faced by those with FASD than in the recent past, there is a danger that justice system personnel who do not receive ongoing training about FASD may interpret its symptoms as "defiance of court orders," "absence of remorse," and "apparent incorrigibility."[19] They may also fail to appreciate how people with FASD can, with appropriate supports, live happy and productive lives and contribute to society. It is in the interests of both individuals with FASD and society in general, to better understand FASD and to ensure that justice system personnel and others have the necessary training, tools and resources to support those living, often successfully, with FASD.

The goal of all of those working with people with FASD is to provide supports and guidance in the community so that they can live peaceful, productive and happy lives in the community. Our recommendations are made in the spirit of providing some additional mechanisms in the legal system to respond appropriately to those who suffer from FASD, thereby simultaneously improving their lives and improving the quality of our communities.

As Myles Himmelreich pointed out at the conference:

"It is important for individuals such as myself with FASD to….. understand it so that we can better understand ourselves…… We need to know what it's like for ourselves and we can tell you what works and what doesn't work…… I'm an individual living with FASD, but please remember I'm not a diagnosis, I am a human being."

There is no excuse for inaction on the basis of an uninformed view that nothing can be done. With appropriate improvements to family and community support for those with FASD, and in some areas guidance and more flexibility in the manner in which the legal system responds to the challenges of FASD, the quality of the lives of those living with FASD as well as our communities can be improved.

It has been our privilege as jurors to hear outstanding lectures from experts in a wide variety of relevant fields over a period of two days. It is our hope that this consensus statement, which builds on their expertise, contributes to a better understanding of FASD in the legal community, and, more importantly, that this understanding will lead to action.

19. Justice Melvyn Green "A Judicial Perspective" Paper presented at the Fetal Alcohol Syndrome Disorders Symposium for Justice Professionals 1 March, 2006. We are happy to have heard that awareness of FASD among judges and others in the justice system has significantly improved since 2006.

Jury Members

Chair - The Honourable Ian Binnie, C.C., Q.C.,
Former Justice of the Supreme Court of Canada
Lenczner Slaght

The Honourable Judge Larry G. Anderson[i]
Provincial Court of Alberta

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Family Law Office
Legal Aid Alberta

Dr. Dennis Cooley
Assistant Deputy Minister
Ministry of Justice
Government of Saskatchewan

Dr. Anthony N. Doob
Professor Emeritus of Criminology
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Mr. Don Langford
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Metis Child & Family Services Society
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D-V Massey & Associates
Adjunct Professor at the University of Alberta

Dr. Nicole LeBlanc
Pediatrician
Dr. Georges L. Dumont University Hospital Centre
Associate Clinical Professor from the Université de Sherbrooke and Université de Moncton

Justice Mary T. Moreau[ii]
Court of Queen's Bench of Alberta

The Honourable Landon Pearson O.C.
Landon Pearson Resource Centre for the Study of Childhood and Children's Rights
Carleton University

Professor Kent Roach
Prichard Wilson Chair in Law and Public Policy
University of Toronto

Mr. Bill Robinson
President and Chief Executive Officer
Alberta Gaming and Liquor Commission

Ms. Wilma Shim
Lawyer
Alberta Justice and Solicitor General

Ms. Lee Ann (Weaver) Tyrrell
Nurse, Lawyer, Policy Consultant for Government, Legal Guardian

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i. By reason of his judicial role, Judge Anderson did not participate in the formulation of recommendations relating to legislative changes.
ii. By reason of her judicial role, Justice Moreau did not participate in the formulation of recommendations relating to legislative changes.
* Please note that the analyses and recommendations for the consensus statement do not necessarily reflect those of the organizations that the jury members are affiliated with.

Conference Speakers and Topics

What are the implications of FASD for the legal system?

Overview of FASD
Sterling Clarren, CEO and Scientific Director, Canada Northwest FASD Research Network; Clinical Professor of Pediatrics; Faculty of Medicine, University of British Columbia; Clinical Professor of Pediatrics, School of Medicine,University of Washington.

