

Sentencing and Fetal Alcohol Spectrum Disorder (FASD)

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Introduction

Fetal Alcohol Spectrum Disorder (FASD) is the umbrella term for the range of diagnoses associated with fetal damage resulting from maternal alcohol consumption.² Diagnostic terms used to describe the various effects of alcohol consumption by the mother on her unborn child include Fetal Alcohol Syndrome – FAS, Partial Fetal Alcohol Syndrome- PFAS (or Fetal Alcohol Effects- FAE³), Alcohol Related Neurodevelopmental Disorder- ARND, and Alcohol Related Birth Defects- ARBD.⁴ In this article the term Fetal Alcohol Spectrum Disorder (FASD) will be used. FASD was probably first identified in the nineteenth century⁵ and the mental impairment associated with FASD is now considered to be the most common form of preventable, non-genetic mental impairment.⁶ Ideally FASD should be prevented⁷ but failing that it should be identified in children early, around six years of age. This is because it is easier to identify in young children⁸ and also because the earlier FASD is

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² The National Organisation for Fetal Alcohol Syndrome and Related Disorders Inc, *The Conundrum of FASD in Australia* 2008, <<http://www.sandas.org.au/documents/THE%20CONUDRUM%20OF%20FASD%2020%20June%202008.pdf>> at 2 November 2009.

³ *R v PJM* [2008] SKPC 43 [1]; [40]; although this term was recently used in a Northern Territory case: *R v Doolan* [2009] NTSC 60 [9].

⁴ See Priscilla Pyettfor, Victorian Aboriginal Community Controlled Health Organisation, Melbourne, *Fetal Alcohol Syndrome: A Literature Review for the 'Healthy Pregnancies, Healthy Babies for Koori Communities' Project* (2007), 5. Pyettfor also identifies Fetal Alcohol Syndrome and Related Disorders- FASARD.

⁵ James Sanders, '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, 293. See also Kenneth Warren and Brenda Hewitt, 'Fetal Alcohol Spectrum Disorders: When Science, Medicine, Public Policy and Laws Collide' (2009) 15 *Developmental Disabilities Research Reviews* 170.

⁶ Despite this it is under-recognised in Australia, see Jane Mundy, 'The Bottle and the baby: Alcohol and the unborn child' (2008) 6 (2) *Of Substance* 16, 18; Timothy Moore and Melvyn Green, 'Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System' (2004) 19 *Criminal Reports* 99, 99. One recent study suggests that cognitive impairment of FASD children is worse than for those children whose mothers were cocaine users throughout pregnancy, see S Stevens, K Nash, R Greenbaum, G Koren and J Rovet, 'Capturing the Unique Social, Cognitive and Emotional Processing Profiles of Children with Fetal Alcohol Spectrum Disorders and Children with Pre-natal Cocaine Exposure' (2009) 16 (2) *Canadian Journal of Clinical Pharmacology* 394.

⁷ 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*, N.S. Reg. 181/2005. See also Food Standards Australia and New Zealand, 'Labelling of alcohol beverages with a pregnancy health advisory label' *Initial Assessment Report*, <http://www.foodstandards.gov.au/_srcfiles/A576_IAR_Alcohol_labelling_FINAL.pdf> at 2 November 2009.

⁸ As a result of physical cues; Anne Russell, 'Report on the Yukon 2002 Prairie Northern Conference, Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorders in Australia' (Paper presented at the National Organisation for Foetal Alcohol Syndrome and Related Disorders, Canberra, 2002) 57.

identified the earlier special programs and responses can be put in place so that secondary effects can be avoided.⁹ There are a range of concerns facing FASD sufferers who become involved with the criminal justice process. FASD sufferers may not be credible witnesses.¹⁰ As defendants, those who suffer from FASD may be disadvantaged in processes related to police questioning. For example, the suggestibility of FASD sufferers may cause them to agree with scenarios put to them by police.¹¹ Plea negotiation, establishing fitness to plead and intention and the role of diminished responsibility and provocation¹² in FASD cases may also raise particular 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. Further research on this issue is needed in Australia;¹³ however there is some helpful jurisprudence developing in Canada.¹⁴ The article begins with an overview of FASD and concerns related to assessment and identification of FASD before discussing sentencing issues relevant to FASD.

Impacts of Fetal alcohol spectrum disorder (FASD)

In adults, nerve damage as a result of alcohol ingestion may be temporary; however, alcohol can cause permanent damage to developing nerves.¹⁵ FASD is a life-long disability and indeed some disadvantages associated with FASD may intensify over time.¹⁶ Both the primary and secondary effects of FASD have important implications for how the justice system should respond to defendants who have FASD. These primary and secondary effects of FASD are well-established in the medical literature.¹⁷ 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.

⁹ Parvaneh Yazdani, Mary Motz and Gideon Koren, '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.

¹⁰ Kent Roach and Andrea Bailey, 'The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing' (2009) 42 *University of British Columbia Law Review* 1, 21.

¹¹ See for example: *The State of Western Australia v Cox* [2008] WASC 287 per Martin CJ [1]-[8]. 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 Diana Eades (ed), *Courtroom Talk and Neocolonial Control* (2008), 91-106. However in some situations it may result from FASD.

¹² See for example *R v Korhonen* [1999] NSWSC 933 (per Hulme J).

¹³ Tom Calma, Australian Human Rights Commission, 'Preventing Crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues' (2008) 14.

¹⁴ While the issue has also been discussed in the USA, increasingly research there is focussed on holding mothers both civilly and criminally responsible, see for example Shalini Bhargava, 'Challenging punishment and privatisation: A response to the conviction of Regina McKnight' (2004) 39 *Harvard Civil Rights- Civil Liberties Law Review* 513; Amanda Vedrich, 'Prosecuting pregnant women: Should Washington take the next step?' (1997) 21 *Seattle University Law Review* 133.

¹⁵ Pyettfor, above n4, 7.

¹⁶ Moore and Green, above n6, 99.

¹⁷ Louise Floyd, Mary O'Connor, Robert Sokol, Jacquelyn Bertrand and José Cordero, 'Recognition and Prevention of Fetal Alcohol Syndrome' (2005) 106 (5) *Obstetrics & Gynecology* 1059.

- **Primary effects:**

At the most serious end of the FASD spectrum is FAS. An Australian woman, Elizabeth Russell has two sons who have been diagnosed with FAS. She describes FAS in the following way:

What disability results in sufferers being good at small talk but without substance? Then add a kind heart but a violent temper, complex needs but no insight, a small frame with big expectations and perhaps worst of all, a damaged mind but a beautiful face.¹⁸

There are several requirements for a positive diagnosis of FAS. These are:¹⁹ 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)²⁰ and craniofacial dysmorphism. Craniofacial dysmorphism includes a small head (below the third percentile), small eyes, small eye slits, the groove between the upper lip and nose being under-developed,²¹ 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.²² 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.²³

Alcohol consumption by the mother can cause damage to the frontal lobe of the fetal brain and such damage can result in deficits in executive function.²⁴ Problems in executive function in FASD sufferers include difficulties with decision making, judgment and impulse control.²⁵ Researchers Fast

¹⁸ Elizabeth Russell, *An Interview with Elizabeth Russell*, <<http://www.elizabethrussell.com.au/an-interview-with-elizabeth/>> at 2 November 2009.

