The sentencing response to defendants with foetal alcohol spectrum disorder

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This article explores the sentencing response to defendants who have Foetal Alcohol Spectrum Disorder (FASD). FASD is the umbrella term for a range of effects that result from exposure to maternal alcohol consumption during gestation. Many who have this disorder have difficulty linking their actions to consequences, controlling impulses and remembering things and thus a diagnosis of FASD raises particular issues in sentencing. This article overviews the effects of FASD and the difficulties associated with its diagnosis. It then goes on to examine the appropriate aims of sentencing in FASD cases and addresses the question of whether, and if so in what circumstances, FASD should be perceived as a mitigating factor. The article concludes with a discussion of appropriate penalties for defendants who are diagnosed with FASD and makes some recommendations for increased education about the condition and increased access to resources for diagnosis and response to defendants diagnosed with FASD within the criminal justice system.

INTRODUCTION

Foetal Alcohol Spectrum Disorder (FASD) is not a diagnosis but is an umbrella term for the range of diagnoses associated with foetal damage resulting from maternal alcohol consumption, such as Foetal Alcohol Syndrome (FAS), Partial Foetal Alcohol Syndrome (PFAS), Foetal Alcohol Effects (FAE)[1], Alcohol Related Neurodevelopmental Disorder (ARND), and Alcohol Related Birth Defects (ARBD).[2] FASD was probably first identified in the 19th century[3] and the mental impairment associated with FASD is now considered to be the most common form of preventable, non-genetic mental impairment.[4] Ideally FASD should be prevented;[5] failing that, it should be identified in children as early as possible, around six years of age. It is easier to identify the disorder in young children from visual physical cues, plus the earlier it is identified, the earlier special programs and responses can be put in place so that secondary effects can be avoided.[6] There are various concerns facing FASD sufferers who become involved with the criminal justice process: they may not have

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[1] FAE is rarely used in Canadian jurisprudence, see *R v PJM* [2008] SKPC 43 at [1], [40]; although the term was recently used in a Northern Territory case: *R v Doolan* [2009] NTSC 60 at [9].

[2] See Pyettfor P, *Fetal Alcohol Syndrome: A Literature Review for the "Healthy Pregnancies, Healthy Babies for Koori Communities"*, Victorian Aboriginal Community Controlled Health Organisation (2007) p 5. Pyettfor also identified Foetal Alcohol Syndrome and Related Disorders (FASARD).

[3] Sanders J, "Were our Forebears Aware of Prenatal Alcohol Exposure and its Effects? A Review of the History of Fetal Alcohol Spectrum Disorder" (2009) 16(2) *Canadian Journal of Clinical Pharmacology* 288 at 293.

[4] Despite this, it is under-recognised in Australia; see Mundy J, "The Bottle and the Baby: Alcohol and the Unborn Child" (2008) 6(2) *Of Substance* 16 at 18.

[5] Education has a major role to play in this regard. In Canada, government stores and agencies are required to display signs warning of FASD from time to time: *Public Regulation about Fetal Alcohol Syndrome Regulations*, NS Reg 181/2005. See also Food Standards Australia and New Zealand, *Labelling of Alcoholic Beverages with a Pregnancy Health Advisory Label*, Initial Assessment Report (2007), http://www.foodstandards.gov.au/_srcfiles/A576_IAR_Alcohol_labelling_FINAL.pdf viewed 26 April 2010.

[6] Yazdani P, Motz M and Koren G, "Estimating the Neurocognitive Effects of an Early Intervention Program for Children with Pre-natal Alcohol Exposure" (2009) 16(3) *Canadian Journal of Clinical Pharmacology* 453.

good memory function and may be highly suggestible; as a result, some may not be credible witnesses.[7] As defendants, those who suffer from FASD may be disadvantaged in processes related to police questioning because their suggestibility may cause them to agree with scenarios put to them by police.[8] Plea negotiation, establishing fitness to plead and intention and the role of diminished responsibility and provocation[9] in FASD cases may also raise specific concerns. While these matters are important, this article will focus on the sentencing response to those with FASD and therefore fitness to plead is assumed. Calma has observed that research on this issue is lacking in Australia[10] and this article draws significantly on Canadian research.[11] The article begins with an overview of FASD and concerns related to its assessment and identification before discussing relevant sentencing issues.

UNDERSTANDING THE IMPACTS OF FASD

In adults, nerve damage as a result of alcohol ingestion may be temporary; however, alcohol can cause permanent damage to developing nerves.[12] FASD is a life-long disability and indeed some disadvantages associated with FASD may intensify over time.[13] Both the primary and secondary effects of FASD have important implications for how the criminal justice system should respond to defendants who have FASD.[14] Primary effects or disabilities are those that are the direct result of brain damage from alcohol exposure to the foetus. Secondary effects or disabilities are those disabilities that a child develops as a result of the primary disabilities associated with FASD; the child is not born with secondary disabilities. These two types of effects are discussed in turn below.

Primary effects

At the most serious end of the FASD spectrum is FAS. The requirements for a positive diagnosis of FAS are[15] pre-natal and or post-natal retardation of growth in weight and or height below the 10th percentile; confirmed (or unconfirmed) maternal alcohol consumption; impairment of the central nervous system (which is shown in biological abnormality, developmental delay or intellectual impairment)[16] and craniofacial dysmorphology. Craniofacial dysmorphology includes a small head (below the third percentile), small eyes, small eye slits, the groove between the upper lip and nose

[7] Roach K and Bailey A, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42 *University of British Columbia Law Review* 1 at 21.

[8] See, eg *Western Australia v Cox* [2008] WASC 287 at [1]-[8] (Martin CJ). Some writers have argued that the tendency of Indigenous offenders to concur with police (referred to as gratuitous concurrence) may be a result of culture and history, see Eades D, *Courtroom Talk and Neocolonial Control* (2008) pp 91-106; however, in some situations it may result from FASD.

[9] See, eg *R v Korhonen* [1999] NSWSC 933 (Hulme J).

[10] Calma T, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, Australian Human Rights Commission (2008) p 14.

[11] While the issue has also been discussed in the United States, increasingly research there is focused on holding mothers both civilly and criminally responsible, see, eg Bhargava S, "Challenging Punishment and Privatisation: A Response to the Conviction of Regina McKnight" (2004) 39 *Harvard Civil Rights-Civil Liberties Law Review* 513; Vedrich A, "Prosecuting Pregnant Women: Should Washington Take the Next Step?" (1997) 21 *Seattle University Law Review* 133.

[12] Pyettfor, n 2, p 7.

[13] Moore T and Green M, "Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System" (2004) 19 *Criminal Reports* 99 at 99.

[14] Floyd L, O'Connor M, Sokol R, Bertrand J and Cordero J, "Recognition and Prevention of Fetal Alcohol Syndrome" (2005) 106(5) *Obstetrics & Gynecology* 1059.

[15] Hornick J, Paetsch J, Bertrand L and Jacobs L, *FASD and Access to Justice in the Yukon*, Yukon Department of Justice (2008) p 16; Steinhausen H and Spohr H, "Long-term Outcome of Children with Fetal Alcohol Syndrome: Psychopathology, Behaviour, and Intelligence" (1998) 22(2) *Alcoholism: Clinical and Experimental Research* 334 at 335; Chartrand L and Forbes-Chilibeck E, "The Sentencing of Offenders with Foetal Alcohol Syndrome" (2003) 11 *Health Law Journal* 35 at 37-38.

[16] Impairment of the central nervous system may be referred to as Alcohol Related Neuro-developmental Disorder (ARND).

being under-developed,[17] a thin upper lip and a flattening of the upper jaw. Other physical impairments due to pre-natal exposure to alcohol may include visual impairments, hearing impairments, problems with teeth and structural abnormalities of the heart, kidneys and skeleton.[18]

A number of mental impairments are often present in FASD sufferers. However, only a minority of those diagnosed with FASD will have all of the FAS indications.[19] Alcohol consumption by the mother can cause damage to the frontal lobe of the foetal brain and such damage can result in deficits in executive function.[20] Problems in executive function in FASD sufferers include difficulties with decision-making, judgment and impulse control.[21] Researchers Fast and Conry have identified the mnemonic ALARM as a summary of the core issues: Adaptive behaviour, Language, Attention, Reasoning and Memory.[22] Difficulty with abstract reasoning is often demonstrated by a failure to learn from experience and difficulty in understanding consequences for actions (to self or to others). FASD sufferers can have problems understanding time and sequence,[23] are often said to be "very concrete in their thinking"[24] and frequently have difficulties understanding sarcasm, idiom or metaphor. They may have difficulty "reading into" a situation or an idea,[25] and are not able to "get a big picture"; meaning they may have difficulty imagining a future, thinking about others, explaining actions or restraining impulses (to sleep, eat, drink, steal, have sex etc).[26]

Secondary effects

Secondary effects associated with FASD include criminal justice system contact, psychiatric disorders, compromised school experiences, and substance abuse. These effects are discussed in turn below.

