

# **Fetal Alcohol Spectrum Disorder (FASD) and the Justice System**

Federal/Provincial/Territorial Coordinating Committee of Senior Officials (Criminal  
Justice) Steering Committee on FASD

**October 2012**

## Instructional Approach

- This presentation provides a **framework for discussion** about how Fetal Alcohol Spectrum Disorder (FASD) impacts upon the criminal justice system.
- This presentation is divided into **6 Modules** focused on specific discussion areas.
- Accompanying comments are provided for many slides in the "**Notes**" section.

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### Notes

- This presentation is intended as an introduction to current FASD-related issues for consideration.
- It is divided into six modules focused on specific discussion areas outlined for each module. Notes pages are provided for presenters or facilitators of discussions which expand on slide points and provide further reference and resources on these topics.
- The goal of these training modules is to promote a common understanding of the knowledge, attitudes, approaches that will help Justice professionals better understand and serve clients with the complex condition of FASD.
- This presentation does not attempt to provide a comprehensive coverage of these topics. It is expected that facilitators and learners will revise this tool as new information, from research and learned professional practice, becomes available.
- For a broader discussion, please see *Roach and Bailey* (2009).
- For a comprehensive curriculum, facilitators are encouraged to view the online resource developed by the Asante Centre: Bodaly, K.(2011). *FASD and communication disability: Strategies for youth in the legal system*. Maple Ridge, BC: The Asante Centre for Fetal Alcohol Syndrome, available online: [www.asantecentre.org](http://www.asantecentre.org).

# Order of Modules

1. What is FASD?
2. Why do Justice Professionals Need to Know about FASD?
3. Identifying FASD – Screening & Diagnosis
4. Criminal Responsibility of Persons with FASD
5. Strategies:
  - For Police
  - For Crown & Defence Counsel
  - For Probation Officers and Correctional Services Staff
6. Sentencing and Supervisions Considerations

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## Notes

- The time allotted for each module will vary depending on whether it is used by an individual or as a group learning activity where discussion is encouraged – the information in each module can be presented in approximately **one hour**; offering the modules in a group setting would require at least two hours/module.

## **MODULE ONE:**

**What is FASD?**

# What is FASD?

## Fetal Alcohol Spectrum Disorder, or "FASD", is:

- an umbrella term – it describes “a complex range of brain injuries that can result from **prenatal exposure to alcohol**”;  
(Consensus Statement on FASD – Across the Life Span, Institute of Health Economics, 2009, p. 3)
- a **brain-based disability** with **behavioural characteristics** – it impairs both intellectual and social development;
- one of the **leading birth disabilities** in North America;
- a **permanent**, lifelong disability; and
- often described as an “**invisible disability**” – identified by general patterns of behaviours and cognitive deficits, and on occasion by facial abnormalities.

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## Notes

- The degree of brain injury depends on numerous factors including genetics, maternal characteristics, nutrition, developmental timing, reactions to other drugs and duration and extent of alcohol exposure.
- People with FASD may be some of the most marginalized and vulnerable people in our society.
- A permanent, physical disability with behavioural symptoms.
- Often the disability is invisible; no outward affects.
- All individuals on the spectrum experience brain differences that impact functioning.
- Social, health, and education sectors need to work together to support individuals with FASD. The justice sector is the last resort for persons who are affected by FASD and are in conflict with the law. It should not be the system where individuals go to “get help” or access social services.

# Primary Characteristics of FASD

## ➤ Compromised Executive Functioning

Difficulty connecting past experiences with present actions; egocentric and impulsive behaviour; reduced ability to plan, predict, organize, prioritize, initiate, follow-through, set goals, adhere to schedule, and understand "cause and effect" and other people's perspectives.

## ➤ Memory Problems

Reduced ability to recall information and describe a sequence of events.

## ➤ Problems with Social Adaptation

Difficulty with self-direction, social skills, responsibility, and following/obeying rules and laws.

## ➤ Inability to Generalize Information

Reduced ability to apply a learned rule to a new situation.

## ➤ Attention Regulation

Difficulty maintaining focus and attention, staying on task and transitioning between activities.

## ➤ Impaired Judgement

## ➤ Difficulty with Abstract Thinking / Concepts

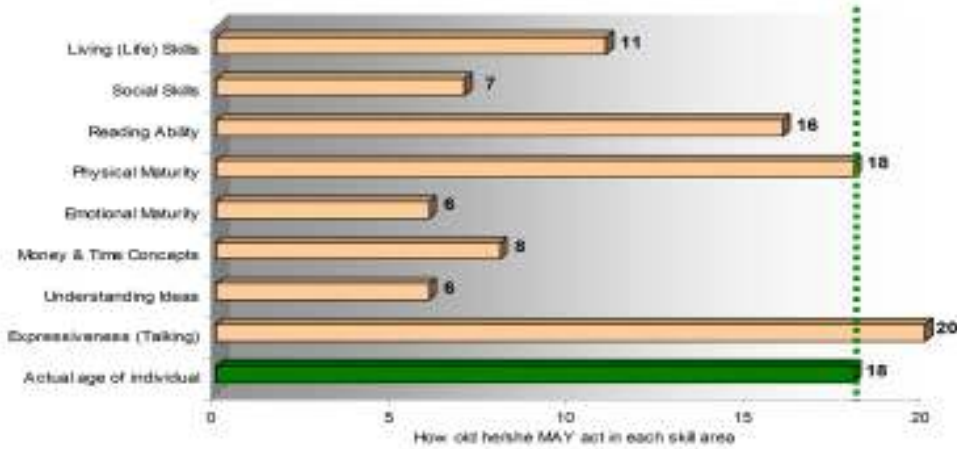
### Notes

#### Neurological changes:

- Brain dysfunction is the most significant disability for individuals with a brain injury caused by prenatal exposure to alcohol.
- "Compromised Executive Functioning" is why cognitive based or behavioural based therapies need to be altered to accommodate the behavioural symptoms for people with FASD.
- It is also becoming clearer that alcohol exposures might be responsible for neurochemical changes that are later manifest in life as mental health conditions like depression, anxiety, and others. The final result of this irregular pattern of brain processing and mood stability often is **maladaptive behaviour**. This seemingly inexplicable inability to achieve in school, in society or to fit into a family is the usual reason for eventual referral for an FASD diagnosis. Without understanding, supervision and appropriate supports, a significant percentage of the individuals with FASD apparently manifest their maladaptation in illegal activities.
- First the term FASD does not in itself describe the specific pattern of brain dysfunction found in the individual nor does it link those brain changes to the illegal behaviours of concern. This requires a comprehensive and synthesized assessment of the individual which includes medical, psychological and psychiatric components. (S. Clarren, May, 2009 personal communication).