¹⁹ Joseph Hornick, Joanne Paetsch, Lorne Bertrand and Lisa Jacobs, *FASD and access to justice in the Yukon*, Yukon Department of Justice(2008), 16; Hans-Christoph Steinhausen and Hans-Ludwig Spohr, 'Long-term outcome of children with fetal alcohol syndrome: Psychopathology, behaviour, and intelligence.' (1998) 22 (2) *Alcoholism: Clinical and experimental research* 334, 335; Larry Chartrand and Ella Forbes-Chilibeck 'The sentencing of offenders with foetal alcohol syndrome' (2003) 11 *Health Law Journal* 35, 37-38.

²⁰ Impairment of the central nervous system may be referred to as Alcohol Related Neuro-developmental Disorder (ARND).

²¹ Small eyes are referred to in medical literature as 'microphthalmia'; small eye slits are referred to in medical literature as 'short palpebral fissures', and the groove between the upper lip and nose is referred to in medical literature as the 'filtrum'; see Marina Avner, Paul Henning, Gideon Koren and Irena Nulman, 'Validation of the facial photographic method in fetal alcohol spectrum disorder screening and diagnosis' (2006) 4 (20) *Journal FAS International*, 6.

²² Referred to as Alcohol Related Birth Defects (ARBD), see Kieran O'Malley, 'Fetal alcohol spectrum disorders: An overview' in Kieran O'Malley (ed), *ADHD and Fetal Alcohol Spectrum Disorders FASD* (2007) 1, 11. Visual impairments are said to have fifty percent prevalence in FASD sufferers.

²³ Shane McKee, 'Fetal Alcohol Syndrome- The Geneticist's View' (2009) May *Fetal Alcohol Forum* 13.

²⁴ Vivian Kulaga, 'Cognitive processing speeds among children exposed to fetal alcohol' (2006) 4(3) *Journal of FAS International* 1. The brain is the most vulnerable organ to alcohol influences, see Mansfield Mela, 'Accommodating the fetal alcohol spectrum disorders in the diagnostic and statistical manual of mental disorders (DSM-V)' (2006) 4(23) *Journal of FAS International* 8.

²⁵ Department of Communities, Queensland Government, 'Prenatal alcohol exposure affects young lives' 2008 (13) *Community Spirit*,

and Conry have identified the mnemonic ALARM as a summary of the core issues. This mnemonic refers to: Adaptive behaviour, Language, Attention, Reasoning and Memory.²⁶ Difficulty with abstract reasoning is often demonstrated by a failure to learn from experience and difficulty in understanding consequences for actions (to either themselves or to others). FASD sufferers can have problems understanding time and sequence and can be highly suggestible.²⁷ Sufferers are said to be 'very concrete in their thinking' and have difficulties understanding sarcasm, idiom or metaphor.²⁸ They may have difficulty 'reading into' a situation or an idea.²⁹ FASD sufferers will not be 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).³⁰

- **Secondary effects**

Secondary effects associated with FASD include criminal justice system contact, psychiatric disorders, compromised school experiences, and substance abuse. Criminal justice contact is considered to be a secondary FASD disability. The cognitive, social and behavioural problems associated with FASD often bring sufferers to the attention of the criminal justice system.³¹ It has been estimated that approximately sixty percent of adolescents with FASD have been in trouble with the law.³² Impulsive behaviour may lead to stealing things for immediate consumption or use, unplanned offending³³ and offending behaviour precipitated by fright or noise.³⁴ As a result of their suggestibility, FASD sufferers may engage in secondary participation with more sophisticated offenders.³⁵ Lack of memory or understanding of 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

<<http://www.communityservices.qld.gov.au/department/publications/communityspirit/2008/edition13/prenatal-alcohol-exposure.html>> at 2 November 2009.

²⁶ Diane Fast and Julianne Conry, 'The Challenge of Fetal Alcohol Syndrome in the Criminal Legal System' (2004) *Addiction Biology* 161, 162; see also Diane Fast and Julianne Conry 'Fetal Alcohol Spectrum Disorders and the Criminal Justice System' (2009) 15 *Developmental Disabilities Research Reviews* 250, 252.

²⁷ Fast and Conry, above n 26, 162

²⁸ Moore and Green, above n6, 101.

²⁹ *R v Harper* (2009) YKTC 18 [17].

³⁰ Kathryn Paige, 'Fetal Alcohol Spectrum- The Hidden Epidemic in our Courts' (2001) 52 *Juvenile and Family Court Journal* 21, 25.

³¹ Chartrand and Forbes-Chilibeck, above n 19 at 42.

³² See Diane Fast, Julianne Conry and Christine Loock, 'Identifying Fetal Alcohol Syndrome Among Youth in the Criminal Justice System' (1999) 20 (5) *Developmental and Behavioural Pediatrics* 370.

³³ See *People v W* 222 Mich. App. 160, 564 N.W. 2d 903 (Ct. App. 1997), 182.

³⁴ Kathryn Kelly and Ann Streissguth, 'Fetal Alcohol Spectrum Disorder (FASD) and Offender Criminal History, (1996) unpublished, University of Washington School of Medicine.

³⁵ See for example *Alchin v South Australian Police* [1995] SCSA 981 [2] (per Debelle J).

amongst FASD sufferers; in one study about fifty percent of FASD sufferers had displayed appropriate sexual behaviours.³⁶ Diagnoses of FASD (and ADHD) are over-represented in prison populations of sex offenders.³⁷

Throughout their lifespan, over ninety percent of FASD sufferers will also be diagnosed with one or more psychiatric disorders such as a mood (for example bi-polar disorder) or anxiety disorder.³⁸ Attention Deficit Hyperactivity Disorder (ADHD) may be the most commonly diagnosed mental health disorder in FASD sufferers.³⁹ 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.⁴⁰ Thus a girl presenting with ADHD presents a 'red-flag' for a FASD assessment. Autism Spectrum Disorder, Asperger's Syndrome, Oppositional Defiant Disorder or Conduct Disorder are also diagnosed in many FASD sufferers.⁴¹ It is problematic when these diagnostic categories alone are applied to FASD sufferers as they do not incorporate the collection of other issues often associated with FASD.⁴² FASD sufferers are also a greater suicide risk as a result of impulsivity, lack of tolerance and depression.⁴³

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.⁴⁴ 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.⁴⁵ A FASD sufferer's lack of engagement may be assumed to be simply

³⁶ Fred Boland, Rebecca Burrill, Michelle Duwyn and Jennifer Karp, *Fetal alcohol syndrome: Implications for Correctional Service* (1998) [2] [32] Correctional Services, Canada <<http://www.csc-scc.gc.ca/text/rsrch/reports/r71/er71.pdf>> at 27 October 2009.

³⁷ Natalie Novick-Brown, 'Sexually Inappropriate Behaviour in Patients with Fetal Alcohol Spectrum Disorders' in Kieran O'Malley (ed), *ADHD and Fetal Alcohol Spectrum Disorders FASD* (2007) 125, 135; 137.

³⁸ Kieran O'Malley, 'Fetal alcohol spectrum disorders: An overview' in Kieran O'Malley (ed), *ADHD and Fetal Alcohol Spectrum Disorders FASD* (2007) 1, 11; Hans-Christoph Steinhausen and Hans-Ludwig Spohr, 'Long-term outcome of children with fetal alcohol syndrome: Psychopathology, behaviour, and intelligence' (1998) 22 (2) *Alcoholism: Clinical and experimental research* 334, 337.

³⁹ Jenna Doig, '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, 366.

⁴⁰ O'Malley, above n38, 4.

⁴¹ J.L. Nanson, 'Autism in Fetal Alcohol Syndrome: A Report of Six Cases', (1992) 16 *Alcoholism: Clinical and Experimental Research* 558.

⁴² Paige, above n30, 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 [10].

