

FASD and the Criminal Justice System

¹*Courtney R. Green, PhD ; ¹Jocelynn L. Cook, PhD, MBA; ^{1,2}Michelle Stewart, PhD ; and ¹Amy Salmon, PhD*

¹*Canada Fetal Alcohol Spectrum Disorder Research Network; ²University of Regina*

Issue

Fetal Alcohol Spectrum Disorder (FASD) is the most common preventable cause of developmental disability in Canada. Individuals with FASD frequently come into contact with many areas of the justice system: as victims of crime, as witnesses, as individuals in conflict with the law, and in family and civil law matters. There is a need for enhanced understanding of the concerns of people living with FASD in all of these areas of the justice system.

Background

FASD is the umbrella term that represents a cluster of diagnoses that result from prenatal exposure to alcohol, causing organic brain injury. Individuals with FASD experience mild to severe cognitive deficits that can compromise their level of intellectual function. When individuals with FASD are not properly supported, these deficits can result in criminal activities and behaviours, reinforced by challenging social circumstances. This in turn may place them at increased risk for having contact with the justice sector¹ as victims, offenders and witnesses.

Among the difficulties faced by those with FASD, impairments including language comprehension, memory, attention and reasoning may place them at further risk for being evaluated negatively by those in criminal-legal environments². For example, although individuals with FASD can be extremely talkative, impairments in both receptive and expressive language are common, leading others to overestimate their competence and level of understanding. Due to elements of their disability, some individuals with FASD may confabulate, which is a blending of fictional and actual experiences. This may look like “lying” or “distorting the truth” which can complicate an investigation, as individuals may not be able to convey events accurately (as a witness, offender or victim). Investigators need to understand the complex elements of FASD as misunderstandings about the disorder can have a large impact on the outcomes.

In a recent study of young offenders with FASD, psycholegal abilities (i.e., their understanding and appreciation of legal jargon, factual knowledge of criminal procedure, the nature and object of the proceedings, and the ability to participate in a

defence and communicate with counsel) were significantly deficient in the majority of participants (90%) compared to young offenders without FASD³. These findings underscore the importance of individualized and comprehensive forensic assessments for individuals with FASD. In the absence of an early diagnosis and receipt of effective treatment⁴, affected individuals are at increased risk of developing mental health issues⁵, which can further contribute to adverse behaviours and place them in circumstances which further increase the risk for coming into contact with the justice system.

This combination of individual, professional, and systemic factors converge to result in a disproportionate number of youth with FASD being incarcerated. In fact, youth with FASD have been found to be 10-19 times more likely to be incarcerated than youth without FASD⁶. In another sample of 253 individuals with FASD, 60% reported a history of being charged, convicted or in trouble with the authorities and 42% of adults had been incarcerated⁷. Recently, data from the Forensic Outpatient Clinic in Saskatchewan revealed that the rate of FASD diagnosis was 55.5% in their adult population⁸.

All of the available evidence to date indicates both the necessity and the value of incorporating FASD screening and diagnosis into justice settings⁶. In the absence of a full diagnosis (that requires a multi-disciplinary team), several screening tools have been developed and validated, including the FASD checklist⁹ and the Youth Probation Officers' Guide to FASD Screening and Referral^{10,11}. With improved understanding and recognition of FASD in the criminal justice system, appropriate and early interventions and management plans can be implemented. Whether encountering the justice system as a witness, victim or offender, individuals with FASD have unique and often complex needs that are not supported in the current justice system model. With improved training of FASD for frontline workers, individuals with FASD will have access to equitable justice outcomes.

Recommendations

- 1. Expand the scope of FASD knowledge through training for those working in the justice system.**
 - a. Foster proactive approaches to supporting people with FASD that reduce or eliminate the likelihood that they will come into conflict with the law, and which enable them to access the justice system equitably, with accommodations appropriate for their disability.
 - b. Increase legal education and training of FASD for members of the criminal justice system, including probation officers, court workers, lawyers and judges¹². Police officers are often interested in receiving more information about FASD, but it must be delivered in a manner relevant to their frontline experiences¹³. These resources must be developed collaboratively to ensure trainings are most effective.
 - c. Post local FASD resources including diagnosis and mentoring programs. Make these resources visible to workers and clients alike.

2. Increase court supports for families and individuals with FASD.

- a. Implement or expand court worker programs that assist individuals as they navigate the court system. These mentors can assist individuals to remember important dates or requirements relative to their case. These individuals could also be trained to work with a wide-range of clients, including those with other cognitive disabilities.
- b. Provide specific support for caregivers and parents within existing social service and community networks that can assist them and their child as they navigate the criminal justice system. For example, biological parents may struggle with their own issues (e.g., abuse, criminal behaviour), while foster/adoptive parents may not understand how their child's neurocognitive impairments can result in criminal activity.

3. Introduce interventions that are coordinated by a community mentor

- a. Provide targeted support and resources for individuals with FASD who have been in contact with the criminal justice system.
- b. Mentorship programs (both institutional and community-based), family therapy (specific support focused on re-entering the community), and professional aftercare and intensive case management (ranging from work with health care practitioners to group home operators and case workers) have been suggested to maximize success and reduce the likelihood of recidivism for individuals with FASD⁸.

4. Encourage expanded use of diversion, conferencing, therapeutic courts, community courts, and FASD-informed sentencing practices

- a. Develop FASD-informed practices that recognize the various limitations and concerns that could compromise a fair trial. Alternatives to incarceration can include conditional sentences, diversion or sentencing circles (i.e., community-directed process to develop consensus on appropriate sentencing plans). Additionally, therapeutic or community court models focus on the individual, the importance of community supports and appropriate conditions or sanctions that meet a person where they are. These must be explored in situations involving individuals with FASD, and be delivered in ways that are informed by the needs and concerns of those who live with this disability. Encourage sentences for individuals with FASD aimed at improving or changing living and social situations, instead of behaviour.
- b. Promote collaborative approaches to case management, which account for the multi-disciplinary and multi-sectoral support needs of people who live with FASD.

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