# Dysmaturity Concept

Individuals with FASD frequently display abilities in many different developmental ages at the same time:



## Notes

- This chart is meant to show the disparity between the chronological age (18) and the age that the youth who is affected by FASD may be functioning at in different areas.
- Good verbal skills often mask poor comprehension of the situation.
- People with FASD frequently do not act their age.
- It is important to note again that FASD represents a spectrum of behaviours.
- Each individual will have different capabilities; a spectrum of abilities and challenges.

## Variable Developmental Profiles

- It is important to understand the full developmental profile of an individual and their **full range of ability**.
- Each individual has a **unique profile of functionality**.
- Some areas of ability may **mask other areas of limitation**.
  - For example, if a person speaks well, we assume s/he is competent in all other areas of function.
  - “*Dysmaturity Concept*” – people with FASD may display abilities in various areas from many different developmental ages at the same time.

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### Notes

- A developmental profile is generated in a functional assessment (individuals with FASD often function at half their chronological age).
- A gradual equalizing potential has been noted in some young adults with FASD. For example, rather than being able to leave home at 18, a more realistic timeline may be 25 to 30. (*Malbin, 2002*)
- To prevent frustration, consider the level of responsibility that would be appropriate for a 10-year-old when standing in front of a tall, verbal 16-year-old with FASD. Adjust expectations accordingly. *Remember their developmental age, not their chronological age!*
- Adapted from research findings of *Streissguth, Clarren* and others.



## Primary → Secondary

Primary disabilities can lead to secondary problems, or secondary disabilities.



## Secondary Characteristics of FASD

Secondary characteristics of FASD may be viewed as “**defensive behaviours**” that develop over time when there is a chronic ‘poor fit’ between the person and his or her environment.”

(Diane Malbin, 2004)

- Mental Health Concerns (90%)
- Dependent Living (80% – 100%)
- Employment Problems (70% – 90%)
- Disrupted School Experience (60%)
- Trouble with the Law (60%)
- Alcohol and Drug Issues (35%)

Secondary  
Characteristics /  
Disabilities of FASD

(Streissguth et al., 1996)

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### Notes

- The statistics here refer to work FASD researchers did at the University of Washington in 1996 on the types and severity of secondary disabilities.
- The study illustrated that for individuals with FASD who were over the age of 12, 90% had suffered mental health problems, 60% had trouble with the law, 50% had been confined at some point in their lives (defined as incarceration or inpatient treatment for mental health or substance abuse problems), and 30% had suffered alcohol and/or drug problems. (Streissguth et al., 1996)
- Secondary characteristics can be significantly lessened but may well still occur even when there is a diagnosis and long term support in place.

## "Mental Disorder" Diagnosis Common

- A mental disorder is the **most common (92%) secondary disability** experienced by individuals with FASD.
- Most common types of mental disorders are:
  1. Attention Deficit Disorder (ADD) / Attention Deficit Hyperactivity Disorder (ADHD) – **65%**;
  2. Depression – **47%**; and
  3. Panic Disorder – **21%**.

(The Clark Study, *Secondary Disabilities Among Adults with Fetal Alcohol Spectrum Disorder in British Columbia*, The Hospital for Sick Children, 2004.)

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### Notes

- The Clark study (*Secondary Disabilities Among Adults with Fetal Alcohol Spectrum Disorder in British Columbia*, The Hospital for Sick Children, 2004) reinforces the Streissguth data.
- Some of the other diagnoses listed (not included in the list above) included post traumatic stress disorder, obsessive compulsive disorder, oppositional defiance disorder and bipolar disorder.
- Clients may live with co-occurring disabilities.
- New research shows that children with FASD have more severe behavioural problems than children diagnosed with ADHD: "Based on previous work from our lab, children and adolescents with FASD were more likely than children with ADHD to engage in antisocial behaviours, such as cheating, stealing and acting young, as well as sociopathic behaviours including lying and stealing," ... "Importantly, the findings from our present study, specifically the significant differences in social cognition and emotional processing between children with FASD and ADHD, may underlie the severe conduct problems observed in children prenatally exposed to alcohol."
- "It is imperative that these children receive assistance in social and emotional processing domains, specifically targeting interventions to deal with their unique deficits." (*Social Cognitive and Emotion Processing Abilities of Children with Fetal Alcohol Spectrum Disorders: A Comparison with Attention Deficit Hyperactivity Disorder*: Rachel L. Greenbaum of the Children's Mental Health Team at Surrey Place Centre; Sara A. Stevens of the Department of Psychology at

the University of Toronto and the Neuroscience and Mental Health Program at The Hospital for Sick Children; Kelly Nash of the Neuroscience and Mental Health Program at The Hospital for Sick Children and the Ontario Institute for Studies in Education of the University of Toronto; Gideon Koren of the Motherisk Program, and the Department of Pediatrics at the University of Toronto.)

- \* The study was funded by the Canadian Institutes of Health Research, and the Natural Sciences and Engineering Research Council of Canada.

## Prevalence of FASD in Canada

- **No national data** on the prevalence of FASD in Canada.

*(Boland, Bunt, Dawyn, Karp, 1998; Chisley et al., 2005)*

- International estimates = **9.1 / 1000 live births.**

*(Working Group of the FASD Stakeholders of Ontario)*

## Prevalence of FASD in Criminal Justice System

### ■ Manitoba:

- 10% of a sample of male inmates entering the federal correctional institution in Manitoba (sentence of 2+ years) met the **Canadian Guidelines for Diagnosis of FASD**.
- Additional cases where FASD was suspected, but was not confirmed.

(Addictions Research Centre – Correctional Service of Canada, 2007)

### ■ British Columbia:

- 23% of a sample of youth remanded for psychiatric / psychological assessment in British Columbia had FASD.

(Fast, Conry & Lock, 1999)

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### Notes

- In 2005, a subcommittee of the Public Health Agency of Canada's "National Advisory Committee on FASD" reviewed, analyzed and integrated current approaches to diagnosis to reach agreement on a standard in Canada. Known as the **Canadian Guidelines for Diagnosis of FASD**, the guidelines are based on widespread consultation of expert practitioners and partners in the field.
- The *Canadian Guidelines for Diagnosis of FASD* are a central resource for guiding the development and delivery of diagnostic training services. However, they are guidelines and not a diagnostic tool. **Diagnostic tools** or assessments are criterion-based measurements which are definitive and can indicate whether or not a person has a certain illness, disorder or condition. **Guidelines**, on the other hand, are not definitive and simply estimate a person's risk or likelihood of having a certain illness, disorder or condition.
- In July 2008, the New Brunswick Department of Health in collaboration with the Public Health Agency of Canada (PHAC) undertook a scan of existing FASD diagnostic training programs across Canada. The purpose of this project was to provide a description of FASD diagnostic training service capacity in the Canadian context. Project activities were completed in September 2009 and culminated in

the dissemination of the final project report to FASD government and practice stakeholders. The report identified eleven specific diagnostic training services in Canada; however, there were no formalized links among the diagnostic training services. That said, most of the training services did refer to the *Guidelines* as their central resource. In this regard, the *Guidelines* are critical for ensuring uniformity in diagnostic practices from varied services or sites across Canada.