⁴³ Kieran O'Malley, *Transcontinental Psychiatric Experience with Foetal Alcohol Spectrum Disorders (FASD)* Fetal Alcohol Forum (2009) [15] <<http://www.nofas-uk.org/PDF/Fetal%20Alcohol%20Forum%20Eletter%20May%202009.pdf>> at 9 December 2009.

⁴⁴ *R v R (A)* (2003) Carswell Ont 1401 (OSCJ) discussed in Timothy Moore and Melvyn Green, 'Fetal alcohol spectrum disorder (FASD): A Need for Closer Examination by the Criminal Justice System' (2004) 19 *Criminal Reports* 99, 103.

⁴⁵ *R v Harper* (2009) YKTC 18 [16], [50].

ADHD as one may be deceived by the 'superficial fluency' of language common among FASD sufferers.⁴⁶ Thus although ADHD may be identified, FASD may be missed. Alcohol induced physical abnormalities causing problems with sight and hearing may also be relevant in the school environment. Together, these factors may contribute to the disrupted or curtailed schooling experienced by about sixty percent of FASD sufferers.⁴⁷ Research in criminology has shown that early school leaving can lead to delinquent behaviour.⁴⁸ Similar issues will affect FASD sufferers' ability to maintain employment.⁴⁹

Pre-natal alcohol exposure increases the likelihood of alcohol abuse in adolescence up to threefold.⁵⁰ Researchers have noted that about thirty percent of FASD sufferer's develop substance abuse problems.⁵¹ Such problems also increase the likelihood of involvement with criminal justice interventions,⁵² 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.⁵³ This is significantly lower than Canada which has an incidence of 1-3 per 1,000 live births.⁵⁴ FASD seems to be under-reported in New Zealand where, from 199-2001, 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.⁵⁵ A lack of paediatric expertise available to diagnose FASD has also been recognised in Australia.⁵⁶

⁴⁶ Paige, above n30, 24.

⁴⁷ See Larry Burd, Rachel Selfridge, Marilyn Klug and Tim Juelson, 'Fetal Alcohol Syndrome in the Canadian Corrections System' (2003) 1 *Journal of FAS International*, 2.

⁴⁸ Don Weatherburn, Lucy Snowball and Boyd Hunter, '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.

⁴⁹ Justice Committee of FASD Ontario, *FASD: After Sentencing* (2007), <<http://fasdjustice.on.ca/fasd-sentencing.html>> at 3 November 2009.

⁵⁰ O'Malley, above n38, 11.

⁵¹ Boland et al, above n36, [2]. Alcoholism may be genetically influenced, it has been bred selectively in rats, see Donald W Goodwin, *Is Alcoholism Hereditary?* (1976).

⁵² Gideon Koren, 'Hypothetical framework: FASD and criminality- causation or association? The Limits of Evidence based knowledge' (2004) 2 *Journal of FAS International* 1, 4.

⁵³ Queensland, Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009) 67.

⁵⁴ Russell, above n8, 26. In Canada in 2003, of a prison population of 148,797 inmates, only thirteen offenders were identified with FASD; Burd et al, above n47, 7.

⁵⁵ New Zealand Parliament, Hon Pete Hodgson (Minister for Health), 17 July 2007, see also Fast et al, n32.

⁵⁶ Calma, above n13, 13. See also the discussion of expertise in *R v Doolan* [2009] NTS 60.

FASD is disproportionately diagnosed among Indigenous people. Langton suggests that 25 Indigenous children per 1,000 live births suffer from FASD.⁵⁷ A Western Australian study estimated that FASD affected 2.97 Indigenous children per 1,000 live births.⁵⁸ In Canada Indigenous people are ten times more likely than others to be identified as suffering from FASD.⁵⁹ However researchers have found that this is a result of socio-cultural and socio-economic issues rather than suggesting any genetic disposition.⁶⁰ Some researchers have noted that it is Canadian children in foster care who tend to receive the FASD label,⁶¹ and that because there are disproportionate numbers of Indigenous Canadians in foster-care, it is therefore Indigenous children who often receive the label. Research in Victoria suggests that Indigenous children in that state are thirteen times more likely to be in foster-care and therefore they are similarly more likely to receive the FASD label despite the fact that there may be numerous other factors in the child's life that might also explain many of the symptoms.⁶² Some have been 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.⁶³ A Canadian judge has pointed out, '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.'⁶⁴ The position is surely similar in Australia. Such concerns underline the importance of careful multidisciplinary assessment. Wartnik,

⁵⁷ Langton actually quotes one in 40 Indigenous children; Marcia Langton, 'The end of "big men" politics' (2009) 14 *Griffith Review* 13, 25. Other estimates include 5/100 (FAS and ARND) in child psychiatry presentations; 23/100 in juvenile justice presentations (FAS and ARND), see Paul Connor, *Fetal Alcohol Spectrum Disorders and the Justice System* (2009) UW School of Law: Court Improvement Training Academy, <<http://www.uwcita.org/CITAv1008/trainingmaterials/fasd.html>> at 3 November 2009.

⁵⁸ 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, 631. See also the brief discussion in the recent report: Queensland, Crime and Misconduct Commission, *Restoring Order: Crime Prevention, Policing and Local Justice in Queensland's Indigenous Communities* (2009) 64-67.

⁵⁹ Chartrand and Forbes-Chilibeck, above n19, 40.

⁶⁰ C O'Leary, 'Fetal-alcohol syndrome: diagnosis, epidemiology, and developmental outcomes' (2004) 40 *Journal of Paediatric Child Health* 2. Although results of testing non-identical twins suggest that the different genetic makeup of children may mean they are more or less likely to experience FASD symptoms Fred Boland, Rebecca Burrill, Michelle Duwyn and Jennifer Karp, *Fetal alcohol syndrome: Implications for Correctional Service* (1998) [28] Correctional Services, Canada <<http://www.csc-scc.gc.ca/text/rsrch/reports/r71/er71.pdf>> at 27 October 2009.

⁶¹ 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 Kathryn Page, 'The Invisible havoc of pre-natal alcohol damage' (2003) 4 *Journal of the Center for Families, Children and the Courts* 67, 67.

⁶² Priscilla Pyett, Peter Waples-Crowe, Kellie Hunter Loughron and Jill Gallagher, '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, 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), 46.

⁶³ Loretta de Plevitz, Judith Gould and Terrina Smith, 'Letters: Fetal Alcohol Syndrome and Fetal Alcohol Spectrum Disorder in Indigenous School Children,' (2009) 190 (5) *Medical Journal of Australia* 286, 286.

⁶⁴ *R v Quash* [2009] YKTC 54 [62]

a former Canadian judge, suggests that the diagnostic team might include a psychologist, neuropsychologist, psychiatrist, and paediatrician.⁶⁵

There are probably a number of reasons behind the under-reporting and diagnosis of FASD in Australia. The lack of expertise associated with its diagnosis⁶⁶ explains the situation to some extent. It is also often difficult to get an accurate history of maternal drinking patterns during pregnancy,⁶⁷ 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 biological mother.⁶⁸ Sometimes doctors and other practitioners forget to ask about maternal drinking during pregnancy.⁶⁹ On this point a practitioner noted that local Aboriginal Community Justice Groups (CJGs)⁷⁰ may have a role to play in letting the court know about possible FASD, he observed:

I think the youth and the community justice groups within Murri Court and educating them about being on the lookout, could be particularly useful. So for instance those elders that are up there know mum and might have known what she was doing at what time and they've got that instant recognition of the lifestyle and the family history. That's a particularly useful tool, I think, in them then saying something to the magistrate or to one of the Murri Court coordinators, hey I remember this or perhaps you should be on the lookout for that...Using them in that way would be particularly ... helpful from a diagnostic point of view.⁷¹

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.⁷² In the criminal justice process it may be the case that there are simply insufficient resources to identify it.⁷³

⁶⁵ See Anthony Wartnik, 'Will anyone with a MD do?' (Paper presented at the FASD and the Justice System Conference, Kiana Lodge, Suquamish, WA, 23 April, 2009).