The cognitive, social and behavioural problems associated with FASD often bring sufferers to the attention of the criminal justice system.[27] It has been estimated that approximately 60% of adolescents with FASD have been in trouble with the law.[28] Impulsive behaviour may lead to stealing things for immediate consumption or use, unplanned offending[29] and offending behaviour precipitated by fright or noise.[30] As a result of their suggestibility, FASD sufferers may engage in secondary participation

[17] In medical literature, small eyes are referred to as "microphthalmia"; small eye slits as "short palperbral fissures", and the groove between the upper lip and nose as the "filtrum"; see Avner M, Henning P, Koren G and Nulman I, "Validation of the Facial Photographic Method in Fetal Alcohol Spectrum Disorder Screening and Diagnosis" (2006) 4(20) *Journal FAS International* at 6.

[18] Referred to as Alcohol Related Birth Defects (ARBD), see O'Malley K, "Fetal Alcohol Spectrum Disorders: An Overview" in O'Malley K (ed), *ADHD and Fetal Alcohol Spectrum Disorders FASD* (Nova Science Publishing, New York, 2007) p 11. Visual impairments are said to have 50% prevalence in FASD sufferers.

[19] McKee S, "Fetal Alcohol Syndrome – the Geneticist's View" (2009) (May) *Fetal Alcohol Forum* 13.

[20] Kulaga V, "Cognitive Processing Speeds Among Children Exposed to Fetal Alcohol" (2006) 4(3) *Journal of FAS International* at 1.

[21] Department of Communities, Queensland Government, *Prenatal Alcohol Exposure Affects Young Lives: Community Spirit* (2008).

[22] Fast D and Conry J, "Fetal Alcohol Spectrum Disorders and the Criminal Justice System" (2009) 15 *Developmental Disabilities Research Reviews* 250 at 252.

[23] Fast D and Conry J, "The Challenge of Fetal Alcohol Syndrome in the Criminal Legal System" (2004) *Addiction Biology* 161 at 162.

[24] Moore and Green, n 13 at 101.

[25] *R v Harper* [2009] YKTC 18 at [17].

[26] Paige K, "Fetal Alcohol Spectrum – the Hidden Epidemic in our Courts" (2001) 52 *Juvenile and Family Court Journal* 21 at 25.

[27] Chartrand and Forbes-Chilibeck, n 15 at 42.

[28] See Fast D, Conry J and Loock C, "Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System" (1999) 20(5) *Developmental and Behavioural Pediatrics* 370.

[29] See *People v Wybrecht* 222 Mich App 160 (1997) at 182; 564 NW 2d 903.

[30] Kelly K and Streissguth A, *Fetal Alcohol Spectrum Disorder (FASD) and Offender Criminal History* (unpublished, University of Washington School of Medicine, 1996).

with more sophisticated offenders.[31] Lack of memory or in not understanding cause and effect may lead to breach of court orders, further enmeshing FASD sufferers in the justice system. Impaired adaptive behaviour that results from brain damage is translated into practical problems such as trouble handling money and difficulties with day to day living skills. It may be difficult for FASD sufferers to understand or perceive social cues and to tolerate frustration. Inappropriate sexual behaviour is also common amongst FASD sufferers; in one study, about 50% of FASD sufferers had displayed inappropriate sexual behaviours.[32] Canadian research has found that FASD is over-represented in prison populations of sex offenders.[33]

Throughout their lifespan, over 90% of FASD sufferers will also be diagnosed with one or more psychiatric disorders such as a mood disorder (for example, bi-polar disorder) or anxiety disorder.[34] Attention Deficit Hyperactivity Disorder (ADHD) may be the most commonly diagnosed mental health disorder in FASD sufferers.[35] Although ADHD is generally diagnosed four times more often in boys than in girls, in FASD children, ADHD seems to be distributed equally between genders;[36] thus, a girl presenting with ADHD presents a red flag for a FASD assessment. Autism Spectrum Disorder, Asperger's Syndrome, Oppositional Defiant Disorder (ODD) or Conduct Disorder are also diagnosed in many FASD sufferers.[37] It is problematic when these diagnostic categories alone are applied to FASD sufferers because they do not incorporate the collection of other issues often associated with FASD.[38] FASD sufferers are also a greater suicide risk as a result of impulsivity, lack of tolerance and depression.[39]

Factors associated with FASD are understood to contribute to the disrupted or curtailed schooling experienced by about 60% of FASD sufferers.[40] In adolescence and adulthood, one of the most common problems associated with FASD is difficulty remembering things. Problems with verbal memory may lead to difficulty understanding long or complex sentences.[41] Language issues coupled with executive function problems, which make it difficult to plan or concentrate, may make sufferers unable to engage in school classes or explain things. Because some FASD sufferers cannot tell the time of day or the week, they may not be able to cope with appointments.[42] A FASD sufferer's lack of engagement may be assumed to be simply ADHD since one may be deceived by the "superficial fluency" of language common among FASD sufferers.[43] Thus, although ADHD may be identified, FASD may be missed. Alcohol-induced physical abnormalities causing problems with sight and

[31] See, eg *Alchin v South Australian Police* [1995] SCSA 981 at [2] (Debelle J).

[32] Boland F, Burrill R, Duwyn M and Karp J, *Fetal Alcohol Syndrome: Implications for Correctional Service*, Correctional Services, Canada (1998) at [2], [32], http://www.csc-scc.gc.ca/text/rsrch/reports/r71/er71.pdf viewed 27 October 2009.

[33] Novick-Brown N, "Sexually Inappropriate Behaviour in Patients with Fetal Alcohol Spectrum Disorders" in O'Malley, n 18, pp 125, 135, 137.

[34] O'Malley, n 18, p 11; Steinhausen and Spohr, n 15 at 337.

[35] Doig J, "Medication Effects on Symptoms of Attention-deficit/Hyperactivity Disorder in Children with Fetal Alcohol Spectrum Disorder" (2008) 18(4) *Journal of Child and Adolescent Psycho-Pharmacology* 365 at 366.

[36] O'Malley, n 18, p 4.

[37] Nanson J, "Autism in Fetal Alcohol Syndrome: A Report of Six Cases" (1992) 16 *Alcoholism: Clinical and Experimental Research* 558.

[38] Paige, n 26 at 24. See the discussion from Martin CJ considering the cognitive impairment, and whether the defendant required full-time care: *R v Doolan* [2009] NTSC 60 at [10].

[39] O'Malley K, *Transcontinental Psychiatric Experience with Foetal Alcohol Spectrum Disorders (FASD)*, Paper presented at the Fetal Alcohol Forum (2009) at [15].

[40] See Burd L, Selfridge R, Klug M and Juelson T, "Fetal Alcohol Syndrome in the Canadian Corrections System" (2003) 1 *Journal of FAS International* 2.

[41] *R v R (A)* (2003) Carswell Ont 1401 discussed in Moore and Green, n 13 at 103.

[42] *R v Harper* [2009] YKTC 18 at [16], [50].

[43] Paige, n 26 at 24.

hearing may also be relevant in the school environment. Research in criminology has shown that early school leaving can lead to delinquent behaviour.[44] Similar issues will affect FASD sufferers' ability to maintain employment.[45]

Pre-natal alcohol exposure increases up to threefold the likelihood of alcohol abuse in adolescence.[46] Researchers have noted that about 30% of FASD sufferers develop substance abuse problems.[47] Such problems also increase the likelihood of involvement with criminal justice interventions,[48] especially in Indigenous communities in Australia where alcohol use is often prohibited.

IDENTIFICATION AND DIAGNOSIS

Estimated rates of FASD in Australia range from 0.06 to 0.68 per 1,000 live births.[49] This is significantly lower than Canada which has an incidence of one to three per 1,000 live births.[50] FASD may be under-reported in New Zealand where, from 1999-2001, there were 2.9 diagnoses per 100,000 children under 15 years; the low numbers reported were argued to result from variation in the willingness and ability of paediatricians to diagnose.[51] A lack of paediatric expertise available to diagnose FASD has also been recognised in Australia.[52]

FASD is disproportionately diagnosed among Indigenous people. Langton suggests that 25 Indigenous children per 1,000 live births suffer from FASD.[53] A Western Australian study estimated that FASD affected 2.97 Indigenous children per 1,000 live births.[54] In Canada, Indigenous people are 10 times more likely than others to be identified as suffering from FASD.[55] However researchers have found that this disproportionate diagnosis is a result of socio-cultural and socio-economic issues rather than suggesting any genetic disposition towards FASD.[56] Some researchers have noted that Canadian

[44] Weatherburn D, Snowball L and Hunter B, "The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS Survey" (2006) 104 *Crime and Justice Bulletin* 6.

[45] Justice Committee of FASD Ontario, *FASD: After Sentencing* (2007), http://www.fasdjustice.on.ca/fasd-sentencing.html viewed 3 November 2009.

[46] O'Malley, n 18, p 11.

[47] Boland et al, n 32 at [2].

[48] Koren G, "Hypothetical Framework: FASD and Criminality – Causation or Association? The Limits of Evidence Based Knowledge" (2004) 2 *Journal of FAS International* 1 at 4.