## **MODULE TWO:**

**Why do Justice Professionals Need to  
Know about FASD?**



# FASD and the Justice System

- Adults or youth who come into conflict with the law may be affected by mental disorders and/or **neuro-cognitive impairments**.
- **FASD** is one of the neuro-cognitive impairments found in many individuals who come into contact with the criminal justice system.
  - Evidence suggests that individuals with FASD are **especially at risk** of coming into contact with the justice system:
    - *Criminal Justice System* → as victims, witnesses and accused; and
    - *Family & Civil Law Proceedings* → as litigants.

(Conry and Flint, *Fetal Alcohol Syndrome and the Criminal Justice System*, 2000)

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## Notes

- Justice professionals are increasingly becoming aware of the challenges for individuals with FASD when interacting with the justice system and FASD advocates are learning about the justice system in order to better anticipate difficulties and advocate for clients who come into conflict with the law.
- Individuals with FASD may include accused persons, victims, witnesses and offenders.
- An increased understanding about FASD may lead to a more efficient use of human and financial resources.

# Presumptions of the Canadian Justice System

## The Canadian criminal justice system:

- is premised on the **presumption** that people can make **informed and voluntary choices** both with respect to the exercise of their rights and the decision to commit crimes; and
- does not take into account that many people that come into contact with the law are **neurologically impaired**.

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## Notes

### Diane Malbin describes learning theory:

- Normal brain development is complex, orderly and sequential. Rich neural networks provide mechanisms for basic abilities: storing, remembering, integrating and retrieving information.
- Alcohol is a very small molecule that passes freely into the placenta and fetus when consumed during pregnancy. It eliminates some cells, reduces the number of neural pathways and alters neurochemistry.
- Memory, sensory responses, executive functioning and planning, processing speed, social and developmental growth and abstracting abilities are often affected.
- Alcohol causes damage to the brain structure.
- A damaged brain structure may result in behavioural symptoms.

(Diane Malbin, *Trying Differently Rather than Harder*, 2002)

(\* See also Kent Roach and Andrea Bailey "The Relevance of FASD in Canadian Criminal

Law” (2009) 42 Univ. of B.C. Law Review 1-68.)

## Current Context

- A deficit of understanding of FASD in the justice field has been acknowledged.

(Access to Justice for Individuals with FASD Conference, Yukon, September 2008)

- Since January 2009, Federal, Provincial and Territorial Ministers and Deputy Ministers Responsible for Justice have identified **FASD as a priority issue.**

➤ As a result, the "Federal/Provincial/Territorial Coordinating Committee of Senior Officials (Criminal Justice) Steering Committee on FASD" was created in 2009.

- **Multiple Service Failure:**

"The high percentages of mentally [ill] and/or neuro-cognitively impaired individuals who become clients of the criminal justice system represents a **sustained failure by multiple systems** (health, housing, social services, etc.) to address the basic needs of Canadians who need assistance."

(Verdun – Jones, 2009)

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### Notes

- Nationally, the Public Health Agency of Canada, Health Canada has the federal lead on FASD.
- Public Health Agency of Canada has regional offices that work with Provinces and Territories on strategies regarding prevention, identification, screening and diagnosis and programming for individuals with FASD.
- There is a great deal of work occurring in Canada about FASD, in particular, provincial and territorial governments have initiatives geared toward the prevention of and social service supports for individuals who have FASD.
- In August 2010, the Canadian Bar Association passed the following Resolution relevant to work on FASD and the justice system: <http://www.cba.org/cba/resolutions/pdf/10-02-A.pdf>.
- The Institute for Health Economics (IHE) in Alberta is planning a consensus conference on FASD and the justice system to occur in the fall of 2013: <http://www.ihe.ca/>.

## Why are People with FASD at Risk of Becoming Victims / Offenders?



Many adolescents and adults with FASD become involved in criminal activity due to the **cognitive and adaptive deficits** typical to the disability.

*(FASD Collaboration Roundtables Project, 2009)*

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### Notes

- Inadequate community supports contribute to the likelihood that persons with FASD will be involved in the criminal justice system.
- Anecdotal evidence indicates that large numbers of persons with FASD are involved in the criminal justice system. (Vancouver Police, *Trainer Manual: Youth with FASD*)
- “Many individuals with FASD become ‘trapped’ in a revolving door of criminal justice involvement, exacerbated by high rates of mental health issues, substance misuse, concurrent disorders, and homelessness.” (FASD Collaboration Roundtables Project, 2009)

## Challenges for the Justice System

- **Identify individuals** who may have FASD **early** in their contact with the criminal justice system so that they can be **diverted out**;
- Develop a **better way to respond** to individuals with neuro-cognitive impairments who come into contact with the justice system;
- Appropriately **assess the degree of responsibility** of accused individuals affected by FASD; and
- **Reduce** the overall involvement in **criminal activity** by persons with FASD.

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**MODULE THREE:**  
**Identifying FASD – Screening & Diagnosis**

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# Identifying FASD – Red Flags

## RED FLAGS or behavioural signs indicating need for assessment:

- Involvement of **child welfare** and removal from parental home;
- Sporadic school or work **attendance**;
- **Multiple diagnoses**: ADD, ADHD, Conduct Disorder, Anti-Social Personality Disorder, etc.;
- **Inappropriate responses** or behaviour: smiling inappropriately, inappropriate sexual behaviour, etc.;
- Criminal activity that seems **illogical**;
- Number of **administration of justice breaches**: failure to appear, failure to comply with probation, failure to abstain from drugs/alcohol, etc.; and
- **Lack of remorse** or insight into the possible effects of an offence on other people.

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## Notes

- It should be noted that red flags may occur when interviewing witnesses or victims of crimes.
- When you are working with an individual, you may see “red flags” that may lead you to consider that person may have a cognitive disability. These red flags can occur at each stage of the judicial process.
- Examples of offences committed by an individual suspected of having FASD:
  - Breaking into a home and remaining there, watching TV and eating potato chips until apprehended by police;
  - Committing the same offence multiple times, under the same set of circumstances, but does not change his strategy in committing the crime and still appears surprised when caught (*Vancouver Police Department*, 2006).
- The Law Courts Education Society of B.C. and Kindale Developmental Association Vancouver, Armstrong BC developed a training package titled *Developmental Disabilities and the Justice System: A Training Package* in 2003. Includes a tool to help identify clients with developmental disabilities using observation, data collection and task performance techniques.