⁶⁶ E Peadon, C O'Leary, C Bower and E Elliot, 'Impacts of alcohol use in pregnancy: the role of the GP' (2007) 36 (11) Australian Family Physician; Department of Communities, 'Prenatal alcohol exposure affects young lives' Queensland Government, 2008 (13) *Community Spirit* <<http://www.communityservices.qld.gov.au/department/publications/communityspirit/2008/edition13/prenatal-alcohol-exposure.html>> at 2 November 2009; Ingrid Goh et al, 'Development of Canadian Screening tools for Fetal Alcohol Spectrum Disorder' (2008) 15 (2) *Canadian Society for Clinical Pharmacology* 344, 346; Hornick, et al above n19, 45.

⁶⁷ Fast and Conry, above n 26, 162.

⁶⁸ In an Australian study of FASD only 40% of children identified with FASD lived with a biological parent, see E J Elliot, et al., 'Fetal Alcohol Syndrome: A Prospective National Surveillance Study.' (2008) 93(9) *Archives of Disease in Childhood* 733. See also *Regina v J (T)* [1999] Carswell Yukon 99 [1999] YJ 57 where the sentencing judge observed that nearly one third of FAS children never live with their biological mother.

⁶⁹ J Elliot, et al., 'Fetal Alcohol Syndrome: A Prospective National Surveillance Study.' (2008) 93(9) *Arch Dis Child* 737.

⁷⁰ See *Penalties and Sentences Act 1995* (Qld) ss 9(2)(p), 9(7). This suggestion was strongly supported by the ATSILS workers.

⁷¹ ATSILS interview above n1, 23.

⁷² See *R v Dayfoot* [2007] ONCJ 332 [4], [14], where it was observed that in order to obtain an assessment it may be necessary to detain the defendant.

⁷³ ATSILS interview above n1, 15.

FASD is made 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 FASD.⁷⁴ Additionally Goh and colleagues have observed that facial features can be affected by ethnicity and genetics and specific ethnic norms have not been developed.⁷⁵ FASD is generally easier to recognise in childhood partly because physical symptoms appear to reduce as the child grows and also because FASD sufferers are often subjected to violence, especially head trauma from car accident, child abuse⁷⁶ or assault, which can complicate their presentation.⁷⁷ Intelligence tests will often not help to identify FASD. Many FASD sufferers will have a normal IQ, although some will score below average on intelligence tests, they will rarely score below seventy.⁷⁸ This means that the deficits in functional ability, especially memory and attention, associated with FASD will not be identified with an IQ test.⁷⁹ 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.'⁸⁰

FASD children often grow up in severely disadvantaged backgrounds, where there is poverty, neglect, violence and disorganisation;⁸¹ frequently both parents are heavy drinkers and have criminal records.⁸² Often parents have FASD themselves which compromises their ability to parent;⁸³ 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 experienced by many FASD sufferers, behavioural issues often associated with FASD such as criminal offending and difficulties at school may be explained by other factors.⁸⁴ As noted earlier, the FASD sufferer may abuse alcohol or other drugs;⁸⁵ this may contribute further to

⁷⁴ Moore and Green, above n6, 99; Chartrand and Forbes-Chilibeck, above n19, 38.

⁷⁵ Goh et al, n66, 349. 'Development of Canadian Screening tools for Fetal Alcohol Spectrum Disorder' (2008) 15 (2) *Canadian Society for Clinical Pharmacology* 344, 349.

⁷⁶ Chartrand and Forbes-Chilibeck, above n19, 52.

⁷⁷ Fast and Conry, above n26, 162; FASD may also be difficult to diagnose in new-borns.

⁷⁸ O'Malley, above n38, 2; 5; Paul Connor, *Fetal Alcohol Spectrum Disorders and the Justice System* (2009) UW School of Law: Court Improvement Training Academy <<http://www.uwcita.org/CITAv1008/trainingmaterials/fasd.html>> at 3 November 2009. Ironically possessing an IQ under 70 provides a protective factor as diagnosis of FASD is more likely so proper supports are more likely to be provided, see Kathryn Paige, 'Fetal Alcohol Spectrum- The Hidden Epidemic in our Courts' (2001) 52 *Juvenile and Family Court Journal* 21, 27.

⁷⁹ C R Green et al., '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, 695.

⁸⁰ ATSIIS interview above n1, 3.

⁸¹ Fast and Conry, above n26, 162.

⁸² Ibid 162. Smoking also appears to increase the effects of alcohol on the fetus, see Hans-Christoph Steinhausen and Hans-Ludwig Spohr, 'Long-term outcome of children with fetal alcohol syndrome: Psychopathology, behaviour, and intelligence.' (1998) 22 (2) *Alcoholism: Clinical and experimental research* 334, 335.

⁸³ O'Malley, above n38, 7; and see for example Paige Taylor, 'Blight of alcohol abuse seen in Kimberley's schoolgirl mums' *The Australian* (Sydney), 24 March 2009, 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.

⁸⁴ Symptoms similar to FASD sometimes occur as a result of other genetic or environmental disorders such as viruses, see C O'Leary, 'Fetal-alcohol syndrome: diagnosis, epidemiology, and developmental outcomes' (2004) 40 *Journal of Paediatric Child Health* 2.

⁸⁵ For example glue and petrol sniffing, see *R v Korhonen* [1999] NSWSC 933 per Hulme J [31].

cognitive impairment.⁸⁶ As it is common for FASD children to have been previously diagnosed with disorders such as ADHD, Oppositional Defiance Disorder and other various learning disabilities,⁸⁷ in many cases it may be difficult to untangle the various causes of symptoms.⁸⁸ A practitioner at ATSILS observed: 'so where does one end and when does the other start? I mean, that makes it incredibly hard for anyone, I guess, to pick that up.'⁸⁹ While another observed: 'I'd have no idea how anyone's going to sort through this quagmire.'⁹⁰

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.⁹¹ Although FASD is a medical diagnosis,⁹² most experts accept that a diagnosis of FASD requires a multi-disciplinary approach.⁹³ FASD is not currently included in the DSM-IV;⁹⁴ 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.⁹⁵ It is hoped by some that FASD may be included in the DSM-V to be published in 2012,⁹⁶ and this may lead to better training in recognition, therapeutic diagnosis and response. The most influential protective factors against adverse effects of FASD are getting a FASD diagnosis (the earlier the better) and stable home life.⁹⁷ The earlier the diagnosis the more the secondary damages associated with FASD will be able to be mitigated.⁹⁸ Currently, in Canada, many cases of FASD have been identified late and as a result of criminal justice system contact.⁹⁹ 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

⁸⁶ Fast and Conry, above n26, 164. See for example *R v Lucas-Edmonds* [2009] 3 NZLR 493 where the defendant was a FASD sufferer and a chronic abuser of solvents.

⁸⁷ Kathryn Page, 'The Invisible havoc of pre-natal alcohol damage' (2003) 4 *Journal of the Center for Families, Children and the Courts* 67, 75.

⁸⁸ C O'Leary, 'Fetal-alcohol syndrome: diagnosis, epidemiology, and developmental outcomes' (2004) 40 *Journal of Paediatric Child Health* 2. For example hair analysis may be able to help identify FASD, see V Kulaga, F. Pragst, N. Fulga and G. Koren, '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.