[49] Queensland Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009) p 67.

[50] In Canada in 2003, of a prison population of 148,797 inmates, only 13 offenders were identified with FASD; Burd et al, n 40 at 7.

[51] New Zealand Parliament, *Parliamentary Debates*, Hon Pete Hodgson (Minister for Health) (17 July 2007); see also Fast et al, n 28.

[52] Calma, n 10, p 13. See also the discussion of expertise in *R v Doolan* [2009] NTSC 60.

[53] Langton actually quotes one in 40 Indigenous children: Langton M, "The End of 'Big Men' Politics" (2009) 14 *Griffith Review* 13 at 25. Other estimates include five out of 100 (FAS and ARND) in child psychiatry presentations, and 23 out of 100 in juvenile justice presentations (FAS and ARND): see Connor P, *Fetal Alcohol Spectrum Disorders and the Justice System*, UW School of Law: Court Improvement Training Academy (2009), http://www.uwcita.org/CITAv1008/trainingmaterials/fasd.html viewed 3 April 2010.

[54] Glasson E, Sullivan S, Hussain R, and Bittles A, "An Assessment of Intellectual Disability Among Aboriginal Australians" (2005) 49(8) *Journal of Intellectual Disability Research* 626 at 631. See also the brief discussion in the recent report: Queensland Crime and Misconduct Commission, n 49, pp 64-67.

[55] Chartrand and Forbes-Chilibeck, n 15 at 40.

[56] O'Leary C, "Fetal-alcohol Syndrome: Diagnosis, Epidemiology, and Developmental Outcomes" (2004) 40 *Journal of Paediatric Child Health* 2.

children in foster care tend to receive the FASD label,[57] and that because there are disproportionate numbers of Indigenous Canadians in foster care, it is therefore Indigenous children who are said to have FASD.

Research in Victoria suggests that Indigenous children in that State are 13 times more likely to be in foster care and therefore they are similarly more likely to be described as having FASD, despite the fact that there may be numerous other factors in the child's life that might explain many of the symptoms.[58] Some authors are concerned that unsubstantiated claims that children have FASD can fuel racism; for example, teachers may use the label to explain poor school performance when there may be a number of other possible explanations.[59] However, a Canadian judge has pointed out that "FASD often finds its roots in the systemic discrimination of First Nations people and the resultant alienation they experience from their ancestry, their culture and their families".[60] The position is likely to be similar in Australia, but concerns about racism underline the importance of careful multidisciplinary assessment. Wartnik, a former United States judge, has suggested that the ideal diagnostic team might include a psychologist, neuropsychologist, psychiatrist, and paediatrician.[61]

There are probably several reasons behind the under-reporting and under-diagnosis of FASD in Australia. The lack of expertise associated with its diagnosis[62] explains the situation to some extent. It is also often difficult to get an accurate history of maternal drinking patterns during pregnancy,[63] in part because of the stigma associated with such behaviour but also because in many cases the FASD sufferer may no longer be in contact with his or her biological mother.[64] Sometimes doctors and other practitioners forget to ask about maternal drinking during pregnancy.[65] In relation to this concern, a legal practitioner has observed that local Aboriginal Community Justice Groups (CJGs) may have a role to play in letting the court know about possible FASD.[66] The complex circumstances and histories of many FASD sufferers will also complicate the diagnostic picture and may contribute to under-diagnosis. An added complication for obtaining a diagnosis is that there are likely to be several appointments with different professionals necessary for the suspected FASD sufferer to attend; thus, the very problems of attention deficit and lack of planning that are linked to FASD may make completion of the diagnosis difficult.[67]

[57] Similar concerns exist elsewhere, eg in Santa Clara California, it has been estimated that 85% of children placed in foster care are affected by substance abuse: see Page K, "The Invisible Havoc of Pre-natal Alcohol Damage" (2003) 4 *Journal of the Center for Families, Children and the Courts* 67 at 67.

[58] Pyett P, Waples-Crowe P, Hunter-Loughron K and Gallagher J, "Healthy Pregnancies, Healthy Babies for Koori Communities: Some of the Issues Around Alcohol and Pregnancy" (2008) 32(1) *Aboriginal and Islander Health Worker Journal* 29 at 32. For example, some Indigenous people have been identified to have a cognitive disability when actually they have a hearing impairment and no cognitive disability: see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) p 46.

[59] de Plevitz L, Gould J and Smith T, "Letters: Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in Indigenous School Children" (2009) 190(5) *Medical Journal of Australia* 286 at 286.

[60] *R v Quash* [2009] YKTC 54 at [62].

[61] See Wartnik A, *Will Anyone With a MD Do?*, Paper presented at the FASD and the Justice System Conference (Kiana Lodge, Suquamish, Western Australia, 23 April 2009).

[62] Peadon E, O'Leary C, Bower C and Elliot E, "Impacts of Alcohol Use in Pregnancy: The Role of the GP" (2007) 36(11) *Australian Family Physician* 935 at 936; Goh I, Chudley A, Clarren S, Koren G, Orrbine E, Rosales T and Rosenbaum C, "Development of Canadian Screening Tools for Fetal Alcohol Spectrum Disorder" (2008) 15(2) *Canadian Society for Clinical Pharmacology* 344 at 346.

[63] Fast and Conry, n 23 at 162.

[64] In an Australian study of FASD, only 40% of children identified with FASD lived with a biological parent: see Elliot E et al, "Fetal Alcohol Syndrome: A Prospective National Surveillance Study" (2008) 93(9) *Archives of Disease in Childhood* 733.

[65] Elliot et al, n 64 at 737.

[66] See *Penalties and Sentences Act 1995* (Qld), ss 9(2)(p), 9(7) in relation to CJGs. A recorded interview with a social worker and a lawyer from ATSILS took place on 1 December 2009 (the ATSILS interview) p 23.

[67] See *R v Dayfoot* [2007] ONCJ 332 at [4], [14], where it was observed that in order to obtain an assessment it may be necessary to detain the defendant.

FASD is more difficult to diagnose where none of the visual cues are present. Many who are severely compromised by FASD may not have obvious facial characteristics associated with the disorder.[68] Additionally, Goh and colleagues have observed that facial features can be affected by ethnicity and genetics and a specific test which can take these matters into account has not been developed.[69] Intelligence tests will often not help to identify FASD. Many sufferers will have a normal IQ, although some will score below average on intelligence tests, they will rarely score below 70.[70] This means that the deficits in functional ability associated with FASD, especially memory and attention, will not be identified with an IQ test.[71] For example one practitioner observed that a particular FASD client was "quite bright but he can't exercise it somehow to his own benefit or to fit into social situations".[72]

FASD children often grow up against severely disadvantaged backgrounds, where there is poverty, neglect, violence and disorganisation; frequently both parents are heavy drinkers and have criminal records.[73] Often parents have FASD themselves which compromises their ability to parent;[74] they may be neglectful as a result of their cognitive impairment which exacerbates the potential for secondary disabilities to develop in their child who may also have FASD. Given the backgrounds of many FASD sufferers, behavioural issues often associated with FASD such as criminal offending and difficulties at school may be explained by other factors.[75] As noted above, the FASD sufferer may abuse alcohol or other drugs,[76] which may increase cognitive impairment.[77] As it is common for FASD children to have been previously diagnosed with disorders such as ADHD, ODD and other learning disabilities,[78] in many cases it may be difficult to untangle the various causes of symptoms.[79]

Despite the difficulties in diagnosis and identification, experts now agree that FASD is a condition with objective findings that has scientific support and, although a FASD diagnosis is easier to make where a history of maternal drinking is known, a diagnosis can be made without the maternal drinking history.[80] Although FASD is a medical diagnosis,[81] most experts accept that a diagnosis of FASD requires a multi-disciplinary approach.[82] FASD is not currently included in the Diagnostic and

[68] Moore and Green, n 13 at 99; Chartrand and Forbes-Chilibeck, n 15 at 38.

[69] Goh et al, n 62 at 349.

[70] O'Malley, n 18, pp 2, 5; Connor, n 53. Ironically, possessing an IQ under 70 provides a protective factor because diagnosis of FASD is more likely so proper supports are more likely to be provided: see Paige, n 26 at 27.

[71] Green C, Mihic A, Nikkel S, Stade B, Rasmussen C, Munoz D and Reynolds J, "Executive Function Deficits in Children with Fetal Alcohol Spectrum Disorders (FASD) Measured Using the Cambridge Neuropsychological Tests Automated Battery" (2008) 50(6) *Journal of Child Psychology and Psychiatry* 688 at 695.

[72] ATSILS interview, n 66, p 3.

[73] Fast and Conry, n 23 at 162. Smoking also appears to increase the effects of alcohol on the foetus; see Steinhausen and Spohr, n 15 at 335.

[74] O'Malley, n 18, p 7; see also Taylor P, "Blight of Alcohol Abuse Seen in Kimberley's Schoolgirl Mums" *The Australian* (24 March 2009) p 3. See *R v Elias* [2009] YKTC 59 where Elias suffered from FASD and one of her children in the care of child protection also had FASD.