## Screening Tools

- "Screening" is meant to provide information that will **lead to a referral** to seek further information about FASD.
  - *NOT* the same as obtaining a neuro-cognitive assessment or medical diagnosis of FASD!
- There is an interest in screening for FASD in many sectors of the justice system, but screening is **difficult and complex**.
- There is currently **no validated tool** that can screen offenders, victims, or witnesses for FASD.

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### Notes

- The Canadian Association of Pediatrics Health Centres published in 2008, *Development of Canadian Screening Tools for Fetal Alcohol Spectrum Disorder*. They reviewed 5 screening tools, 2 of which are currently being used in the justice system, for the identification of children at risk for FASD.
- \* See this website for up-to-date work regarding screening tools for FASD:  
[http://www.caphc.org/programs\\_fasd.html](http://www.caphc.org/programs_fasd.html)

## Diagnosis

- Obtaining a diagnosis of FASD is **difficult and complex**.
- **No definitive biological markers** for FASD.
  - There is promising research in a number of areas, but there is no definitive or cost-effective test for FASD.
  - 2005 – National guidelines for diagnosis of FASD were accepted across Canada (comprehensive, multidisciplinary assessment of brain function).
- The challenge with diagnosis is to identify not only the brain injury but also to **assess the person's ability** in the exercise of judgement, planning, memory, and the ability to cope independently in day-to-day life.

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### Notes

- Many individuals who come into contact with the justice system and are suspected of having FASD will **never receive a diagnosis**.
- “Diagnosis requires a comprehensive, multidisciplinary assessment that includes neuropsychological testing and confirmation of maternal alcohol consumption during pregnancy.” (*Dr. Sterling Clarren*)
- In many instances, especially for adults, it is not possible to determine whether alcohol was consumed during a pregnancy.
- With the wrong diagnosis, “treatment” or court orders have been unsuccessful, the accused is unfairly labelled as “non-compliant” or not amenable to treatment.
- A medical diagnosis may be necessary to support certain legal decisions, establish the rationale for particular sentencing alternatives, or give access to certain services. (*Conry & Fast, 2000*)

# Barriers to Diagnosis

## ➤ Stigma associated with FASD:

- Can prevent **active participation** and accuracy of diagnosis (individuals may resist being considered "different / not normal" and oppose the support that is offered because they do not see the value of learning the reason for their difficulties);
- Can prevent birth Mothers from **disclosing information about alcohol use** during pregnancy (confirmation of which from a reliable source is necessary for accurate diagnosis of FASD);
- Can make it difficult to address the issue in **certain communities**;

## ➤ Lack of awareness within the medical and psychological professions:

- FASD is not in the "Diagnostic and Statistical Manual of Mental Disorders" (DSM-IV);

## ➤ Accessibility to diagnostic services is **limited**, and there is confusion regarding which sector should pay for those services;

## ➤ Privacy restrictions limit the ability to verify necessary behavioural information from schools / previous assessments; and

## ➤ Confusion with other disabilities / syndromes / disorders (or individuals may have concurrent disorders).

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### Notes

- The DSM is a publication of all diagnosable mental disorders, ranging from childhood onset developmental disorders (mental retardation, learning disorders, ADHD, autistic disorders, etc.) to mood disorders (i.e. depression and bipolar disorder,) thought disorders (schizophrenia), substance use disorders, and personality disorders. Within the DSM-IV, 2000, there is no consistent way to code for FASD. (*Rich, S. Dr. Iceberg – June 2008 Newsletter*).

## Benefits to Diagnosis

- Early diagnosis has been shown effective in **preventing secondary disabilities** that may lead individuals with FASD to become recidivists in institutional settings (i.e., jails, mental health programs, psychiatric hospitals, homeless shelters, etc.);
- Treatment may be **tailored to specific problems**;
- Allows **data to be collected** showing the causal connection between pre-natal alcohol consumption and FASD:
  - Beneficial in the campaign to adequately inform women about the neurodevelopmental problems and psychopathology associated with drinking alcohol during pregnancy; and
- Ability of parents / caregivers / professionals to **provide appropriate supports** improves when they understand that the individuals problems are most likely caused by brain injury.

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## Assessments – ADULT System

- In the **ADULT** criminal justice system, a **mental health assessment** can be ordered in limited circumstances under s. 672.11 of the *Criminal Code* in order to determine a person's fitness to stand trial *OR* criminal responsibility.
- Assessments cannot be ordered to determine whether or not an **alternative or less severe sentence** is appropriate for a person with FASD.
- **Sentencing:**
  - Section 721(4) of the *Criminal Code* – **Report by Probation Officers** can be used to obtain additional information about the offender (including FASD).

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### Notes

- The assessment under Part XX.1 could reveal that the mental disorder (which is an essential criteria or precondition to a finding of unfit or NCR) is FASD.
- Section 721(4) of the *Criminal Code* authorizes the court, on its own motion, to order a non-consensual psychiatric assessment for sentencing purposes (*R. v. Blackwell* (2007), 227 C.C.C. (3d) 275).
- Are there other ways to inform the court that an individual has FASD absent an assessment order?

## Assessments – YOUTH System

- In the YOUTH criminal justice system, a **medical or psychological assessment** can be ordered under s. 34 of the *Youth Criminal Justice Act (YCJA)*, either with the consent of the young person or on the court's own motion, IF there are reasonable ground to believe that the young person may have:
  - A physical or mental illness or disorder;
  - A psychological disorder;
  - An emotional disturbance; and/or
  - A learning or mental disability.
- If the youth's fitness or criminal responsibility is at issue, a **psychiatric assessment** may be required.
- Pursuant to s. 141(1) of the YCJA, the Mental Disorder provisions of the *Criminal Code* (i.e., s. 16 and Part XX.1) apply in respect of proceedings under the YCJA.

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### Notes

- Section 34 has been used by some judges to specifically order FASD assessments.
- **R. v. M.B.**, 2003 SKPC 83 at para. 14:

“Section 34 allows for the collection of information regarding a young person's medical and psychological circumstances because this information is crucial in dealing with young people. Medical and psychological expertise assists the Court by rounding out the portrait of the youth. Their health, intellectual capacities, behaviour or neurological difficulties might be related to issues within or beyond their grasp. In particular with FASD, it has been the experience of the Youth Court that the spectrum of disabilities which arise from maternal consumption of alcohol are often linked to offending behaviour. This type of information might help explain the "why" as well as address how to reduce a youth's risk of future offending.” [emphasis added]
- A section 34 assessment can be ordered for the purpose of sentence or review of a prior disposition.