⁸⁹ ATSILS interview above n1, 9.

⁹⁰ *Ibid* 21.

⁹¹ Wartnik, above n65.

⁹² Paul Connor, *Fetal Alcohol Spectrum Disorders and the Justice System*' (2009) University of Washington School of Law: Court Improvement Training Academy <<http://www.uwcita.org/CITAv1008/trainingmaterials/fasd.html>> at 3 November 2009.

⁹³ Hornick et al, above n19, 17.

⁹⁴ American Psychiatric Association, *DSM-IV: The Diagnostic and Statistical Manual for Mental Disorders* (4th ed, 2000).

⁹⁵ O'Malley, above n38, 6.

⁹⁶ See Mansfield Mela, 'Accommodating the fetal alcohol spectrum disorders in the diagnostic and statistical manual of mental disorders (DSM-V)' (2006) 4 *Journal of FAS International* 8.

⁹⁷ Paige, above n30, 26; Christelle Gedeon, 'Adverse Life Outcomes Associated with Fetal Alcohol Syndrome: The Benefits of Early Diagnosis' (2005) 3 *Journal of FAS International* 11

⁹⁸ Gedeon, above n97, 11.

⁹⁹ Fast et al, above n32.

it may be their last chance and thus the criminal justice system has a responsibility to respond carefully in these cases.

Sentencing considerations

*The calculus of sentencing the average offender simply does not apply to an offender with FASD.*¹⁰⁰

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 breach probation orders and good behaviour bonds.¹⁰¹ Suspended sentences will not be useful in a context where cause and effect is not understood and 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 their potential.¹⁰² 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, Justice Fowler stated that the case he was hearing involving a violent sexual offender who suffered from FASD was 'like a canary in the coalmines'.¹⁰³ He observed that governments now know people with FASD will increasingly fill the prisons as they have a high rate of re-offending, act on impulse and do not consider the consequences.¹⁰⁴ 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.

- **The roles of Justice Personnel, Assessment and Informing the court:**

A Canadian judge recently observed that, '[m]y seat might be the best one in the courtroom, but I can only see what counsel allow me to see.'¹⁰⁵ 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.¹⁰⁶ In Australia, it is likely that there is not enough

¹⁰⁰ *R v Harper* (2009) YKTC 18 [39].

¹⁰¹ Vicki Russell, 'An insight into foetal alcohol exposure: The implications for criminal justice' (Paper presented at the Insights and Solutions conference, Melbourne, 3 September 2008).

¹⁰² *R v M (B)* (2003) SKPC 83, 17.

¹⁰³ *R v Obed* [2006] NLTD 155 [68].

¹⁰⁴ *R v Obed* [2006] NLTD 155 [67].

¹⁰⁵ Melvyn Green, 'A Judicial perspective' (Paper presented at Fetal alcohol Syndrome Disorders Symposium for Justice Professionals, Toronto, 1 March 2006) 1.

¹⁰⁶ Ann Waller, '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).

information available to the criminal justice community at the present time. For example one practitioner commented:

I've asked everybody down at court ... whether they've encountered it [FASD]. There was a lot of blank faces, what's that, is that like sort of sleep walking, is that sort of thing?...They've got no awareness. They've never encountered that.¹⁰⁷

Another practitioner observed:

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.¹⁰⁸

Further, where files are handed between one lawyer and another, it is vital that information about FASD is also passed on.¹⁰⁹

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 as they are often the first to consider the possibility of FASD.¹¹⁰ FASD assessment programs developed in Canada have recognised the key role of probation officers in identifying appropriate referrals as they are often involved relatively early in the Justice process.¹¹¹ In the Australian context, given current under-diagnosis, it may be appropriate for probation officers to specifically 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.¹¹²

Generally 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

¹⁰⁷ ATSILS interview above n1, 8.

¹⁰⁸ Ibid 16.

¹⁰⁹ Ibid 21.

¹¹⁰ Hornick et al, above n19, 23; the Royal Canadian Mounted Police have developed a guide for diversion in appropriate cases where sufferers are identified as having FASD.

¹¹¹ 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) [20] Department of Justice Canada <http://www.plea.ca/pdf/FASD_project_report.pdf> at 9 November 2009.

¹¹² David Boulding, *Fetal alcohol: The role of Crown Counsel* (2005) [2] <<https://www.alaskabar.org/SectionMeetingHandouts/LandCommunityHealthForum/ABA%20January%202008/boulding/8.%20Fetal%20Alcohol%20-%20The%20Role%20of%20Crown%20Counsel.pdf>> at 9 November 2009.

can then arrange appropriate screening (with the person's consent).¹¹³ 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.¹¹⁴ 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. In this case 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.'¹¹⁵ 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 behaviour¹¹⁶ 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 their level of capacity.

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,¹¹⁷ and thus may be a successful appeal point.¹¹⁸ Ordinarily the defence lawyer has discretion about how the sentencing hearing is approached and the mitigating material to be put before the court. One practitioner noted: 'I'd always want a diagnosis'¹¹⁸ but also observed that 'whether the lawyer chooses to play the [FASD] card is a strategic thing, which I guess they'll look at each particular juncture, depending upon who their bench is.'¹¹⁹ 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

¹¹³ Goh et al, above n66, 349.

¹¹⁴ GAS v R [2004] HCA 22; 217 CLR 198 [30] (per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

¹¹⁵ R v KU & Ors; ex parte A-G (Qld) [2008] QCA 154 [33]. A similar situation is noted by David Boulding and Susan Brooks, 'Trying Differently: A Relationship centred approach to representing clients with cognitive challenges.' Unpublished paper available from the author (2009), 2.

¹¹⁶ Burd et al, above n47, 6.

¹¹⁷ State v Haberstroh 69P. 2d 676 (Nev.2003).

¹¹⁸ ATSILS interview above n1, 22.

¹¹⁹ Ibid 19.

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.¹²⁰

In Canada defendants have often been sentenced on the basis of 'suspected' FASD.¹²¹ 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.¹²² Thus it may be inappropriate for the Court to accept submissions from the bar table about FASD that are not supported by evidence.¹²³ 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,¹²⁴ 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.¹²⁵ In Canada courts have found that they do not have the power to compel assessment.¹²⁶ Issues about who pays for assessments have also been debated in some Canadian cases¹²⁷ and 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.¹²⁸ We have already seen the lack of availability of appropriate services in the preventive detention cases in Queensland.¹²⁹ In Australia, the lack of availability of services generally is

¹²⁰ Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995), 175. See also Abbe Smith, 'Defending the Unpopular Down-Under' (2006) 30 Melbourne University Law Review 495, 530-539.

¹²¹ See *R v MMP* [1999] AJ no.223; *R v DEK* [1999] AJ No. 1357; *R v Harris* [2002] BCJ No 1691 BCCA 152; *R v Abou* [1995] BCJ No 1096; *R v DJM* [2005] YJ No 18 YKTC 25, in each of these cases suspected FASD was said to mitigate sentence.

¹²² *R v Harris* [2002] BCCA 152

¹²³ 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 Nanette Rogers, *Aboriginal Law and Sentencing in the Northern Territory: Supreme Court at Alice Springs 1986-1995* (PhD thesis, University of Sydney, 1998).

¹²⁴ See for example *R v Kruse* [2004] AJ No 1227 ABPC 194.

¹²⁵ Roach and Bailey, above n9, 42.

¹²⁶ *R v TK* [2006] NUCJ 15 (per Johnson J).