Prenatal alcohol exposure and abnormal brain development: Insights from animal studies
Kathy Sulik, Professor of Cell Biology and Physiology; Member of the Bowles Center for Alcohol Studies, University of North Carolina, Chapel Hill, NC, USA.

Can FASD be imaged?
Sarah Treit, Centre for Neuroscience, University of Alberta

Characteristics of FASD
Carmen Rasmussen, Assistant Professor, Department of Pediatrics, University of Alberta; Research Affiliate, Glenrose Rehabilitation Hospital, Edmonton.

Prevalence of FASD in the legal system
Patricia MacPherson, Senior Research Manager, Correctional Service of Canada.

Socio-Economic implications of FASD
Philip Jacobs, Professor of Health Economics, Faculty of Medicine, University of Alberta; Director of Research Collaborations, IHE.

Legal perspectives of FASD
Fia Jampolsky, Chair, Yukon Human Rights Commission; Lawyer, Cabott and Cabott, Whitehorse.

How can efforts to identify people with FASD in the legal system be improved?

Potential impact, benefits and burdens of an FASD screening program in the corrections system
Larry Burd, Professor, Department of Pediatrics, University of North Dakota School of Medicine; Director of the North Dakota Fetal Alcohol Syndrome Center and FAS Clinic.

Review of current models for assessment and screening of FASD in the youth justice system
Albert Chudley, Professor, Department of Pediatrics, University of Manitoba; Medical Director, Winnipeg Regional Health Authority Program in Genetics and Metabolism.

Building effective connections between courts and diagnostic clinics
Julianne Conry, Asante Centre, Maple Ridge, BC.; previously, Department of Educational and Counselling Psychology and Special Education, University of British Columbia.

How can the criminal justice system respond more effectively to people with FASD?

At what points in the criminal justice process is an individual with FASD most vulnerable?
Patricia Yuzwenko, Defence Lawyer, Youth Criminal Defence Office.

How could an understanding of needs in FASD shape sentencing responses within the criminal justice system?
Jacqueline Pei, Assistant Professor, Department of Educational Psychology; Assistant Clinical Professor, Department of Pediatrics, University of Alberta.

The effect of FASD on the reliability of confessions and the giving of testimony.
Kaitlyn McLachlan, Clinical psychology, forensic specialization, Postdoctoral fellow, Department of Pediatrics, University of Alberta.

Policy and legal recommendations to the understanding of FASD, its challenges and potential solutions.
William Edwards, Deputy Public Defender, Los Angeles County Public Defender's Office.

FASD and the modern sentencing theory debate; a path to criminal code reforms.
Allan Manson, Professor in the Faculty of Law, Queen's University, Kingston, Ontario.

Considerations in making effective sentences for persons with FASD.
The Honourable Judge Sheila Whelan, Provincial Court of Saskatchwen.

Legislative impediments to judicial consideration of moral blameworthiness in sentencing offenders with FASD
Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto; Chair, FASD Justice Committee.

How can a youth criminal defence advocacy model assist young people with FASD navigate the justice system?
Cathy Lane Goodfellow, Acting Senior Counsel, Youth Criminal Defence Office.

How can family courts and the family/child welfare legal system address the specific needs of people with FASD?

Working with parents with FASD in family and child welfare matters
Lydia Bubel, Lawyer, Family Law Office, Alberta Legal Aid.

What specific characteristics of FASD need to be taken into account in family court and in the child welfare system?
- *Donna Debolt, Social Work Consultant, Edmonton, Alberta.*
- *Gail Andrew, Board Member, Canada FASD Research Network; Medical Site Lead, Pediatrics; Medical Director, FASD Clinical Services; Pediatric Consultant, Glenrose Rehabilitation Hospital.*

How can children with FASD be best supported in foster care or other placements?
Corey La Berge, Deputy Children's Advocate, Manitoba Legislative Assembly.

What are best practices for guardianship, trusteeship and social support in a legal context?