[75] Further, symptoms similar to FASD sometimes occur as a result of other genetic or environmental disorders such as viruses: see O'Leary, n 56 at 2.

[76] For example, glue and petrol sniffing; see *R v Korhonen* [1999] NSWSC 933 at [31].

[77] Fast and Conry, n 23 at 164. See, eg *R v Lucas-Edmonds* [2009] 3 NZLR 493 where the defendant was a FASD sufferer and a chronic abuser of solvents.

[78] Page, n 57 at 75.

[79] O'Leary, n 56 at 2. For example, hair analysis may be able to help identify FASD: see Kulaga V, Pragst F, Fulga N and Koren G, "Hair Analysis of Fatty Acid Ethyl Esters in the Detection of Excessive Drinking in the Context of Fetal Alcohol Spectrum Disorders" (2009) 31(2) *The Drug Monitor* 261.

[80] Wartnik, n 61.

[81] Connor, n 53.

[82] Hornick et al, n 15, p 17.

Statistical Manual of Mental Disorders (DSM-IV);[83] however, there is a general category in the DSM-IV called "Mental Disorders due to General Medical Condition" which has been used to describe the sufferer.[84] It is hoped by some that FASD may be included in the next edition of the DSM (DSM-V) to be published in 2012,[85] and this may lead to better training in recognition, therapeutic diagnosis and response. According to experts, the most influential protective factors against adverse effects of FASD are getting an early FASD diagnosis and stable home life.[86] The earlier the diagnosis, the more opportunities to limit the secondary damages associated with FASD.[87] Currently, in Canada, many cases of FASD have been identified late and as a result of criminal justice system contact.[88] Access to assessment, diagnosis and support via the criminal justice system is not the ideal pathway for FASD sufferers to get the assistance they need. However, for some individuals, it may be their last chance and thus the criminal justice system must respond carefully in these cases.

SENTENCING CONSIDERATIONS

> The calculus of sentencing the average offender simply does not apply to an offender with FASD.[89]

As a result of deficits in executive function resulting in memory difficulties, inability to plan and failure to recognise the consequences of actions, many of those with FASD are likely to fail to pay fines and to breach probation orders and good behaviour bonds.[90] Suspended sentences will not be useful in a context where cause and effect is not understood; in prison, highly suggestible FASD sufferers are likely to be victimised. While FASD clients cannot be cured of all their symptoms, techniques and approaches have been identified that can be employed by professionals to help the person reach his or her potential.[91] This section of the article discusses the application of sentencing principles in FASD cases before turning to explore sentencing outcomes in FASD cases. In a 2006 Canadian case, Fowler J stated that the case he was hearing involving a violent sexual offender who suffered from FASD was "like a canary in the coalmines".[92] He observed that governments now know people with FASD will increasingly fill the prisons because they have a high rate of re-offending, act on impulse and do not consider the consequences.[93] He warned that unless immediate steps were taken to develop meaningful programs for dealing with FASD offenders, more and more offenders would simply be incarcerated. This same warning is applicable in the Australian context.

Informing the court

Given that the physical abnormalities associated with FASD are not present in many sufferers, it will often be impossible for judges to recognise a defendant with FASD from the Bench. It is therefore important that probation and parole officers and defence and prosecution lawyers, who will usually have more contact with the defendant, are knowledgeable about FASD and its effects.[94] In Australia, it is likely that there is not enough information available to the criminal justice community at the present

[83] American Psychiatric Association, *DSM-IV: The Diagnostic and Statistical Manual for Mental Disorders* (4th ed, 2000).

[84] O'Malley, n 18, p 6.

[85] See Mela M, "Accommodating the Fetal Alcohol Spectrum Disorders in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V)" (2006) 4 *Journal of FAS International* 8.

[86] Paige, n 26 at 26; Gedeon C, "Adverse Life Outcomes Associated with Fetal Alcohol Syndrome: The Benefits of Early Diagnosis" (2005) 3 *Journal of FAS International* 11

[87] Gedeon, n 86 at 11.

[88] See examples in Fast et al, n 28.

[89] *R v Harper R v Lucas-Edmonds* [2009] YKTC 18 at [39].

[90] Russell V, *An Insight into Foetal Alcohol Exposure: The Implications for Criminal Justice*, Paper presented at the Insights and Solutions Conference (Melbourne, 3 September 2008), http://www.arbias.org.au/Downloads/Vicki%20Russell.pdf viewed 27 April 2010.

[91] *R v M (B)* [2003] SKPC 83 at 17.

[92] *R v Obed* [2006] NLTD 155 at [68].

[93] *R v Obed* [2006] NLTD 155 at [67].

[94] Waller A, *Stopping the Revolving Door in the Justice Systems: The Family Perspective*, Paper presented at Fetal Alcohol Spectrum Disorder: Research, Policy and Practice Around the World (Victoria, Canada, 7-10 March 2007).

time. For example, one practitioner commented:

> There's just no exposure to start with in terms of we don't know what Fetal Alcohol Spectrum Disorder is. Practitioners do not know what to look for. They don't know the physical characteristics let alone the behavioural characteristics … So I think that first thing is the exposure and the knowledge and nobody really has it. From then after we've defeated that one, then I guess we'd look at the strategies around it but we haven't even got to that point.[95]

It is important for information to be collected as early as possible in the justice process. Canadian commentators have observed that investigating police have an important role to play as they are often the first to consider the possibility of FASD.[96] FASD assessment programs developed in Canada have recognised the key role of probation officers in identifying appropriate referrals since they are often involved relatively early in the justice process.[97] In the Australian context, given current under-diagnosis, it may be appropriate for probation officers specifically to rule out FASD in preparing their pre-sentence reports. According to Boulding, prosecuting lawyers should ask defence lawyers in advance of the trial whether they have considered FASD; he argues that this might encourage a defence lawyer to consider the issue and obtain relevant assessments.[98]

Judges will only respond to what they can hear and see and to the material put before them; however, there is also a role for judges to respond to concerns about FASD if the circumstances present such concerns. In a Saskatchewan program, a judge who observes various matters associated with FASD, such as repeated failure to comply with court orders, lack of empathy and risky offending behaviour, can report the defendant to a designated youth court worker who can then arrange appropriate screening (with the person's consent).[99] Although no similar program exists in Australia, judges are able to ask questions of counsel and parole representatives to assist them in their deliberations on sentence.[100] One recent Queensland case involved the rape of a young girl by a number of offenders, including a 14-year old boy, referred to as PAG. The court was advised that the mother of PAG was an alcoholic, that PAG had breached a number of court orders and had left school early. The sentencing judge asked whether the case was appropriate for a more detailed psychological report from the Griffith Youth Forensic Service. The representative from probation services advised, "[w]ith respect, Your Honour, it might be overkill with this particular set of facts".[101] In this case, FASD may well have been diagnosed as a result of a more detailed report, as suggested by the judge, and may have been an opportunity lost for the particular defendant who appears to have been placed on a standard probation order which may not have addressed concerns associated with FASD. A FASD assessment will be able to identify the level and type of cognitive impairment of the defendant and these findings may have an impact on the type of conditions and type of sentence ordered. As a result of cognitive deficits, FASD offenders may not be able to complete standard programs provided in relation to substance abuse, anger management, vocational training or sexual behaviour[102] that are often ordered along with sentences such as probation. It is important that probation orders for FASD sufferers do not contain provisions that will inevitably be breached; such an approach requires that conditions and expectations must be carefully tailored for the individual and his or her level of capacity.

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[95] ATSILS interview, n 66, p 21.

[96] See Hornick et al, n 15, p 23, where it is reported that the Royal Canadian Mounted Police have developed a guide for diversion in appropriate cases where sufferers are identified as having FASD.

[97] PLEA Community Service Society of British Columbia and Asante Centre for Fetal Alcohol Syndrome, *Specialised Assessment and Program Pilot Project for Young Offenders with FASD: Final Report* (2005) at [20].

[98] Boulding D, *Fetal Alcohol: The Role of Crown Counsel* (2005) at [2], https://www.alaskabar.org/SectionMeetingHandouts/LandCommunityHeatlhForum/ABA%20January%202008/boulding/8.%20Fetal%20Alcohol%20-%20The%20Role%20of%20Crown%20Counsel.pdf viewed 9 April 2010.

[99] Goh et al, n 62 at 349.

[100] *GAS v The Queen* (2004) 217 CLR 198 at [30] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

[101] *R v KU; Ex parte A-G (Qld)* [2008] QCA 154 at [33]. A similar situation is noted by Boulding D and Brooks S, *Trying Differently: A Relationship Centred Approach to Representing Clients with Cognitive Challenges* (unpublished paper, 2009) p 2.

[102] Burd et al, n 40 at 6.