¹²⁷ Roach and Bailey, above n9, 43.

¹²⁸ Melvyn Green, 'A Judicial perspective' (Paper presented at the Fetal alcohol syndrome disorders symposium for justice professionals, Toronto, ON, 1 March 2006) 6. Although see *AG Qld v Robinson* [2007] QCA 111 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' [29].

¹²⁹ Heather Douglas, 'Post-Sentence Preventive Detention: Dangerous and Risky' [2008] (11) *Criminal Law Review* 854.

especially pronounced in rural and remote communities and specialised services for FASD clients appear to be practically non-existent. However, the current lack of resources does not present justification for ignoring FASD. Diagnosis may have some positive outcomes such as improved access to appropriate services, the encouragement of different and more suitable approaches to the delivery of education, therapy and supervision and it may also help to identify other family members who are at risk.¹³⁰ 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.¹³¹ However FASD sufferers may have a lower level of culpability as a result of their cognitive deficiencies. In the Canadian case of *Harper*, Justice Lilles 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.'¹³² In the US and in Canada evidence of FASD has been identified as a mitigating factor.¹³³ FASD may be the main criminogenic factor in an offender's life 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.¹³⁴

Typical attitudes and behaviours of FASD sufferers that may be observed in court include an inability to understand the seriousness of their crime 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.'¹³⁵ FASD offenders may seem to carry out opportunistic, impulsive offending in relation to crimes that don't make sense.¹³⁶ They may carry out high risk behaviours for modest outcomes.

¹³⁰ Goh et al, above n66, 346.

¹³¹ *Veen v R* (no 2) [1988] HCA 14; (1988) 164 CLR 465 (29 March 1988) per Mason CJ, Brennan, Dawson and Toohey JJ [7].

¹³² *R v Harper* (2009) YKTC 18 [37]-[38].

¹³³ See for example *Stankewitz v Woodford* 365 F.3rd 706 (9th Cir. 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, 16P. 3d 601 (2001); *Castro v State of Oklahoma* 71F.3d 1502 (10th Cir. 1995); *Johnson v State of Missouri* 102 SW 2d 535 (Mo.2003).

¹³⁴ *R v Harper* (2009) YKTC 18 [37]-[38].

¹³⁵ AT SILS interview above n1, 3.

¹³⁶ Connor, above n92; Melvyn Green, 'A Judicial perspective' (Paper presented at the Fetal alcohol syndrome disorders symposium for justice professionals, Toronto, ON, 1 March 2006) 6; Goh et al, above n66, 349; Hornick et al, above n19, 24.

These are matters that might usually suggest incorrigibility and an outright refusal to engage with the criminal justice process and may cause a sentencing justice to increase the penalty.¹³⁷ 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,¹³⁸ and, as has been noted earlier, this is a feature that is not necessarily common to all FASD sufferers. Thus if an intelligence assessment defines cognitive capacity the disadvantages experienced by FASD sufferers may be missed.¹³⁹ In the Brisbane context a practitioner commented:

I would always imagine that I would get mitigation from a diagnosis of Fetal Alcohol Spectrum Disorder here in front of magistrates. I think with the bulk of the magistrates and it's getting more and more so. You would get the sympathy of the court and they would be not considering only the risks to the community, so they wouldn't be saying we'd better lock him up, because he's never going to get any better.¹⁴⁰

According to Wartnik, once the link between FASD and the criminal offence is established,¹⁴¹ 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.¹⁴²

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 their mistakes.¹⁴³ Depending on the degree of cognitive deficit, the role of special deterrence may be limited.¹⁴⁴ As has already been noted, many FASD sufferers do not understand cause and effect and will therefore find it difficult or impossible to connect the sentence to their crime. Given the inability to connect cause and effect and therefore to learn from past actions, special deterrence often has little, if any, value.¹⁴⁵ In relation to general deterrence one Canadian justice observed that it would be 'obscene' to warn off other potential

¹³⁷ See generally *Cameron v R* [2002] 209 CLR 339 where a reduction in sentence was justified in part on the basis that the defendant was remorseful.

¹³⁸ See the discussion Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* Cambridge University Press (2007), 167-168 and see also *Crimes Act 1914* (Cth) s16A(2)(m), 'mental condition'. See also for example *R v Gommers* [2005] SASC 493.

¹³⁹ Boulding and Brooks, above n115, 22.

¹⁴⁰ ATSILS interview above n1, 11.

¹⁴¹ *R v Synnuck* [2005] BCCA 632; see also *R v Papparone* (2000) 142 A Crim R 190 [50]-[53] - this was not specifically a FASD case.

¹⁴² Wartnik, above n65.

¹⁴³ Roach and Bailey, above n9, 21.

¹⁴⁴ *R v Quash* [2009] YKTC 54 [70].

¹⁴⁵ *R v Harper* (2009) YKTC 18 [45]; *R v Obed* [2006] NLTD 155 [29]; see also *R v Lucas-Edmonds* [2009] 3 NZLR 493 [34] (per Ellen France, Priestly, Miller JJ). In Australia see also *R v Thompson* (2005) 157 A Crim R 385, [54], although this case was not related to FASD.

offenders by inflicting a more serious punishment on a 'handicapped' person.¹⁴⁶ 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.¹⁴⁷

Ultimately the role of general deterrence will also depend on an assessment of cognitive deficit.¹⁴⁸ 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.'¹⁴⁹ The suggestion here is that the principle of denunciation will also have little value as in a FASD case as it is another's failure, for example a mother's failure as a result of abusing alcohol while pregnant and the community's failure to provide appropriate support, that have led to offending.¹⁵⁰

The two most important guidelines for sentencing FASD sufferers are argued to be rehabilitation and community protection.¹⁵¹ 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 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.¹⁵²

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'¹⁵³ may be able to be

¹⁴⁶ *R v Abou* [1995] BCJ 1096 (Prv court) referred to in *R v Harper* (2009) YKTC 18 [47]; see also *R v Mason-Stuart* (1993) 61 SASR 204, 205-206 (per King J) (although the latter case related to brain damage rather than FASD).

¹⁴⁷ *R v Champion* (1992) 64 A Crim R 244 at 254-5

¹⁴⁸ *R v Quash* [2009] YKTC 54 [72]. See also *R v Pham* [2005] NSWCCA 314.

¹⁴⁹ *R v Quash* [2009] YKTC 54 [81].

¹⁵⁰ *R v Champion* (1992) 64 A Crim R 244, 254-5.

¹⁵¹ Chartrand and Forbes-Chilibeck, above n19, 35; see also *R v IDB* [2005] ABCA 99.

¹⁵² *Veen v R* (no 2) (1988) 164 CLR 465, 476 (per Mason C.J., Brennan, Dawson and Toohey JJ). See also *Ryan v R* [2001] HCA 21; 206 CLR 267; 179 ALR 193; 75 ALJR 815 (3 May 2001) [129] (per Kirby J). See also *R v Harper* (2009) YKTC 18 [35].

¹⁵³ *R v Channon* (1978) 20 ALR 1.

accomplished to some degree in the sentencing of FASD sufferers.¹⁵⁴ 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 reform¹⁵⁵ will be impossible in many FASD cases.