**MODULE FOUR:**  
**Criminal Responsibility of Persons**  
**with FASD**

## Difference between definitions of Mental Disorder

- There is a psychological/psychiatric definition for mental disorder which is **different** from the definition of mental disorder in Canadian criminal law.
- Psychiatric/Psychological Definition of Mental Disorder
  - Mental disorder is a "behavioural, psychological or biological dysfunction that impairs a person's ability to function with the everyday demands of life." The classification of mental illnesses is based on the Diagnostic and Statistical Manual of Mental Disorders (**DSM-IV**).
  - FASD is not listed in the DSM-IV

(Davidson & Manion, 2008)
- Criminal Code Definition of Mental Disorder
  - Mental disorder is a disease of the mind (s. 2, *Criminal Code*).

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### Notes

- Note to facilitator: It is very rare that the mental disorder provisions of the *Criminal Code* will apply to a person with FASD. This information may not need to be reviewed in detail as a result.
- "Substantial variation exists on which behaviours and conditions should fall under the umbrella of mental illness, depending on the disciplines and mandates of the respective organizations or agencies. This is especially true within the criminal justice system." (Sinha, Canadian Centre for Justice Statistics, *An Investigation into the Feasibility of Collecting Data on the Involvement of Adults and Youth with Mental Health Issues in the Criminal Justice System*, 2009).



## Mental Disorder – *Criminal Code* Provisions

A mental health assessment can be ordered under s. 672.11 of the *Criminal Code* to determine a person's fitness to stand trial (s. 2) *OR* a person's criminal responsibility (s. 16).



"It is a tenet of our criminal law that persons charged with a criminal offence should not be tried while they are not fit to stand trial, or not criminally responsible due to mental disorder. In very rare cases, FASD is found to be a **disease of the mind**, and therefore a mental disorder under the *Criminal Code*."

(Roach & Binley, 2009)

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### Notes

- Unfit to stand trial and not criminally responsible are two completely different things.
- It is a very high threshold to meet for each.

# Fitness to Stand Trial

- **Fitness Hearing:**
  - May be ordered by the court at **any stage of the proceedings**, either on its own direction, at the request of the accused, or in certain circumstances at the request of the Crown.
- **"Unfit to Stand Trial":** pursuant to s. 2 of the *Criminal Code*, an accused may be found unfit to stand trial IF:
  - S/he is unable to **conduct a defence**; OR
  - S/he is not fully capable of **instructing or communicating with counsel**; OR
  - S/he is not capable of **understanding the nature and consequences of a trial**.  
(Stelliar, 2003)
- Must also consider whether accused has **mental capacity** to exercise their s. 10(b) *Charter* right to counsel.

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## Notes

- Most individuals with FASD are found to be fit to stand trial – though there have been some successful claims of unfit to stand trial for accused with FASD. (*Justice Committee of FASD Ontario, 2007; Roach & Bailey, 2009*)
- The classic case of unfitness to stand trial is a case where an accused either before or after the crime becomes so mentally disturbed that he or she would not understand the proceedings or be able to instruct counsel. The idea that such a person can be treated or otherwise recover sufficient mental capacities to be put on trial is well demonstrated by *Code* provisions which require the issue of fitness to stand trial to be determined every 2 years (s. 672.33 CC).
- "The option of being found unfit to stand trial can still be an awkward means for the criminal justice system to deal with offenders with FASD, but it is one that may be used, if only because in some cases there may be no other option." (*Roach & Bailey, p. 24*).
- "...from the accused's point, being found UST, offers little advantage. If found unfit, the accused will be under the control of the provincial Review Board for an undetermined amount of time." (*Verbrugge, 2003*).

# Permanently Unfit to Stand Trial

- 2005 Amendments to Criminal Code (s. 672.851):

- A court can now order a **permanent judicial stay of proceedings** for an unfit accused IF:

- S/he is not likely to ever become fit to stand trial;
- S/he does not pose a significant risk to public safety; and
- A stay is in the interests of the proper administration of justice.

# Criminal Responsibility

## ■ Not Criminally Responsible on Account of Mental Disorder:

- This defence, known as the "Mental Disorder Defence", is set out in s. 16 of the *Criminal Code*.
- It is available to anyone who, **at the time of the offence**, was suffering from a **mental disorder** which rendered them:
  - Incapable of appreciating the **nature and quality of the act**; *OR*
  - Incapable of knowing the act was **legally or morally wrong**.

(Roach & Bailey, 2009)

- Generally, FASD does not meet the criteria of a "mental disorder" for the purposes of this defence.

(Vancouver Police Department, 2006)

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## Notes

- "Criminal responsibility requires appreciation only of the immediate physical consequences of actions and not of 'remote or long-term' ones." (Roach & Bailey, 2009)
- The determination of whether or not the accused was not criminally responsible by reason of mental disorder (NCRMD) occurs only after it has been determined that the accused committed the act. (Verbrugge, 2003)
- There is no guilt in an NCRMD verdict.
- "There are several reported cases in which courts have held that FASD is a disease of the mind." Though there are cases, such a finding is rare. (Verbrugge, 2003; Bonnie Tulloch)

## **MODULE FIVE:**

**Strategies for Police, Crown & Defence  
Counsel, Probation Officers and  
Correctional Services Staff**

# "Strength-Based" Approach

## ■ Traditional Strategy:

- "Traditional intervention programs have these kids doing things their brains are not adept at doing, and their success rates are not great. We flipped things around and said, 'Why don't we build intervention programs **based on things they are good at?**'"

(Anne McIlroy, "Motor-skill activities hold promise of rewiring children's damaged brains", *The Globe and Mail*, 29 January 2010)

## ■ Modern Strategy:

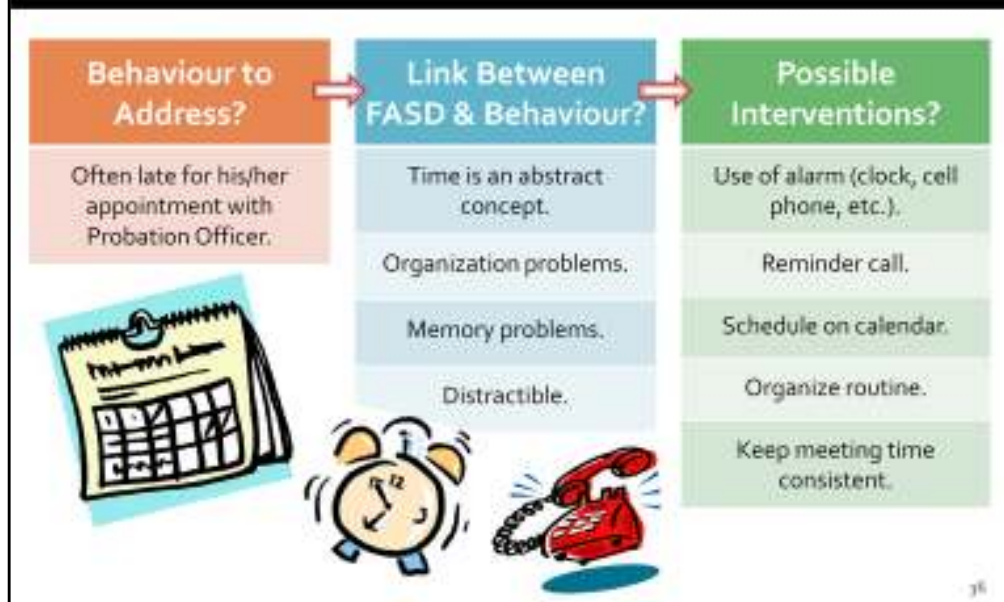
- In developing intervention strategies, it is important to **build on** what the individual with FASD **can do**.