Where it has already been diagnosed, FASD should be raised by parties appearing before a justice. In the United States, there is authority to the effect that failure to raise FASD in relation to sentencing may be prejudicial,[103] and thus may be a successful appeal point. Ordinarily the defence lawyer has discretion about how the sentencing hearing is approached and the mitigating material to be put before the court. In Australia, in the current environment, where systems of support for FASD defendants are so poor, defence lawyers who identify FASD to the court may perceive that they are merely putting their clients at risk of increased surveillance or incarceration. Despite this, it is arguable that, from an ethical perspective, a defence lawyer's knowledge about possible or diagnosed FASD is something that concerns the administration of justice and thus should be disclosed to the court.[104]

In Canada, defendants have often been sentenced on the basis of "suspected" FASD.[105] However, in one case it was found on appeal that a judge could not diagnose FASD or make a ruling based on an unsubstantiated claim.[106] Thus, it is important to have a full assessment in cases where FASD is suspected. In some cases it may be helpful to call an expert or experts at the sentencing hearing on the issue of appropriate sentencing options in consideration of FASD where it has already been properly diagnosed or where diagnosis is disputed.

While in some Canadian cases judges have recommended FASD assessment as part of a sentencing order,[107] ideally a proper assessment will be available prior to sentencing so the judge can be assisted in crafting an appropriate sentencing outcome. In some circumstances, defendants may be unwilling to be assessed because of the delay assessment will cause to sentencing or the stigma that would be associated with a positive diagnosis.[108] In Canada, courts have found that they do not have the power to compel assessment for FASD.[109] Issues about who pays for assessments have also been debated in some Canadian cases;[110] presumably, this is a matter that needs to be resolved in Australia as well. Many FASD defendants are likely to be represented by Legal Aid services so, ultimately, it is government resources that would be paying for FASD assessments in many cases.

Judges do not have the power to compel provision of various services, even where a diagnosis is made.[111] There is already a lack of appropriate probation services in Australia, and the lack of available services is especially pronounced in rural and remote communities. Specialised services for FASD clients appear to be practically non-existent in Australia. However, the current lack of resources does not present a justification for ignoring FASD. Goh and colleagues have observed that diagnosis may have some positive outcomes such as improved access to appropriate services, the encouragement

[103] *State v Haberstroh* 69P 2d 676 (2003).

[104] Hunter J and Cronin K, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Butterworths, Sydney, 1995) p 175. See also Smith A, "Defending the Unpopular Down-Under" (2006) 30 *Melbourne University Law Review* 495 at 530-539.

[105] See *R v MMP* [1999] AJ 223; *R v DEK* [1999] AJ 1357; *R v Harris* [2002] BCJ 1691; *R v Abou* [1995] BCJ 1096; *R v Malcolm* [2005] YKTC 25. In each of these cases, suspected FASD was said to mitigate sentence.

[106] *R v Harris* [2002] BCCA 152. Others have raised concerns about Indigenous people and sentencing in the context of defence counsel raising customary law at the bar table as a mitigating factor without evidence: see Rogers N, *Aboriginal Law and Sentencing in the Northern Territory: Supreme Court at Alice Springs 1986-1995* (PhD thesis, University of Sydney, 1998).

[107] See, eg *R v Kruse* [2004] AJ 1227.

[108] Roach and Bailey, n 7 at 42.

[109] *R v TK* [2006] NUCJ 15 (Johnson J).

[110] Roach and Bailey, n 7 at 43.

[111] Green M, *A Judicial Perspective*, Paper presented at the Fetal Alcohol Syndrome Disorders Symposium for Justice Professionals (Toronto, Ontario, 1 March 2006) p 6. Although see *Attorney-General (Qld) v Robinson* [2007] QCA 111 at [29] in the context of detention order under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), where Holmes JA stated that it was the Attorney General's obligation to do everything it could to achieve release so that "the character of his detention does not … become punitive rather than preventive".

of different and more suitable approaches to the delivery of education, therapy and supervision; it may also help to identify other family members who are at risk.[112] Diagnosis may also lead to more appropriate approaches to sentencing.

CULPABILITY AND THE AIMS OF SENTENCING IN FASD CASES

A fundamental principle of sentencing is that the sentence should be just and should be proportionate to the gravity of the offence and the offender's degree of responsibility.[113] However, FASD sufferers may have a lower level of culpability as a result of their cognitive deficiencies. In the Canadian case of *Harper*, Lilles J asked: "what does [the principle] mean for an offender … who suffers from an organic brain disorder that affects not only his ability to control his actions but also his understanding of the consequences that flow from them."[114] In the United States and in Canada, evidence of FASD has been identified as a mitigating factor.[115] For some offenders, it may be the main criminogenic factor and in Canadian case law it is accepted that FASD is:

> a factor that affects the degree of the offender's responsibility so as to reduce the severity of a just sentence … failing to take it into account during sentencing works an injustice to both the offender and society at large. The offender is failed because he is being held to a standard that he cannot possibly attain given his impairments.[116]

Typical attitudes and behaviours of FASD sufferers that may be observed in court include an inability to understand the seriousness of their crimes which may be exhibited in nonchalance or inappropriate smiling, apparent lack of remorse and defiance of court orders. For example, one practitioner noted that his FASD client "didn't seem to express much remorse. That's just the practicality of getting caught; he's in prison, what a nuisance".[117] FASD offenders may seem to carry out opportunistic, impulsive offending in relation to crimes that do not make sense.[118] They may carry out high risk behaviours for modest outcomes. These are matters that might usually suggest incorrigibility and an outright refusal to engage with the criminal justice process and may cause a sentencing judge to increase the penalty.[119] However, if these behaviours and attitudes can be identified as an effect of FASD, a judge is likely to perceive the defendant quite differently. In Australia, a number of cases have accepted that intellectual disability is a mitigating factor in sentencing because culpability is reduced; however, many of the Australian cases have referred to "below average intelligence" as the concept that defines cognitive challenge[120] and, as noted above, FASD sufferers often have normal intelligence. If an intelligence assessment defines cognitive capacity, the disadvantages experienced by FASD sufferers may be missed.[121] According to Wartnik,

[112] Goh et al, n 62 at 346.

[113] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [7] (Mason CJ, Brennan, Dawson and Toohey JJ).

[114] *R v Harper* [2009] YKTC 18 at [37]-[38].

[115] See, eg *Stankewitz v Woodford* 365 F 3rd 706 (2004); *R v Harper* [2009] YKTC 18. In the United States, FASD diagnosis has been pivotal for some defendants in the avoidance of the death penalty, see *In the Matter of Brett* 142 Wash 2d 868 (2001); 16P 3d 601; *Castro v State of Oklahoma* 71F 3d 1502 (1995); *Johnson v State of Missouri* 102 SW 2d 535 (2003).

[116] *R v Harper* [2009] YKTC 18 at [37]-[38].

[117] ATSILS interview, n 66, p 3.

[118] Connor, n 53; Green, n 111, p 6; Goh et al, n 62 at 349; Hornick et al, n 15, p 24.

[119] See generally *Cameron v The Queen* (2002) 209 CLR 339 where a reduction in sentence was justified in part on the basis that the defendant was remorseful.

[120] See the discussion Edney R and Bagaric M, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) pp 167-168; see also *Crimes Act 1914* (Cth), s 16A(2)(m), which refers to "mental condition". See also, eg *R v Gommers* [2005] SASC 493.

[121] Boulding and Brooks, n 101, p 22.

once the link between FASD and the criminal offence is established, the first consideration with respect to sentencing must be whether FASD has resulted in less culpability and therefore whether a less severe sentence is warranted.[122]

In their discussion of sentencing FASD offenders in Canada, Roach and Bailey observe that the purposes of sentencing, such as deterrence, denunciation and rehabilitation assume that the defendant can make choices and learn from his or her mistakes.[123] Depending on the degree of cognitive deficit, the role of special deterrence may be limited.[124] It has been noted that many FASD sufferers do not understand cause and effect and will therefore find it difficult or impossible to connect the sentence to their crime and will not learn from past actions. In FASD cases, special deterrence often has little, if any, value.[125] In relation to general deterrence, one Canadian justice observed that it would be "obscene" to warn off other potential offenders by inflicting a more serious punishment on a "handicapped" person.[126] In the Australian context, Kirby P has observed:

> Because the constraints which may be demanded of a person with ordinary adult intellectual capacities may not operate, or operate as effectively, in the case of a person with significant mental handicaps, the community (reflected by the judges) applies to such people the principles of general deterrence in a way that is sensibly moderated to the particular circumstances of their case. General deterrence still operates … It is in place for the protection of the community and the victims of offences which the community rightly takes most seriously. But as that principle falls upon a person such as this applicant, it is necessarily a consideration to which less weight can, and therefore should, be given.[127]

Ultimately, the role of general deterrence will also depend on an assessment of cognitive deficit.[128] In relation to denunciation, in the Canadian case of *Quash*, the judge observed that, to the extent that the crimes of a FASD sufferer are denounced, "the failings of the greater society are denounced as well".[129] The suggestion here is that the principle of denunciation will also have little value in a FASD case because it is another's failure (for example, a mother's failure as a result of abusing alcohol while pregnant, or the community's failure to provide appropriate support) that led to offending.[130]

The two most important guidelines for sentencing FASD sufferers are argued to be rehabilitation and community protection.[131] The High Court in Australia has grappled with the effect of mental illness on balancing community protection and culpability in sentencing. In *Veen*, the High Court noted that the aims of sentencing:

> are guideposts to the appropriate sentence but sometimes they point in different directions. And so a mental abnormality which makes an offender a danger to society when he is at large but which diminishes his moral culpability for a particular crime is a factor which has two countervailing effects: one which tends towards a longer custodial sentence, the other towards a shorter. These effects may

[122] Wartnik, n 61. See also *R v Synnuck* [2005] BCCA 632; *R v Paparone* (2000) 112 A Crim R 190 at [50]-[53] (*Paparone* was not specifically a FASD case).