Broadening guardianship and lowering barriers to service eligibility; protective arrangements for people with FASD.
Stephen Greenspan, Emeritus Professor of Educational Psychology, University of Connecticut; Clinical Professor of Psychiatry, University of Colorado.

Clinical and ethical issues within capacity assessment of people with FASD
Arlin Pachet, Clinical Neuropsychologist, Adjunct Assistant Professor, Department of Psychology, University of Calgary.

Views from a Public Guardian's perspective
Barb Martini, Director, Office of the Public Guardian.

What legal measures are there in different jurisdictions to contribute to the prevention of FASD, and what are the ethical and economic implications of these measures?

Legal measures to contribute to prevention of FASD, effectiveness and ethical issues
Nancy Poole, Director, Research and Knowledge Transition, British Columbia Centre of Excellence for Women's Health; Research Consultant, Women and Substance Use Issues, British Columbia Women's Hospital

Legal and ethical aspects of meconium testing to identify alcohol use during pregnancy
Gideon Koren, Director, The Motherisk Program, The Hospital for Sick Children; Professor of Pediatrics, Pharmacology, Pharmacy and Medical Genetics, University of Toronto; Professor of Medicine, Pediatrics and Physiology/ Pharmacology; Ivey Chair in Molecular Toxicology, University of Western Ontario; Scientific Chair, CFFAR

A Personal Perspective
Myles Himmelreich, FASD Consultant, Edmonton, Alberta, Canada

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Jury Recommendation Summary

Question 1

1. The ability of communities and families must be strengthened to deal – outside of the traditional criminal justice system – with "offending behaviour" of youths and adults.
2. Services must be provided within communities that would help create more stable homes and placements for those in care. The goal should be to help communities manage the problems associated with FASD so that those with FASD from that community can remain in the community as productive members of society.
3. FASD must be assessed using a multidisciplinary team approach; no one specialty is sufficient.
4. The development of biomarkers appears to be the most promising area of research to identify FASD affected individuals and should be pursued, although the use of them raises important legal and ethical issues.
5. Greater effort must be made to make the public aware of the cost of dealing with FASD in the legal system.
6. Where at all possible those affected by FASD should be kept out of the criminal justice system. In 2010/11 it cost an average of about $114,000 per year to keep a prisoner in federal prison, much more than it costs to provide services – criminal justice or otherwise - in the community. Studies suggest that between 10% and 25% of prisoners have FASD. It is estimated that each person with FASD costs governments $1.5 – 2.0 million over their lifetime including education, health and other services. These costs, as well as the difficulties that people with FASD may experience in custodial institutions, include but are not limited to:
   - support for community-based housing (such as the At Home Chez-Soi / Housing First Program); and transition housing programs
   - community education programs starting with children and youth; and
   - community support and intervention programs that are evidence-based in supporting individuals affected by FASD throughout their lifespan, particularly in key transition periods.
7. More resources should be focused on family and community supports that will allow those with FASD to live under supervision outside of the criminal justice system. The jury heard evidence about a cross-sectoral program in Alberta that supports people with FASD in the community for costs below $5,000 per person served per year or $1.63 per capita, a figure that is far below correctional costs.
8. Mandate training for all players in the legal system, including judges, crown, defence, corrections, police, probation officers, parole officers, and community frontline workers so that when they encounter a citizen, in a home or on the

street, they have the background knowledge that will sensitize them to the cues that may suggest that the person they are dealing with has FASD.