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## Notes

- Many of the current therapies or interventions being used with children with FASD focus on their deficits – for example, anger management therapy for a child who is acting out in school or extra time devoted to reading or math for a child struggling in those subjects. (*Dr. Bertram*)
- \* See McIlroy, Anne, "Motor-skill activities hold promise of rewiring children's damaged brains", *The Globe and Mail*, 29 January 2010 online:  
<http://www.theglobeandmail.com/news/technology/science/motor-skill-activities-hold-promise-of-rewiring-childrens-damaged-brains/article1450205/comments/>

# Strategies to Inform Interventions



## Notes

- Looking at behavior through an FASD lens (linking behavior to brain injury) can inform appropriate interventions.
- Individuals with FASD become more successful as they rely on external supports and follow healthy routines.

# Reframing Our Perceptions

**Brain injury** is responsible for the dysfunctional behaviour; therefore, the behaviour should be **interpreted accordingly**.

Negative Behaviours	Misinterpretation of Behaviours	Accurate Interpretation
Non-compliance with orders.	Wilful misconduct.	Difficulty translating verbal directions into actions.
Failure to appear.	Attention Seeking.	Does not understand the concepts associated with those behaviours.
Missing probation meetings.	Stubborn.	Memory problem.

(Cunningham, 1996)

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## Reframing Our Perceptions - Examples

PERCEPTION	ACCURATE INTERPRETATION
Resisting	Cannot understand or process verbal directions.
Bad	Frustrated; defensive; challenged.
Lazy	Does not understand, or does not remember.
Lies	Has memory problems; "fills in" the gaps.
Lack of Effort / Does Not Try	Afraid of failure.
Mean / Rude	Defensive; hurt; abused; unable to interpret social cues.
Does Not Care	Cannot show feelings; is protecting him/herself.
Immature	Does not understand social cues and rules.
Poor Social Judgement	Not able to interpret social cues; needs help organizing.
Overly Physical	Hyper / hypo-sensitive to touch; does not understand social boundaries.
Repeats Mistakes	Cannot link cause and effect; cannot see similarities.

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# Strategies for Justice Professionals

## ➤ Case Planning:

- Be sure to include a **support person**, and try to maintain consistent personnel;
- Ensure all directions are given **in writing**, and also provide a copy to the support person;
- Ensure the meeting environment is free from **distractions** (visual, auditory, etc.);

## ➤ Time Management:

- Keep interviews as **short** as possible;
- Routine interviews/counselling sessions should be held at the **same day and time**;

## ➤ Adaptive Behaviours:

- Adapt your behaviour to what works, and **be creative**;
- Make your expectations very clear and **reinforce expectations** at each meeting;
- Limit tasks or expectations and give **limited choices** where possible:
  - Make statements / questions short, clear and simple;
  - Ask questions several different ways;
  - Allow more time to respond to questions and tasks;
  - Encourage free narrative (i.e., ask open-ended questions); and
  - Avoid asking multi-step / complex questions – use familiar language.

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## Notes

- Source: *FASD Strategies, Not Solutions* (City of Edmonton).
- FASD is one type of brain damage. Others may show similar symptoms/behaviours, and may be best addressed with similar strategies.

## Protective Environment & Safety Net

- A combination of **supports and supervision** to create a “protective environment” is the ideal response for persons affected by FASD.

(S. Clarren cited in Malbin, 2002)

- Individuals with FASD will need a **lifelong safety net**, and a range of intervention services:

- Interventions should be aimed at the individual, their family, and their environment;
- Risk and protective factors should be identified on an individual-basis and should be based on the larger context; and
- Interventions should attempt to minimize risk and boost protective factors.

(Heather Carmichael Olson, *Families Moving Forward*, 2009)

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### Notes

- The framework for an “external brain” makes up for deficits in judgment and executive brain functioning.
- “**External Brain**”: In an effort to support a person with FASD, pair them with a person (family member, friend, community member, etc.) known as an “external brain” who can:
  - Provide *external guidance*;
  - Help them *recognize and avoid situations* that may cause stimulus overload and help them regain emotional control; and
  - Help them *attend probation* appointments or counselling session.
- Top Unmet needs of adults with FASD will need to be addressed:
  - *Alcohol and Drug Abuse Treatment* that is specific for their disability needs;
  - *Emergency Shelter* (often “wear out” their caregivers and are often oppositional to support so have unstable housing);
  - *Mental Health Supports* – they present with many co-morbid conditions including depression, anxiety, oppositional defiant disorder, conduct disorders; and
  - *Permanent Supportive Housing* – creating placement stability is the foundation of improved case management for individuals affected by prenatal alcohol exposure.

- “Lifelong Safety Net” – cited in *FASD Training Manual* (Department of Health and Social Services, State of Alaska, available online: <http://www.hss.state.ak.us>).
- Some Considerations for support:
  - “Intensive case planning that is directed at the person is NOT as effective as planning directed at the environment they find themselves in and WILL find themselves in. GET THERE FIRST!” (*Donna Debolt, 2010*)
  - The success of the person is directly related to the support system put in place for him or her. The person needs consistency and an advocate who can anticipate his or her needs and provide accommodations. (*Bodaly, 2011*)
- What do individuals with FASD need the most? (*Donna Debolt, 2010*)
  - A consistent support person;
  - Consistent coordination of resources; and
  - Access to resources.