[123] Roach and Bailey, n 7 at 21.

[124] *R v Quash* [2009] YKTC 54 at [70].

[125] *R v Harper* [2009] YKTC 18 at [45]; *R v Obed* [2006] NLTD 155 at [29]; see also *R v Lucas-Edmonds* [2009] 3 NZLR 493 at [34] (Ellen France, Priestly and Miller JJ). In Australia see also *R v Thompson* (2005) 157 A Crim R 385 at [54], although this case was not related to FASD.

[126] *R v Abou* [1995] BCJ 1096, referred to in *R v Harper* [2009] YKTC 18 at [47]; see also *R v Mason-Stuart* (1993) 61 SASR 204 at 205-206 (King J); 68 A Crim R 163 (although the latter case related to brain damage rather than FASD).

[127] *R v Champion* (1992) 64 A Crim R 244 at 254-255.

[128] *R v Quash* [2009] YKTC 54 at [72]; see also *R v Pham* [2005] NSWCCA 314.

[129] *R v Quash* [2009] YKTC 54 at [81].

[130] *R v Champion* (1992) 64 A Crim R 244 at 254-255.

[131] Chartrand and Forbes-Chilibeck, n 15 at 35; see also *R v IDB* [2005] ABCA 99.

> balance out, but consideration of the danger to society cannot lead to the imposition of a more severe penalty than would have been imposed if the offender had not been suffering from a mental abnormality.[132]

The aims of community protection and rehabilitation are often difficult to balance, and this dilemma is emphasised in FASD cases. Rehabilitation, in the sense of "reducing or eliminating the factors which contributed to the conduct for which the offender is sentenced",[133] may be able to be accomplished to some degree in the sentencing of FASD sufferers.[134] For example, opportunities for offending may be minimised, problematic associations may be reduced or eliminated, and strict routine and supervision may be applied. However, rehabilitation in the deeper sense of internal attitudinal reform[135] will be impossible in many FASD cases.

The defendant's reduced capacity to understand actions and learn from the past will contribute to re-offending and these aspects of the disability are likely to make community protection a significant consideration.[136] While high levels of supervision in the community are thought to address the concern of re-offending, the necessary level of supervision is often difficult to arrange or assure. In Canada, risk assessment has been considered an extremely important aspect of sentencing consideration in FASD cases.[137] However, despite the high level of risk of re-offending attributed to many FASD offenders, the proportionality and totality principles must be kept in mind. The sentence should fit the crime and it should not be too "crushing".[138] Once FASD is identified, and the relevant aims of sentencing have been explored, the court will investigate applicable sentencing options. This is discussed below.

THE "EXTERNAL BRAIN": COMMUNITY SUPERVISION FOCUS

> My FAS clients often did not follow through with basics, like showing up for appointments, being on time, going to the right places, or conducting themselves appropriately … My assumption that my clients were not interested or did not care was wrong; they could not structure the pieces of the puzzle together in a logical and meaningful way.[139]

Research suggests that 24-hour structure and supervision, what has been referred to as a "second" or "external" brain,[140] may be required in some cases of where FASD has been identified. While such a level of supervision is available in a custodial setting, it may be possible to create necessary levels of supervision and structure external to a prison setting.[141] In the Queensland case of *Twaddle*, an expert witness recommended that the defendant, who had been diagnosed with FASD, "be placed in a secure position with 24 hour supervision … [although] he may be able to manage with as little as 12 hours a

[132] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476 (Mason CJ, Brennan, Dawson and Toohey JJ). See also *Ryan v The Queen* (2001) 206 CLR 267 at [129] (Kirby J); 118 A Crim 538. See also *R v Harper* [2009] YKTC 18 at [35].

[133] *Channon v The Queen* (1978) 33 FLR 433; 20 ALR 1.

[134] *R v Quash* [2009] YKTC 54 at [83].

[135] Edney and Bagaric, n 120, p 66; *R v Keewatin* [2009] SKQB 58 at [50].

[136] *R v Lucas-Edmonds* [2009] 3 NZLR 493 at [36] (Ellen France, Priestly, Miller JJ).

[137] See *R v Harper* [2009] YKTC 18 at [45]. Risk assessment continues to be controversial: see Hart S, Michie C and Cooke D, "Precision of Actuarial Risk Assessment Instruments: Evaluating the 'Margins of Error' of Group Versus Individual Predictions of Violence" (2007) 190 *British Journal of Psychiatry* 60.

[138] Thomas D, *Principles of Sentencing* (2nd ed, Thomas Heinemann, London, 1979) p 56, cited in *Mill v The Queen* (1988) 166 CLR 59 at 63; 36 A Crim R 463; *Postiglione v The Queen* (1997) 189 CLR 295; 94 A Crim R 397.

[139] Boulding D, *Mistakes I Have Made With FAS Clients: Fetal Alcohol Syndrome and Fetal Alcohol Effects in the Criminal Justice System* (2001) at [6], http://www.davidboulding.com/pdfs/4.pdf viewed 4 April 2010.

[140] *R v Obed* [2006] NLTD 155 at [20], [28].

[141] Boulding and Brooks suggest that the latter approach will be cheaper than incarceration: see Boulding and Brooks, n 101, p 41.

day", if a placement could be found outside of Brisbane.[142] Some FASD sufferers require lists to ensure they complete simple tasks like showering and teeth brushing.[143] Prosecuting counsel and probation staff may need to involve the family and caregivers of a FASD defendant in discussions about appropriate conditions for probation orders. The family and community may be able to identify and keep the defendant away from problem associates and can help with making sure the defendant attends appointments.[144] Harnessing the knowledge and expertise of CJGs where Indigenous defendants are involved will be particularly important in FASD cases as CJG members may be able to carry some of the load of supervision and support in the community. Without a team of people involved in the supervision of FASD offenders, many are likely to re-offend. While it is not possible for a judge to order a team approach to supervision as part of a sentence, probation officers may be able to involve community members informally in supervision.[145]

Sentencing justices and legal representatives need to be careful to use plain and simple or "concrete" language in explaining any court order.[146] If there are forms to be completed by a FASD sufferer, it has been suggested that there should be lots of white space and places for the defendant to initial at the end of each paragraph so that each piece of information receives proper focus.[147] While in court, some FASD sufferers may be able to repeat the content of the probation order back to the judge or magistrate; however, the words and meaning may be quickly forgotten and, once back in the community, there may be difficulty with compliance.[148] Many FASD experts have emphasised the need for repetition if FASD defendants are to learn, thus probation orders need to create learning and re-learning structures[149] so that the defendant is constantly reminded of the rule-sanction connection.[150] As Roach and Bailey have observed, memory problems and impulsivity are a recipe for breaches of conditions.[151] Lack of compliance with court orders often leads FASD defendants to become further enmeshed in the criminal justice system as a result of breach charges,[152] so it is important that conditions are constantly reinforced and that conditions are manageable. While it has been suggested that many FASD sufferers will need long-term community supervision, this is largely outside the realm of criminal justice intervention. In some Canadian FASD cases, courts have recommended supervision for up to 10 years,[153] a possibility only available in specific circumstances in Queensland, New South Wales and Western Australia under the post-sentence preventive detention legislation in those States.[154] Generally, the sentence can only put in place a relatively short-term support structure; however, this may be enough to build the foundations for on-going attention and support.

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[142] This was the recommendation made in one expert report in the case of *R v Twaddle* (unreported, QDC, Durward J, 24 January 2008) at 5. For the background to this case, see Hammill J, "Alcohol and Pregnancy, No Blame, No Shame: A Case Study" (2007) 43 *Australian Children's Rights News* 4.

[143] *R v MacKenzie* [2007] BCPC 57 at [11].

[144] Boulding, n 139 at [7].

[145] Roach and Bailey, n 7 at 52, referring to *R v LEK* [2001] SJ 434 (Youth Ct); *R v WALD* [2004] SKPC 40.

[146] *R v Quash* [2009] YKTC 54 at [93]; *R v Elias* [2009] YKTC 59 at [36]-[37] (Cozens TCJ); Fast and Conry, n 22 at 256.

[147] Hornick et al, n 15, p 30.

[148] Fast and Conry, n 23 at 165.

[149] Boulding, n 139 at [4].

[150] Wartnik A, *Stopping the Revolving Door of the Justice Systems*, UW School of Law, Court Improvement Training Academy (2007), http://uwcita.org/CITAv1008/trainingmaterials/fasd.html viewed 20 April 2010.