9. Support innovative training programs that promote inter-sectoral dialogue and partnerships, and sustain longitudinal educational curriculums in order to ensure continuing education for all major stakeholders in Canada (such as corrections, health, social development, mental health, RCMP, provincial and federal court officials, education, and First Nations).
10. Training needs to be carried out on an ongoing basis to ensure that people know not only the up-to-date best practices but also the services that are available in their communities to those who suffer from FASD.
11. Every child going into care of the state should receive a full medical examination and a full psychological examination that would include a screen for FASD to assist with the planning and implementation of appropriate services for the family. However, should this policy be implemented, the purpose of the assessment should be clearly stated to avoid the misuse of the FASD diagnosis against the mother. Similarly, admission procedures in correctional centres (either on remand or on sentence) should include screening for possible FASD to ensure that prisoners are dealt with appropriately by staff trained in the problems associated with FASD. Again, the FASD diagnosis should not be used against the prisoner, but should be used to help better accommodate and manage such persons within the correctional system.
12. Consideration should be given to the legal, ethical, and practical issues surrounding policies related to the sharing of a positive FASD diagnosis. For example, the suggestion that positive FASD diagnoses be kept on police files (e.g., CPIC) or child protection files to ensure that it is shared with others who may have contact with that individual in the future raises important issues of privacy. Nevertheless, if this information were known to police officers and child protection authorities – under certain specified conditions and with the appropriate training of those officials – it might help alleviate problems and promote just and fair outcomes.
13. Individuals with FASD often get into conflict with the law when they are not involved in a structured program. There is a need to build relationships between an individual with FASD or other neurological impairment and a circle of support that could include family members and social service workers to ensure that the individual has a therapeutic environment in which to live.
14. Housing stability and wraparound support are critical. Government should undertake to examine whether it might be more

economical to develop small (e.g., 10-bed) housing units with 24/7 support from social service agencies to ensure that those people with FASD have established circles of support and therapeutic environments in which to live. The value and costs of such an approach need to be compared to the existing practice of revolving door processing by justice systems and incarceration.

15. FASD screening tools such as the Asante Centre's FASD Screening and Referral Tool for Youth Probation Officers should be examined in order to determine the best way in which they can be used to trigger a formal diagnosis in the court system or in other areas including but not limited to correction and child protection services.

16. There is a need for increased capacity for multi-disciplinary diagnostic teams that can provide timely diagnosis at critical stages of the justice process (e.g., sentencing, child protection proceedings) and at other points in the individual's life when decisions are made that might affect his/her welfare or that of his/her child. Care should be taken, however, not to divert diagnostic resources from the general population such that only those youths or adults who are caught up in the youth or adult criminal justice systems receive diagnostic services. In many locations, but perhaps especially in remote communities, mechanisms need to be developed to ensure that resources are both available and used most effectively to diagnose and create support plans for those with FASD.

Question 2

17. The Supreme Court of Canada has recognized that the over-representation of Aboriginal persons among the inmate population constitutes a crisis in the criminal justice system. In the jury's view, the over-representation of people with FASD in correctional facilities and in care of child protection agencies is of overlapping and equal concern.

18. Federal, provincial and territorial governments should continue to support research that provides estimates of the prevalence of persons with FASD in correctional settings and in child protection care.

19. Federal, provincial and territorial governments, through the Heads of Corrections Committee, should explore effective case-management strategies for offenders with FASD who are serving their sentences in the community or in custody.

20. Child protection authorities should explore effective case-management strategies for parents with FASD and children with FASD to ensure the functional needs of the parent or child are being provided for and adequate services are in place.

Question 3

21. Parliament should give consideration to adding special rules to govern the questioning of suspects with known or suspected serious neurodevelopmental disabilities such as FASD.
22. Statements by a suspect should be videotaped.
23. The videotape requirement should extend to victims and witnesses as well as suspects with known or suspected serious neurodevelopmental disabilities such as FASD.
24. Action should be taken – in legislative policy or in training – to reduce the number of "administration of justice" charges laid against FASD youths and adults. This might start immediately by ensuring that the nature and number of conditions (at pretrial release, on probation, etc.) placed on those apparently with FASD be realistic both in terms of the number and nature of the conditions.
25. Prosecutor's information sheets should be modified so that when a charge is laid against a person whom police suspect of having FASD or another neurodevelopmental disorder, the indications that the person may have FASD or some neurodevelopmental disorder can be noted.
26. Ready access by the court to rapid screening services should be routine. This is particularly important in bail matters as time will often be of the essence.
27. Bail conditions should be tailored to ensure the public safety and the attendance of the accused at trial, of course, but also with the recognition of the nature of FASD and tailored to the capacity and understanding of the person with FASD, who will likely not be able to perform conditions to the standard of the ordinary applicant.
28. Risk reduction strategies based on external supports rather than complex conditions should be considered. This may involve targeted use of sureties and/or the development of bail supervision programs appropriately tailored to the capabilities of accused with FASD.
29. Judges in the adult system should have similar powers as are available under s. 34 of the Youth Criminal Justice Act to order assessments of accused especially when there are reasonable grounds to believe that the accused suffers from FASD or any other intellectual impairment or neurodevelopmental disorder.
30. Consideration should be given to the establishment of special processes within the existing court structures to bring to bear the combined expertise and training of judges, prosecutors and defence counsel knowledgeable about FASD. This would serve the interest of fairness as well as efficiency.
31. A more refined approach to diminished responsibility might properly be considered by Parliament under its policies to