# Police Involvement

## Police officers:

- Respond to a variety of incidents where they interact with **victims, witnesses, individuals at risk** in the community and **suspects**; and
- Must **make decisions quickly** and often without any information about the individuals involved.

~~~~~  
"An individual may be the victim one week, and an offender the next."

(Vancouver Police Department, 2006)

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## Notes

- *Community-based* **sanctions** have been found to be more effective for individuals with FASD. Under the Youth Justice regime, police are required to explore other options.
- **Extrajudicial measures** are measures other than court proceedings used to deal with a young person who has committed an offence. For example:
  - Taking no further action;
  - Warnings;
  - Police cautions;
  - Crown cautions;
  - Referrals to programs, with the youth's consent; and
  - Extrajudicial sanctions.

## Challenges for Police - *Witnesses*

### Victims / witnesses with FASD may *not* be able to:

- Interpret what they have seen;
- Clearly **explain** what happened;
- Explain the **sequence of events**;
- Understand what **elements of the events** are important; and
- Understand **social cues** (i.e., understand the perpetrator's motivation).

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### Notes

- Individuals with FASD may confabulate – tell what they think the listener will want to hear.
- It may be very difficult to have an individual with FASD recall events at a later date with accuracy.

# Challenges for Police - Searches

## In conducting searches, Police need to know that:

- Individuals with FASD may have **sensory sensitivity**;
- Physical contact may cause a person with FASD to become **agitated**;
- Noise and confusion surrounding initial police contact may cause a person with FASD to **react aggressively**;
- **Caution** should be taken and specific strategies adopted when taking statements from individuals suspected of having FASD (see Slide 44).

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## Notes

- Police may consider the need to have a guardian or support person present to ensure that the person suspected of having FASD understands their rights. (FASD Guidebook for Police Officers, RCMP)
- Police may make an assessment as to when to divert an accused (adult or youth) into a diversion program (depends on jurisdiction and availability of programs).
- Some crimes require demonstration of specific intent or *mens rea*.
- Many assume “general” intent by nature of the act itself (*actus reus*). Where criminal intent must be shown, the accused must appreciate the nature and quality of the act; and know it is wrong. This determination only takes place before sentencing and few people will fail to meet this standard; but, again, it is an investigative question from the start. (Verbrugge, 2003; LaDue & Dunne, 1997)
- Supreme Court of Canada case of **R. v L.T.H.** places a very high burden on the police to explain the Waiver form to youth. Police are required, in determining the appropriate language to use in explaining a young person’s rights, to make a reasonable effort to become aware of significant factors, such as learning disabilities and previous experience with the criminal justice system. (R. v. L.T.H., 2008 SCC 49)

# Crown Counsel

## Crown Counsel:

- Must keep in mind that “**consideration of public safety**” is their key responsibility, and that they should be fair and reasonable;
- Must consider the **reasonable likelihood of conviction**;
- Must consider whether a **conviction is appropriate** given the accused's abilities, and also the reasonable likelihood of conviction;
- May need to seek additional information from others and/or order **assessments** (i.e., mental health, psychiatric, etc.);
- Has the overall responsibility of **presenting relevant evidence** to the court in an impartial manner;
- Should consider that victims with FASD make poor witnesses – may be necessary to have **support people present**; and
- Should ensure the following when attaching conditions to orders:
  - Conditions should be written in plain language; and
  - Conditions should be carefully considered and limited (i.e., account for cognitive incapacities of an accused with FASD).

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## Notes

- Crowns will need to consider public safety and may view “need for structure” as calling for custodial sentence. Structure may mean having a dedicated support person work with the individual who has FASD.
- Custody may be necessary for public safety in some instances.
- Example of the use of “plain language” – Probation Order:
  - *Legal Language*: “Abstain absolutely from the purchase, possession or consumption of alcohol.”
  - *Plain Language*: “Do not drink: beer, wine, rye, vodka, rum, or anything else that can get you drunk.”
- Strategies: There is more opportunity for success when individuals are told what **we want them to do**, rather than telling them what **we do not want them to do**. Opposite is an abstract concept. (*Doreen Reid*, NWT, personal communication, April 2010).



# Defense Counsel

## Defense Counsel:

- *Must* also consider whether a **conviction is appropriate** given the accused's abilities;
- *Must* seek **additional information** about their client and his/her abilities;
- *May* need to interview the client with the assistance of a **support person** who is able to act as an advocate for the accused;
- *May* introduce evidence that explains their **client's limitations** as a result of being affected by FASD;
- *Will* require additional time to set-up a "**sentencing plan**" for an offender with FASD; and
- *Should* exercise caution when **negotiating conditions** of probation orders (i.e., limit conditions, ensure written in plain language).

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## Notes

- Some defence cautious about raising FASD as it may result in a longer sentence with increased restrictions imposed on the accused (risk of being caught in the mental review board regime).

# Probation Sentencing Plan

## If a person with FASD is convicted of a criminal offence:

- Judges need to insist on the preparation of an adequate probation or conditional **sentence plan** to address the needs of the offender, including:
  - Where the offender will live and with whom;
  - Where the offender will attend school and for what purpose;
  - Where the offender will work; and
  - What curfews (if any) the offender will be subject to.
- A proper sentence plan will address the full **24-hour day** of the offender, 7 days a week, and **fix responsibility** for the delivery of specific services.

(Mr. Justice David H. Vickers, Supreme Court of British Columbia,  
Fetal Alcohol Syndrome and the Criminal Justice System, Conry & FAST, 2000)

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## Notes

- While the process of putting together an adequate “Sentencing Plan” is time-consuming, it meets both the goals of public safety and protection as well as the needs of the individual offender.

# Probation Officers

## Probation Officers:

- Require **additional education and support** in order to understand how the conditions of probation / parole must be administered differently given the cognitive impairments of persons with FASD; and
- Should take an "**accommodations approach**" to dealing with persons with FASD – discuss what things could be done to make it easier for them to follow the conditions of the Order.

# Probation Orders

## Probation Orders:

- Should be worded in **plain language**:
  - "Abstain absolutely from the purchase or consumption of alcohol."
  - VS.**
  - "Do not buy, keep or drink: beer, wine, rye, vodka, rum, or anything else that will get you drunk."
- Use **ICONS or symbols** to explain the terms of probation.

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## Notes

- Manitoba Corrections has developed an ICON's project that uses symbols to explain terms of probation.
- Make probation orders short, simple and concise, without sacrificing the meaning, and use visuals:
  1. State the sentencing/probation orders in plain language;
  2. List what to do, not the negative (what not to do);
  3. Don't assume because the individual nods that he or she understands; and
  4. Use as few clauses and terms as possible, keep it simple.

*(Boulding, 2006)*

## Administration of Custodial Sentence

- While persons with FASD **need structure**, this should not be misinterpreted as needing a custodial sentence, which could have many negative consequences for the person:
  - They are **easily victimized** in custody;
  - They may be recruited into a **gang** and/or get involved in **drugs**;
  - They are likely to be **influenced by the negative behaviour** and associations with peers that will be counter-productive upon their release; and
  - They may be disciplined in custody for **non-compliance** with conditions.