[151] Roach and Bailey, n 7 at 49.

[152] *R v Dayfoot* [2007] ONCJ 332 at [19].

[153] *R v SRJ* [2001] YKSC 55.

[154] *Dangerous Prisoners (Sexual Offenders) Act Dangerous Sexual Offenders Act 2006* (WA), *Crimes (Serious Sexual Offenders) Act 2006* (NSW); for further discussion see Douglas H, "Post-sentence Preventive Detention: Dangerous and Risky" (2008) (11) *Criminal Law Review* 854.

A further complication for ordering appropriate probation orders is that many FASD sufferers will come before the court with substance abuse issues. Despite this, for some it may be a mistake to require therapy or counselling because, unless programs are specifically developed to cope with the cognitive deficiencies experienced by the FASD sufferer, there will be no benefit in making this a part of an order.[155] To deal with the issue of alcohol abuse in the Canadian case of *Harper*, a medical expert suggested that rather than attempt to teach defendants about appropriate drinking habits, use of alcohol should simply be forbidden.[156]

Given the lack of expertise in diagnosing FASD in Australia, and the (near) invisibility of FASD in the reported case law at the present time,[157] it is likely that there has been insufficient appreciation of the special needs of FASD sufferers who are placed on supervised orders. Unlike Canada, Australian courts have not yet developed a specific sentencing jurisprudence for FASD cases; rather, it would seem that FASD offenders are being dealt with under the broad umbrella of "developmental problems".[158] One practitioner noted the problem with lack of specific FASD services:

> [T]he problem is unless there are other factors that would lead a group or a service provider to say … he fits into our silo … unless he's sort of subject to the public guardian or he's actually an alcoholic or a drug addict … there's little point. The mental health services as such don't appear to be geared to that. They'd see him as a behaviour problem … Within Corrections, the programmes they tend to group people in cohorts of criminogenic factors such as drug addiction and alcoholism and violence and sexual offence and design programmes for groups around those sorts of factors.[159]

The explicit identification of FASD in sentencing judgements may help to establish a consistent and appropriate approach to sentencing and may also assist in drawing attention to the need for specific services for this group of offenders.

Ultimately, providing an "external brain" will be beyond the capacity of most communities.[160] Despite over 10 years of working on developing services to FASD sufferers in Canada, there are still many problems with service delivery. In one 2009 pre-sentence report, written for a Canadian case, a FASD assessor wrote "[the defendant] is a special needs offender who requires the services of a caseworker/mentor to be with him and work with him a minimum of 20 hours a week, and the writer is unaware of an agency who can provide this support".[161]

Where community protection is an important consideration, separation in a secure community setting should be the aim.[162] However, it has been recognised that in Canada there are few credible jail alternatives[163] and this is doubtless the case in Australia as well. Given the high risk of re-offending associated with many FASD defendants, imprisonment is common; however, experts have warned that jail should not be used to warehouse individuals with FASD simply because they are too difficult to deal with.[164]

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[155] *R v Harper* [2009] YKTC 18 at [53].

[156] *R v Harper* [2009] YKTC 18 at [53].

[157] For exceptions, see *R v Doolan* [2009] NTSC 60; *DPP v Moore* [2009] VSCA 264; *JL v Morfoot* [2005] SCTSC 38; *R v Korhonen* [1999] NSWSC 933; *Western Australia v Cox* [2006] WASC 287; *Alchin v South Australian Police* [1995] SCSA 981; *R v Bugmy* [2007] NSWDC 215.

[158] See *R v Twaddle* (unreported, QDC, Durward J, 24 January 2008) at 5, where this occurred despite expert reports that identified FASD.

[159] ATSILS interview, n 66, p 5.

[160] La Du R and Dunne T, "Fetal Alcohol Syndrome: Implications for Sentencing in the Criminal Justice System Part II" (1997) 5(2) *Family Empowerment Newsletter* 2 at 3; *R v Harper* [2009] YKTC 18 at [26].

[161] *R v Keewatin* [2009] SKQB 58 at [42].

[162] *R v Harper* [2009] YKTC 18 at [47]; *R v Williams* [1994] BCJ 3160.

[163] Chartrand and Forbes-Chilibeck, n 15 at 52-53.

[164] *R v Sam* [1999] YKTC 112 at [12] (Stuart J).

INCARCERATION

Where community protection is a significant concern and the crime is sufficiently serious, incarceration may be the only real alternative.[165] Given their difficulties with adaptation, the routine and structure of incarceration may appear at first to be beneficial to FASD sufferers; however, research suggests that their suggestibility may cause them to become scapegoats for troubles arising in prison and they may be victimised (physically, sexually and socially) by others in the prison setting.[166] The effect of a custodial sentence on a person with FASD should be considered and may be a factor that leads to mitigation of punishment.[167] Often, FASD individuals struggle to follow prison regulations and programs which might also lead to victimisation by both inmates and prison staff.[168] This underlines the need to ensure that prison staff are aware of the behaviours and attitudes of FASD offenders since awareness may improve understanding and responses. Some researchers suggest that in certain situations FASD offenders should be separated out from the general prison community.[169] A residential secure care facility is planned for operation in the Northern Territory in 2011 and this may be an appropriate option for FASD sufferers in that jurisdiction.[170] Professionals often recommend that youths afflicted with FASD should be removed from custody for periods of time if possible to encourage pro-social supports and develop potential. In part due to their suggestibility, a FASD offender may be more likely than other offenders to transfer the negative responses and approaches to problem-solving and socialisation that he or she learns in custody to the community.[171]

Conry and Fast have observed that the longer the time between the offence and sentencing, the more difficult it will be for the FASD sufferer to connect the consequence of the penalty with the criminal act.[172] Further, when different sets of offences are being dealt with together (or even at different times), the person suffering FASD may have difficulty understanding which matters are connected. If a custodial sentence is the only option, the sentence should not be too long because individuals with FASD often do not understand why they are in prison or they will forget and the longer they are incarcerated, the more they are likely to experience higher levels of dysfunction when they return to their community.[173] Due to the questionable relevance of specific and general deterrence in many FASD cases, lengthy prison terms may be difficult to justify. Wartnik suggests that if a prison sentence is necessary it should be followed by a long period of supervision so that integration will be assisted.[174]

In some cases imprisonment will be the only way to provide the offender with the required supervision and support. In some Canadian cases, programs offered in jail have been considered to be the best programs available for the FASD offender. Roach and Bailey have observed that there is a risk that offenders may be sentenced to a longer period of imprisonment to make use of such jail programs;[175] again, this will need to be reconciled with the principle of proportionality and totality. Similar to concerns have been raised with respect to programs associated with probation orders, Conry

[165] See, eg *R v Doolan* [2009] NTSC 60 at [17] (Martin CJ).

[166] Fast and Conry, n 23 at 164; *R v Harper* [2009] YKTC 18 at [56]; *R v JMR* [2004] BCJ 2531; *People v Wybrecht* 222 Mich App 160 (1997); 564 NW 2d 903.

[167] *R v Verdins* (2007) 16 VR 269 at [30].

[168] Boland F, Chudley A and Grant B, "The Challenge of Fetal Alcohol Syndrome in Adult Offender Populations" (2002) 14 *Forum on Correctional Research* 61; Boulding, n 139 at [4].

[169] Conry J and Fast D, *Fetal Alcohol Syndrome and the Criminal Justice System* (British Columbia Fetal Alcohol Syndrome Resource Society, Vancouver, BC, 2000) pp 74-75.

[170] *R v Doolan* [2009] NTSC 60 at [17] (Martin CJ).

[171] *R v M (B)* [2003] SKPC 83 at [22].

[172] Fast and Conry, n 23 at 164.

[173] Wartnik, n 150 at 69.

[174] Wartnik, n 150 at 69; see also *R v DP* [2004] BCPC 35; *R v Elias* [2009] YKTC 59 at [35].

[175] Roach and Bailey, n 7 at 44.

and Fast have argued that the vocational programs suitable for the general jail population may need to be modified for FASD inmates.[176] In a recent Canadian case, Cozens TCJ sentenced a FASD offender for assault. In considering her record of efforts towards rehabilitation, he observed:

> It is one thing to have physical opportunity to access programming and take advantage of counselling opportunities and other educational opportunities. It is another thing to have … sufficient tools to take advantage of those opportunities … In the case of individuals who are not cognitively challenged, they need to be self-motivated, but I can accept that individuals who have cognitive difficulties may not have the same tools to exercise the same will power to take the same programs that are available.[177]

Cozens TCJ noted that he "wouldn't put any … negative spin" on her failure to engage in rehabilitation given her cognitive disability. This approach is relevant to both parole considerations as well as sentencing cases. It constructs the defendant's failure to engage with programs as resulting from cognitive disadvantage rather than general incorrigibility.