In many FASD cases the defendant will have a reduced capacity to understand actions and learn from the past and this will contribute to re-offending, these aspects of the disability are likely to make community protection a significant consideration.¹⁵⁶ 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. 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'.¹⁵⁷ Once FASD is identified, and the relevant aims of sentencing have been explored, sentencing outcomes will be investigated. Sentencing outcomes are discussed further 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.¹⁵⁸

Research suggests that 24 hour structure and supervision, what has been referred to as a 'second' or 'external' brain,¹⁵⁹ may be required in some cases of FASD. 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. Boulding and Brooks suggest that the latter approach will be cheaper than incarceration.¹⁶⁰ For example in the Queensland case of *Twaddle*, one expert recommended that the defendant 'needs to be placed in a secure position with 24 hour supervision...[although] he may be able to manage with as little as 12 hours a day' if a placement

¹⁵⁴ *R v Quash* [2009] YKTC 54, [83]

¹⁵⁵ Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (2007) 66; see for example *R v Keewatin* [2009] SKQB 58 [50].

¹⁵⁶ *R v Lucas-Edmonds* [2009] 3 NZLR 493 [36] (per Ellen France, Priestly, Miller JJ).

¹⁵⁷ D A Thomas, *Principles of Sentencing*, (2nd ed, 1979) 56, cited in *Mill v R* (1988) 166 CLR 59, 63 and *Postiglione v R* (1996) 189 CLR 295.

¹⁵⁸ David Boulding, *Mistakes I have made with FAS clients: Fetal alcohol syndrome and fetal alcohol effects in the criminal justice system* (2001) [6] <<http://www.davidboulding.com/pdfs/4.pdf>> at 4 November 2009.

¹⁵⁹ *R v Obed* [2006] NLTD 155 [20], [28].

¹⁶⁰ Boulding and Brooks, above n115, 41.

could be found outside of Brisbane.¹⁶¹ Some FASD sufferers require lists to ensure they complete simple tasks like showering and teeth brushing.¹⁶² 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 problem contacts and can help with making sure the defendant attends appointments.¹⁶³ 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 will be able to involve community members informally in supervision.¹⁶⁴

Sentencing justices and legal representatives need to be careful to use plain and simple or 'concrete' language in explaining any court order.¹⁶⁵ 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.¹⁶⁶ 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 as a result, once back in the community there may be difficulty with compliance.¹⁶⁷ 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 structures¹⁶⁸ so that the defendant is constantly reminded of the rule-sanction connection.¹⁶⁹ Wartnik suggests that the FASD defendant should be regularly reminded of the connection between, for example, the community work carried out and the need to not drink alcohol, if alcohol abuse has been an important secondary effect. As Roach and Bailey observe, memory problems and impulsivity are a recipe for breaches of conditions.¹⁷⁰ Lack of compliance with court orders often leads FASD defendants to become further enmeshed in the criminal justice

¹⁶¹ This was the recommendation made in one expert report in the case of *R v Twaddle* [2008] (Unreported QDC, Durward J, 24 January 2008) 5. For the background to this case see Janet Hammill, 'Alcohol and Pregnancy, No Blame, No Shame: A Case Study' (2007) 43 *Australian Children's Rights News* 4.

¹⁶² *R v MacKenzie* [2007] BCPC 57 [11].

¹⁶³ Boulding, above n158, [7].

¹⁶⁴ Roach and Bailey, above n9, 52; referring to *R v L.E.K* [2001] SJ No 434 (Youth Ct); *R v W.A.L.D* [2004] SKPC 40.

¹⁶⁵ *R v Quash* [2009] YKTC 54 [93]; *R v Elias* [2009] YKTC 59 [36]-[37] (per Cozens TCJ); Diane Fast and Julianne Conry, 'Fetal alcohol spectrum disorders and the criminal justice system' (2009) 15 *Developmental Disabilities research Reviews* 250, 256.

¹⁶⁶ Hornick et al, above n19, 30

¹⁶⁷ Fast and Conry, above n26, 165.

¹⁶⁸ Boulding, above n112, [4].

¹⁶⁹ Anthony Wartnik, 'Stopping the Revolving Door of the Justice Systems', 2007, available at: <<http://uwcita.org/CITAv1008/trainingmaterials/fasd.html>> accessed 20 January 2010.

¹⁷⁰ Roach and Bailey, above n9, 49.

system as a result of breach charges¹⁷¹ 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 ten years,¹⁷² 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.¹⁷³ 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.

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 as, 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.¹⁷⁴ 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.¹⁷⁵

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,¹⁷⁶ 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 states have not 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'.¹⁷⁷

One practitioner noted the problem with lack of specific FASD services:

...the 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.¹⁷⁸

¹⁷¹ *R v Dayfoot* [2007] ONCJ 332 [19].

¹⁷² *R v SRJ* [2001] YJ No 123 YKSC 55.

¹⁷³ *Dangerous Prisoners (Sexual Offenders) Act Dangerous Sexual Offenders Act 2006* (WA), *Crimes (Serious Sexual Offenders) Act 2006* (NSW); for further discussion see Douglas, above n129.

¹⁷⁴ *R v Harper* (2009) YKTC 18 [25], [53].

¹⁷⁵ *R v Harper* (2009) YKTC 18 [25], [53].

¹⁷⁶ See for example: *R v Doolan* [2009] NTS 60; *DPP v Moore* [2009] VSCA 264; *JL v Morfoot* [2005] SCTSC 38; *R v Korhonen* [1999] NSWSC 933; *The State of Western Australia v Cox* [2006] WASC 287; *Alchin v South Australian Police* [1995] SCSA 981; *R v Bugmy* [2007] NSWDC 215.

¹⁷⁷ See for example *R v Twaddle* [2008] (Unreported QDC, Durward J, 24 January 2008) 5, where this occurred despite expert reports that identified FASD.

¹⁷⁸ ATSILS interview above n1, 5.

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.

The provision of general services in rural and remote communities in Australia is already a concern,¹⁷⁹ aside from a consideration of the specialised and increased levels of service and supervision that a FASD sufferer may need. Even if required services are available, they may not be integrated, accessible, readily available,¹⁸⁰ or able to be individualised to the needs of a FASD sufferer.¹⁸¹ Ultimately providing an 'external brain' will be beyond the capacity of most communities.¹⁸² Despite over ten 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:

We have yet to discover a treatment program that works well with persons with FASD...[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.¹⁸³

Despite this position a practitioner suggested that courts and practitioners need to be:

...inventive ... about what they can do, and this is also borne out I guess in the special circumstances court. So long as the offences are not that serious and you can get an offender into special circumstances court if they have this diagnosis, then that's great. They're intensively managed from thereon in till whenever it's considered they no longer need to be intensively managed.... they can certainly drag it on quite a long way to make sure things are in place.¹⁸⁴

Where community protection is an important consideration, separation in a secure community setting should be the aim.¹⁸⁵ However it has been recognised that in Canada there are few credible jail alternatives¹⁸⁶ and this is doubtlessly the case in Australia as well. Given the high risk of re-offending associated with many FASD defendants, imprisonment is common. However jail should not be used to warehouse individuals with FASD simply because they are too difficult to deal with.¹⁸⁷

¹⁷⁹ For example see generally *R v. KU & Ors; ex parte A-G* (Qld) [2008] QCA 154 (13 June 2008) [21].

¹⁸⁰ Hornick et al, above n19, 14.

¹⁸¹ Chartrand and Forbes-Chilibeck, above n19, 54.

¹⁸² Robin La Due and Tom Dunne, 'Fetal Alcohol Syndrome: Implications for Sentencing in the criminal Justice System Part II' (1997) 5(2) *Family Empowerment Newsletter* 2, 3; *R v Harper* (2009) YKTC 18 [26].

¹⁸³ *R v Keewatin* [2009] SKQB 58 [42].

¹⁸⁴ AT SILS interview above n1, 13. In Brisbane the special circumstances court sits once each week in the magistrate's court. It is focussed on finding inventive solutions relating to – for example – how to structure bail for a homeless person, see Tamara Walsh, 'The Queensland special Circumstances Court' (2007) 16 (4) *Journal of Judicial Administration* 223.