assist people with disabilities, or by the courts under their powers under s. 8(3) of the Criminal Code to create new common law defences that are not inconsistent with statutes.

32. Sentencing courts should take into account the challenges faced by those with an intellectual impairment or neurodevelopmental disorder such as FASD. This could be accomplished by deciding that for those with an intellectual impairment or neurodevelopmental disorder such as FASD, courts shall give primary consideration to the objective of rehabilitation and the imposition of a community sanction. Rehabilitation should be defined as including a reasonable prospect of managing the offender in the community,

33. For greater certainty, Parliament might enact a provision dealing with "diminished responsibility due to an intellectual impairment or neurodevelopmental disorder such as FASD." This functional approach would avoid senseless litigation about whether a particular case did or did not fall within a particular definition of a disorder (such as FASD). Instead it would focus on whether there was diminished responsibility and its immediate causes ("intellectual impairment or neurodevelopmental condition or disorder"). Although the meaning of the words "degree of responsibility of the offender" is not defined in the Criminal Code (or the YCJA), we recommend adoption of the following definition by judicial interpretation:

    Degree of responsibility includes consideration of the offender's diminished capacity to comply with the law due to any intellectual impairment or neurodevelopmental disorder.

34. For greater certainty, it is recommended that Parliament consider adopting the definition mentioned above as an amendment to s. 718.1 (b) of the Criminal Code and a parallel addition to s. 38(2)(c) of the YCJA and that Parliament make it clear that for such offenders primary consideration be given to rehabilitation.

35. While we believe there is ample scope under the existing legislation to achieve a fair and balanced result, consideration might also be given by Parliament to enact as follows:

    Evidence that an offender suffers from any intellectual impairment or neurodevelopmental disorder which impairs or diminishes the offender's ability to make judgments, foresee consequences, or perceive risks shall be deemed to be relevant factors in determining whether alternative measures/ extrajudicial measures should be made available to the accused.

36. When considering alternative measures under s. 717 (for adults) and under Part I of the YCJA, it be provided that

    If there is evidence that the offender suffers from any

intellectual impairment or neurodevelopmental disorder, the police and crown attorney shall give primary consideration to the objective of rehabilitation of the offender and special efforts should be made to identify an appropriate set of alternative measures (or extrajudicial measures for youths) commensurate with the accused person's diminished responsibility for the offence. In crafting alternative measures/extrajudicial measures, the focus should be on those measures most likely to provide opportunities for the offender to be rehabilitated and reintegrated peacefully into society.

37. It should be made clear here and elsewhere – preferably in legislation – that the term "rehabilitation" in the Criminal Code and in the YCJA includes a "reasonable prospect of management in the community."

38. In line with the analysis previously outlined, in judicial interim release, consideration be given to the following amendment:

    For those who are charged with criminal offences, the police and/or the judge or justice at a judicial interim release hearing shall make special efforts to find structures that will ensure that the accused will appear in court and desist from committing offences. At the same time, for all accused, but in particular those with an intellectual impairment or neurodevelopmental disorder, police, judges and justices should ensure that conditions placed on the accused as part of a release order are ones that it is plausible to expect that the accused can comply with.