In a recent Northern Territory case of *Doolan*,[178] Martin CJ attempted to grapple with sentencing a FASD defendant. The defendant was charged with assault and was severely cognitively impaired, probably as a result of FASD. Ultimately, Martin CJ found that the defendant required incarceration as there was "no realistic or safe alternative".[179] However, his Honour recommended some flexibility in the approach to incarceration and suggested that the defendant should be supported by staff from the Aged and Disability Services Program and removed from the correctional setting from time to time to visit his family and community. He observed that the court should be "slow to 'micro-manage' in these circumstances".[180] This approach suggests that incarceration may be able to be delivered flexibly, in a way that both supports FASD offenders and protects the community.

FASD, SEX OFFENCES AND SENTENCING

As noted earlier, FASD sufferers often commit crimes of a sexual nature. Sexual offences are considered to be serious offences and often have terrible impacts on their victims. In FASD cases, there may be a good chance of recidivist behaviour so community protection and appropriate treatment is extremely important.

In a recent case involving a defendant with FASD, his sexual offending was explained in a diagnostic report as:

> likely due to his impulsiveness and the fact that he has an immature understanding of social distances, social awareness and personal space … [he] struggles to filter his urges and tends to react to base urges. Couple this with a child-like view of boy-girl relationships and inappropriate relationships are inevitable.[181]

Some judges have also suggested that there are different considerations at play in FASD sex offender cases. For example, in a Canadian matter where the FASD effected offender was 20 years old and the victim was 12 years old, the judge noted that because the defendant was a FASD sufferer, "the practical age gap would not appear to be as great".[182]

It has been suggested that specialised treatment programs should be provided for FASD sufferers who have sexually offended.[183] However, Novick-Brown reported that usually health professionals try to integrate FASD clients into groups with cognitively unimpaired individuals, which frustrates both

[176] Conry and Fast, n 169, pp 74-75.

[177] *R v Elias* [2009] YKTC 59 at [30]-[31] (Cozens TCJ).

[178] *R v Doolan* [2009] NTSC 60.

[179] *R v Doolan* [2009] NTSC 60 at [17] (Martin CJ).

[180] *R v Doolan* [2009] NTSC 60 at [25] (Martin CJ).

[181] *R v Harper* [2009] YKTC 18 at [4].

[182] *R v Quash* [2009] YKTC 54 at [50].

[183] Novick-Brown, n 33, pp 135, 149. See, eg the discussion in *R v Mumford* [2007] OJ 4267 at [231].

providers and participants; such approaches will fail in treating the cognitively impaired person.[184] She noted that usually programs rely on verbal processes and written tasks and they therefore may be inappropriate for a person with FASD. Cognitive type group therapy has been shown to have little positive impact on FASD sufferers and may even be negative.[185] La Due and Dunne observed that because FASD sufferers may not respond to insight-related therapy, their prognosis may seem poorer than is actually the case.[186] In *R v Mumford*,[187] Kitely J accepted that the FASD diagnosed defendant had failed to complete a sexual offender's treatment program. The judge identified barriers to completion which included: sleeping in, delay in completing his biography, he was not receptive or engaged with group therapy and not reading the materials. Kitely J noted that all of these barriers were associated with FASD and thus inferred that the program did not respond Mumford's cognitive needs.[188] The recognition of FASD in this context helps to explain the defendant's behaviour, and highlights failure in the treatment programs provided, rather than suggesting incorrigibility of the defendant.

Given the difficulties FASD sufferers have with memory, perceiving cause and effect and controlling impulse, Novick-Brown has suggested that significant repetition of concepts in different settings may be required if they are to learn appropriate sexual behaviours. There also needs to be some emphasis on long-term maintenance of the effects of the treatment and program.[189] This might include follow-up and strategies to reinforce what has been learned. Finally, environmental factors and inadequate sexual socialisation can be strong influences for a major proportion of FASD offenders[190] and these issues might be appropriately attended to at the sentencing stage.

THERAPEUTIC JUSTICE

Given the problematic fit of traditional sentencing jurisprudence with FASD offenders, it has been suggested that therapeutic models of justice such as the Drug Court model or the Murri Court[191] model may offer a more appropriate approach.[192] The Queensland Drug Court legislation aims to reduce drug dependency and associated crime and to reduce community health risks.[193] It is likely that many FASD offenders are already being dealt with in drug courts in Australia, albeit without a clear diagnosis or assessment of FASD. Certainly, the Intensive Drug Rehabilitation Orders (IDROs)[194] available in Queensland seem to conform to the kind of intensive supervision orders that appear to be required in many FASD cases. Similar to probation orders, these orders will rarely be developed with FASD in mind. Some practitioners already steer their clients away from IDROs because of the likelihood and effects of breach of such orders.[195] Many FASD offenders will need structured long-term supervision to stay out of the criminal justice system and a similar type of order to the IDRO may be appropriate for some FASD offenders. In 2004, a report of Canada's Justice Reform Commission recommended that a "therapeutic court should be established to deal with FAS cases and

[184] Novick-Brown, n 33, pp 135, 149.

[185] *People v Wybrecht* 222 Mich App 160 (1997); 564 NW 2d 903.

[186] La Due and Dunne, n 160 at 6.

[187] *R v Mumford* [2007] OJ 4267 2007.

[188] *R v Mumford* [2007] OJ 4267 2007 at [231].

[189] Hornick et al, n 15, p 32.

[190] Marshall B, Wortley R, Smallbone S and Marshall W, *Preventing Child Sexual Abuse: Evidence, Policy and Practice* (Willan Publishing, Portland, 2008).

[191] For further discussion about Indigenous courts, see Marchetti E and Daly K, "Indigenous Courts and Justice Practices in Australia" (2004) 277 *Trends and Issues in Criminal Justice* 1.

[192] Page, n 57 at 88; Chartrand and Forbes-Chilibeck, n 15 at 49.

[193] *Drug Rehabilitation (Court Diversion) Act 2000* (Qld), s 3.

[194] See *Drug Rehabilitation (Court Diversion) Act 2000* (Qld), Pt 5.

[195] ATSILS interview, n 66, p 7.

that a long-term strategy should be developed to deal with FASD including prevention, intervention and follow-up".[196] This is something that could usefully be explored in the Australian context.

CONCLUSION: MOVING FORWARD

Prevention of FASD is crucial; strong education programs about the dangers of alcohol to the developing foetus are needed, especially in those communities that are most at risk. There is already some activity in this direction.[197] Improved education for health professionals in relation to FASD diagnosis also appears to be necessary. There is no doubt that there are numerous offenders with FASD being sentenced in Australian courts every day. How the criminal justice system should respond to these offenders is a very important concern. The lack of appropriate support and incarceration alternatives for FASD offenders currently available through the Australian criminal justice system provides little incentive for defendants and their lawyers to pursue a FASD diagnosis.[198] Currently in Australia, a diagnosis of FASD is likely to lead to sentencing orders that result in increased surveillance and incapacitation of effected defendants through lengthy supervision orders and incarceration with inappropriate support and programs being provided. This is a concern, especially for Indigenous people, given their already high rates of surveillance and incarceration in Australia. It may also explain to some extent the low level of identification of FASD in Australian case law. A recent Canadian study found that criminal justice practitioners wanted more research information,[199] a list of qualified physicians for FASD referral, better diagnostic information, awareness of treatment possibilities and practice guidelines.[200] In this same study, respondents overwhelmingly accepted that improved diagnosis would lead to more appropriate consequences for FASD defendants facing the criminal justice system.[201] Similar developments would be welcomed in Australia. The need for a therapeutic court specifically for FASD offenders was echoed in another Canadian study about what prosecutors and judges wanted[202] and this possibility merits further exploration in the Australian context. FASD is likely to be prevalent in certain corrections populations; awareness programs for staff should be made available so that appropriate management strategies are applied.[203] It may be appropriate, considering the apparent under-diagnosis of FASD, to require that sentencing report writers address the possibility of FASD in preparation of their reports in circumstances where there has been a history of breaches of court orders or where there are other matters that suggest the possibility of FASD (for example, impulsive offending or a known history of maternal drinking). While more resources should be provided to address the sentencing response to FASD defendants, the first step for the criminal justice system is to develop awareness of FASD and its effects.

[196] Chartrand P, "Aboriginal People and the Criminal Justice System in Saskatchewan: What Next?" (2005) 68 *Saskatchewan Law Review* 253 at 259.

[197] See generally NOFASARD Australia which provides information about a number of current campaigns: http://www.nofasard.org viewed 10 April 2010.

[198] ATSILS interview, n 66, p 12.

[199] Bouding and Brooks recommend that every criminal lawyer must have access to Streissguth A, *Fetal Alcohol Syndrome: A Guide for Families and Communities* (Brooks Publishing, Baltimore, 1997); see also Boulding and Brooks, n 101, p 34.

[200] Cox L, Clairmount D and Cox S, "Knowledge and Attitudes of Criminal Justice Professionals in Relation to Fetal Alcohol Spectrum Disorder" (2008) 15(2) *Canadian Journal for Clinical Pharmacology* 306 at 309.

[201] Cox and Clairmount, n 200 at 309; 80% of respondents believed this.

[202] Chartrand, n 196 at 259.

[203] Burd et al, n 40 at 7.