- Programs offered in custody which are “cognitive-based” or are “talk therapy” are not effective for individuals with FASD.

*(Dagher-Margosian, 1997)*

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### Notes

- An individual with FASD who is unable to handle the circumstances that occur in custody may act out of frustration and may become aggressive and violent. Such behaviour may result in disciplinary action in custody or more charges.

**MODULE SIX:**  
**Sentencing and Supervision**  
**Considerations**

# Purpose of Sentencing

- The fundamental purpose of sentencing is to contribute to **respect for the law** and the maintenance of a **just, peaceful and safe society** by imposing just sanctions that have one or more of the following objectives:
  - To **denounce** unlawful conduct;
  - To **deter** the offender and other persons from committing offences;
  - To **separate offenders from society**, where necessary;
  - To assist in **rehabilitating** offenders;
  - To provide **reparations** for harm done to victims or to the community; and
  - To promote a **sense of responsibility** in offenders, and **acknowledgement** of the harm done to victims and to the community.
- Sentence must be **proportionate** to the gravity of the offence and the degree of responsibility of the offender.

(s. 72B.1 of the Criminal Code)

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## Notes

- It is important to consider the following question – what is the degree of responsibility of the offender who has FASD?

## Sentencing Considerations (Adults)

### ■ Traditional Sentencing Tools:

- Include incarceration, probation and conditional sentences;
- May be **inappropriate** for persons with FASD or other neuro-cognitive impairments; and
- Terms and conditions of these sentences may be unrealistic for people with FASD to understand or **comply with**.

### ■ Other Sentencing Options:

- Need to be further explored as knowledge about FASD increases – FASD has been interpreted as an “aggravating” or “mitigating” factor at sentencing;
- A range of **community-based sentences** should be considered to encourage individuals to take responsibility;
- **Restorative processes** may also be considered to repair harm; and
- **Support and follow-up** will be necessary to complete the orders successfully.

(Roach & Bailey, 2009; Verbrugge, 2003)

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### Notes

- Section 718.2(e) of the *Criminal Code* states that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”
- One of the purposes of *paragraph (e)* is to ameliorate the serious problem of overrepresentation of aboriginal people in prison, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. It directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. (*R. v. Gladue*, (1999) 1 S.C.R. 688)
- “While a FASD diagnosis may be a mitigating factor in some sentences, it could be an aggravating factor in others. Case law identifies that FASD can be a mitigating factor due to its influence on “moral culpability”, in which courts have reduced jail time and focused on community sanctions for certain offenders as a result. Although, there are cases where diagnosis lead to an increase in an offender’s time in custody.” (*Roach and Bailey*, 2009)
- Research by *Verbrugge* (2003) and *Roach & Bailey* (2009) list cases where FASD has been considered as an aggravating and mitigating factor at sentencing.



- Supervision and structure will be required in the community. It will be important to establish that “structure” does not mean a custodial setting.
- A support person/advocate will be needed for on-going guidance and assistance.
- If a community justice /restorative process is considered appropriate, additional support provided to the victim could enhance the victims understanding of why the offence happened.
- \* *See the caselaw assembled by the Justice Working Group of the FASD Stakeholders for Ontario at: [www.fasdjustice.on.ca](http://www.fasdjustice.on.ca).*

## Sentencing Considerations (Youth)

- The *Youth Criminal Justice Act* contains sentencing provisions that reflect a policy of **restraint** in the use of punitive measures.
- Sentences must still be **proportionate** to the seriousness of the offence and the degree of responsibility of the young person, and include measures such as:
  - Involve families, communities and social agencies and;
  - Respect gender, ethnic, cultural and linguistic differences
- Custody is reserved primarily for violent offenders and serious repeat offenders.
- A variety of options available to **divert** the youth out of the justice system.

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### Notes

- There are a variety of options included in the *Youth Criminal Justice Act* that may be used to hold a youth with FASD proportionately accountable.

# The Courtroom

- An individual with FASD will require **support** before, during and after his / her court appearance.
- Best practice is to have an **advocate** support the person in order to:
  - Help **prepare** the person for court;
  - Help the person arrive **on-time**;
  - Help the person be **alert** and ready to participate;
  - Help to manage the person's **anxiety**;
  - Help the person process the "**courtroom language**" or legal lingo; and
  - Respect **gender, ethnic, cultural and linguistic** differences.

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## Notes

- It may be that an **alternative court structure** could better serve the needs of individuals with FASD and communication deficits. (*Bodaly, 2011*)
- **Mental Health, Drug, and Wellness Courts** may offer appropriate structures and processes better suited for individuals with FASD.

## Following Sentencing Conditions

- Individuals with FASD need **clear, explicit directions** in court in order to understand and comply with the court's orders / requests.
- Similarly, they are more likely to following sentencing conditions *IF*:
  1. They **understand** the conditions;
  2. There are as **few** conditions as possible;
  3. The conditions are ones they can **successfully follow**; and
  4. They receive regular **reminders** about the condition.

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### Notes

- Programming/Intervention should be designed to make it “harder to fail” than to succeed.
- Explaining the sentence and rephrasing conditions in a way that makes sense to the offender is crucial to him or her being able to comply.

# Supervision in Custody

- Individuals with FASD will require **support** while in custody to:
  - Understand **posted notices**;
  - Complete **forms**; and
  - Understand personal and legal **correspondence**.
- They “can be seen as **resistant** and **defiant** when [in fact] they do not actually understand what is expected.”  
(Conroy & Fast, 2000 at p. 72)
- **Routines** while in custody:
  - Replace the need for reasoning; and
  - May allow the individual to function better in custody.
- **Individualized programs** and accommodations for impairments allow individuals with FASD to be more successful in custody.

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## Notes

- Existing programs in corrections can benefit individuals with FASD, but often need to be modified to meet the needs of the offenders. (*Chartrand & Forbes-Chilibeck, 2003*)

## Circle of Support

- An effective way to respond to individuals with FASD is to provide them with a circle of support which includes at a minimum one person who can:
  - Provide **guidance**;
  - Help them **recognize and avoid situations** that may cause stimulus overload and help them regain emotional control; and
  - Help them **attend probation** appointments or counselling session.
- Circle of support members can be parents, siblings, caregivers, friends or members of community support agencies.

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### Notes

- It may be more appropriate to call this additional assistance a “circle of care and support”.

## CONCLUSION & REFERENCES

## Conclusion

- FASD is a **permanent brain injury** that is often an “invisible” disability, limiting a person’s participation in life, society and access to justice at all levels.
- An **individual response** is necessary because FASD impacts individuals differently.
- Solutions must involve **collaborative, multi-disciplinary responses** focused on accommodations and integrated support and monitoring.
- “It is important that **misconceptions** about the issue do not result in harming people with the disability, including placing unwarranted infringements on their liberty.”

(Roach & Bailey, 2009)  
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### Notes

- Individuals with FASD *may* represent some of the most marginalized and vulnerable persons in our society.



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\* We would like to acknowledge the review of the **FPT Steering Committee on FASD**, and the contribution of **Ray Marnoch** (Northern Institute for Social Justice, Yukon College).

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