¹⁸⁵ *R v Harper* (2009) YKTC 18 [47]; *R v Williams* [1994] BCJ No 3160 (SC).

¹⁸⁶ Chartrand and Forbes-Chilibeck, above n19, 52; 53.

¹⁸⁷ *R v Sam* [1999] YJ No 112 (T.C) [12] (per Stuart J).

Incarceration

Where community protection is a significant concern and the crime is sufficiently serious incarceration may be the only real alternative.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ Often FASD individuals struggle to follow prison regulations and programs which might also lead to victimisation by both inmates and prison staff.¹⁹¹ This underlines the need to ensure that prison staff are aware of the behaviours and attitudes of FASD offenders; as such awareness may improve understanding and responses. Some researchers suggest that in certain situations FASD offenders should be separated out from the general prison community.¹⁹² 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.¹⁹³ Professionals often recommend that youth 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 learns in custody to the community.¹⁹⁴ However, although a community setting may be preferred, a need for community protection often takes priority over developing the defendant's potential.

Wartnik has stressed that if a custodial sentence is the only option, the sentence should not be too long as 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.¹⁹⁵ The social structures that may have assisted an FASD sufferer to cope before going to prison will have often collapsed by the time he is released and this is especially the case after a longer period of incarceration. Conry and Fast have observed that the

¹⁸⁸ See for example *R v Doolan* [2009] NTS 60 [17] (per Martin CJ).

¹⁸⁹ Fast and Conry, above n26, 164; *R v Harper* (2009) YKTC 18 [56]; *R v JMR* [2004] BCJ no. 2531; *People v W* 222 Mich. App. 160, 564 N.W. 2d 903 (Ct. App. 1997) 912.

¹⁹⁰ See generally *R v Verdins* [2007] VSCA 102, [30].

¹⁹¹ F Boland, Albert Chudley & B Grant, 'The challenge of fetal alcohol syndrome in adult offender populations' (2002) 14 *Forum on Correctional Research* 61; Boulding, above n112, [4].

¹⁹² Julianne Conry and Dianne Fast, 'Fetal alcohol syndrome and the criminal justice system, 2000, Vancouver, BC, British Columbia Fetal Alcohol Syndrome Resource Society 74-75.

¹⁹³ *R v Doolan* [2009] NTSC 60 [17] (per Martin CJ).

¹⁹⁴ *R v M (B)* (2003) SKPC 83, 22.

¹⁹⁵ Wartnik, above n169.

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.¹⁹⁶ 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.¹⁹⁷ 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.¹⁹⁸ The Canadian case of *Elias* offers a useful example of this approach. In this case the sentencing judge sentenced the FASD offender to 15 months imprisonment followed by two years of probation. In sentencing *Elias* he observed that:

...the probation should be as minimally intrusive as possible and should be designed to make it as clear as possible so that Ms Elias...can do the best she can to follow this one. I do not wish to set her up for future failures or breaches...this is designed for one primary purpose, which is the rehabilitation of Ms. Elias, which will, ultimately, best protect society and anyone close to Ms Elias.¹⁹⁹

In some cases imprisonment will be the only way to provide the offender with the required supervision and support. Incarceration maybe the appropriate avenue if community protection is a significant issue and treatment is available in the jail. In some Canadian cases programs offered in jail have been considered to be the best programs available for the FASD offender.²⁰⁰ Roach and Bailey observe that there is a risk that offenders maybe sentenced to a longer period of imprisonment to make use of such jail programs;²⁰¹ this will need to be reconciled with the principle of proportionality and totality. Similar to concerns raised with respect to programs associated with probation orders, Conry and Fast argue that the vocational programs suitable for the general jail population may need to be modified for FASD inmates.²⁰² In a recent Canadian case Justice Cozens 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.²⁰³

Cozens TCJ noted that he 'wouldn't put any... negative spin' on her failure to engage in rehabilitation given her cognitive disability. Cozens TCJ's approach may be important in parole considerations as

¹⁹⁶ Fast and Conry, above n26,164.

¹⁹⁷ Ibid 164.

¹⁹⁸ Wartnik, above n169; see also *R v DP* [2004] BCPC 35.

¹⁹⁹ *R v Elias* [2009] YKTC 59 [35] (per Cozens TCJ).

²⁰⁰ Roach and Bailey, above n10, 44.

²⁰¹ Ibid 44. They point to the case of *R v SLN* [1998] SJ no. 709 Youth Court.

²⁰² Julianne Conry and Dianne Fast, 'Fetal alcohol syndrome and the criminal justice system, 2000, Vancouver, BC, British Columbia Fetal Alcohol Syndrome Resource Society 74-75.

²⁰³ *R v Elias* [2009] YKTC 59 [30]-[31] (per Cozens TCJ).

well as sentencing cases. His approach constructs the defendant's failure to engage with programs as resulting from her cognitive disadvantage rather than her general incorrigibility.

In a recent Northern Territory case of *Doolan*,²⁰⁴ 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'.²⁰⁵ However Martin CJ recommended some flexibility in the approach to incarceration and he 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 and the case for such management was not made out.'²⁰⁶ This approach suggests that existing sentencing options may be able to be delivered flexibly, in a way that both supports FASD offenders and protects the community.

Conclusion

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.²⁰⁷ Improved education for health professionals in relation to FASD diagnosis also appears to be necessary. In *R v Harper* it was observed that 'the justice system should not be used as a substitute for social services and supports for the most vulnerable citizens'²⁰⁸ however 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. A recent Canadian study found that criminal justice practitioners wanted more research information,²⁰⁹ a list of qualified physicians for FASD referral, better diagnostic information, awareness of treatment possibilities and practice guidelines.²¹⁰ In this same study respondents overwhelmingly accepted that improved diagnosis would lead to more appropriate consequences for FASD defendants facing the criminal justice system.²¹¹ No doubt similar developments would be welcomed in Australia. The need for a therapeutic court specifically for

²⁰⁴ *R v Doolan* [2009] NTSC 60

²⁰⁵ *R v Doolan* [2009] NTSC 60 [17] (per Martin CJ).

²⁰⁶ *R v Doolan* [2009] NTSC 60 [25] (per Martin CJ).

²⁰⁷ See generally NOFASARD Australia which provides information about a number of current campaigns, <<http://www.nofasard.org/>> at 10 December 2009.

²⁰⁸ *R v Harper* (2009) YKTC 18 [25].

²⁰⁹ Bouding and Brooks recommend that every criminal lawyer must have access to Anne Streissguth, *Fetal Alcohol Syndrome: A Guide for Families and Communities* (1997) ; see Boulding and Brooks, above n115, 34.

²¹⁰ Lori Cox, Donald Clairmount and Seamus Cox, 'Knowledge and attitudes of criminal justice professionals in relation to fetal alcohol spectrum disorder' (2008) 15 (2) *Canadian Journal for Clinical Pharmacology* 306, 309.

²¹¹ *Ibid* at 309; eighty percent of respondents believed this.

FASD offenders was echoed in another Canadian study into what prosecutors and judges wanted.²¹² 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.²¹³ It may be appropriate, considering the apparent under-diagnosis of FASD, to require sentencing report writers to 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 directed towards therapy are needed, the first step is awareness.

²¹² Paul Chartrand, 'Aboriginal people and the Criminal Justice System in Saskatchewan: What next?' (2005) 68 *Saskatchewan Law Review* 253, 259.

²¹³ Burd et al, above n47, 7.