39. Parliament should consider adding balance to s. 718.2 by indicating mitigating as well as aggravating factors to be taken into account in the sentencing process. The Criminal Code currently lists a number of factors that are specifically to be considered aggravating. Although it indicates that judges should take into account mitigating factors (s. 718.2(a)) as well, no mitigating factors are listed. It is recommended, therefore, that the following words be added to this section to make it clear that the presence of FASD and similar intellectual impairments or neurodevelopmental disorders are mitigating factors in sentencing:

    Evidence that an offender suffers from an intellectual impairment or neurodevelopmental disorder which impairs or diminishes the offender's ability to make judgments, foresee consequences, or perceive risks shall be deemed to be a mitigating factor.

40. Parliament should craft a statutory exemption that allows judges to justify departures from mandatory sentences where such exemptions are necessary to provide a fit sentence on an offender with a mental disability such as FASD. Such an amendment would allow the

courts to develop an appropriate and case-sensitive sentencing jurisprudence for offenders with FASD.

41. Parliament should consider greater availability of conditional sentences for persons with an intellectual impairment or neurological disorder such as FASD by allowing exceptions, with reasons, from the statutory exclusions that presently exist. Conditions should be crafted in such a way that they take into account the special challenges faced by those with FASD.
42. There should be broader access to multidisciplinary diagnostic services for individuals suspected of FASD in the federal correctional system. Present standardized intake screening tools used in the federal corrections context do not explicitly address FASD.
43. Diagnostic clinics in all correctional facilities in the provinces and territories should ensure timely and accurate diagnosis.
44. Mandated specialized training for correctional staff should be implemented to ensure that staff appreciate the response styles of inmates with FASD to ensure that unnecessary confrontations are eliminated by staff being adequately equipped to respond without further escalation of the situation.

Question 4

45. FASD-specific training should be made available for parents, caregivers, and foster parents at all stages of the protection process.
46. Fund accurate and timely diagnosis through provincial and territorial governments.
47. Provide transition planning for FASD-affected youth moving into adult services, with consideration of an extension of the original care agreement.
48. Provide stable placements for FASD-affected youth.
49. Direct or re-direct funding to proactive intervention strategies that maintain the family unit.
50. Minimize the negative impact or implications of the diagnosis.
51. Ensure that timelines contained in child protection laws accommodate the parent with FASD and provide meaningful opportunities to parent with their disability.
52. Develop policies to enhance the lives of parents with FASD and to break the cycle as well as the overrepresentation of FASD children and adults in the child protection system.
53. Allocate additional resources to prevent the inequities inherent to the disability when interacting with the legal system.
54. Target existing resources to address the unique and specific needs of the parent with FASD.
55. Provide meaningful ongoing training for judges, lawyers, and child protection workers to adequately be supported in their roles.
56. Government funding should be allocated or redirected to expand the wrap-around and

comprehensive services or provide for additional resources that pair parents with FASD with an advocate who can help them navigate through the legal process while addressing the secondary concerns of FASD.

Question 5

57. Guardianship and trusteeship programs should be considered for adults with FASD who are found to have diminished capacity and therefore require assistance to manage their affairs.

58. Given the characteristics of an individual with FASD, such as impulsivity, ongoing guardianship and trusteeship is particularly important for those individuals with FASD who have received social support during their adolescence as they transition into adulthood.

Question 6

59. Develop a comprehensive FASD prevention strategy for Canada.

60. Develop gender-specific programs and create opportunities for women and men to discuss with their health care provider relationship issues, child care, and alcohol consumption.

61. Prevention programs should focus on those areas in which positive effects have been demonstrated. In particular, it may be worthwhile to examine interventions involving the mother-child unit. Such approaches might help reduce the likelihood of subsequent children with FASD after a child is found to suffer from an intellectual impairment or neurological disorder such as FASD.

62. Develop evidence-based mandatory training programs for front-line workers on how to talk to women in a secure, non-threatening fashion about the underlying causes of alcohol consumption.

Notes

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