

FETAL ALCOHOL SPECTRUM DISORDERS (FASD) AND THE CRIMINAL JUSTICE SYSTEM

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FASD



- Fetal Alcohol Syndrome (FAS)
- Partial Alcohol Syndrome (pFAS)
- Neurodevelopmental Disorders - Alcohol Exposed (ND-AE)

FASD and disability

Primary

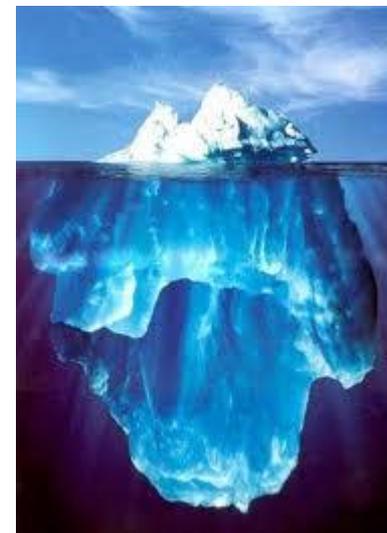
- Brain injury/development:
 - **A**ttention
 - **L**earning
 - **A**daptation
 - **R**easoning
 - **M**emory
- Hearing, sight. Skeletal, soft tissue...

Secondary

- Disrupted schooling
- **Trouble with the law**
- Substance abuse
- Mental health issues

Low IQ (sometimes)

- Only half of those with FASD have an IQ of less than 70.
- Some research suggests that only 20-25% of those who are compromised by FASD will have a low IQ.
- Contributes to invisibility.



FARE funded research: recognition key

49 members of Queensland judiciary completed the survey. This included 37 magistrates

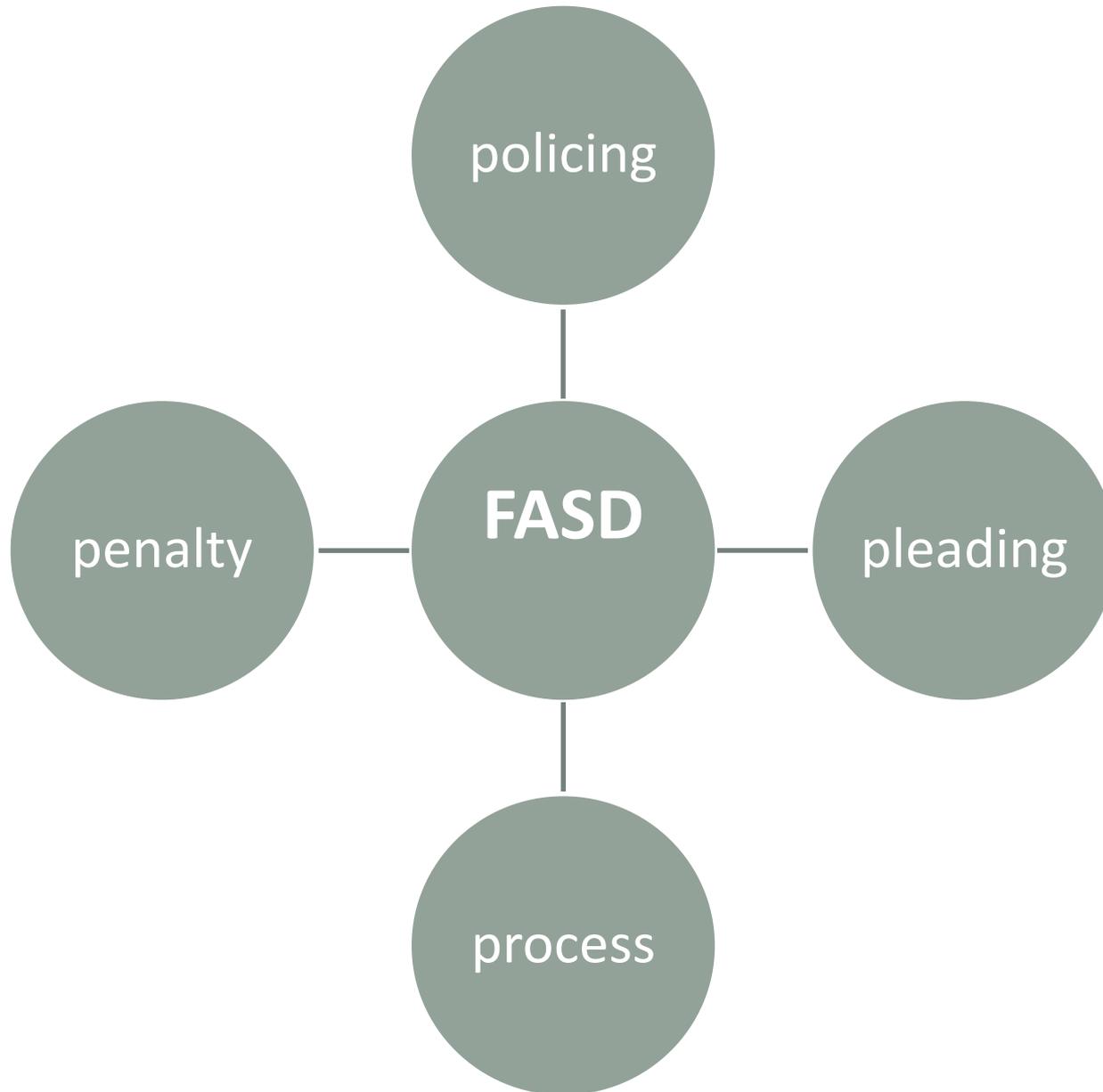
85% of respondents wanted **more information** about FASD

77% of respondents identified 'obvious low IQ' as a factor that made them suspect FASD

Most judges who suspected FASD (82%) had 'never' sent an accused person for assessment to confirm the suspected FASD diagnosis. The most commonly selected the reasons for not seeking an assessment (61%) was that the judge 'did not know where to send the person'

74% wanted a list of qualified experts who could be available to diagnose individuals who may have FASD and to assess specific needs and limitations. 77% wanted information about where to refer for diagnosis and treatment.

85% wanted **guidelines** on how to deal with FASD



Youth Justice Program in Manitoba red flags for FASD screening include:

- a repeated history of 'fail to comply',
- lacking empathy, poor school experiences,
- unable to connect actions with consequences,
- does not seem to be affected by past punishments,
- opportunity crimes rather than planned crimes,
- crimes that involve risky behaviour for little gain gang involvement,
- superficial relationships / friends, Harvie et al 2011
- an 'alphabet soup' diagnosis.

Offence escalation

- act inappropriately when touched due to sensory integration problems
- become aggressive due to sensory overload from noise, flashing lights and activity at the scene or inability to read non-verbal gestures
- respond inappropriately to what was being asked because of difficulty processing language
- be unable to organize thoughts, process information or understand written language.

(Green 2006)

Communication

Avoid

- asking complex **multi-step questions**
- questions containing **complex wording**
- **pronouns** – use the names of people to whom you are referring
- assumptions about the accused's ability to understand and respond appropriately.
- **double negatives** such as “Did you not see...?” and
- using **abstract terms**.

Confabulation-suggestibility

- Compromised reasoning- high level suggestibility as victim or accused - issues for record of interview, giving evidence, (false confessions), pleas of guilty, truly understanding sentence.
- Confabulation- act of 'honest lying' as opposed to 'deliberate lying'
- May entail / result in filling gaps in memory with false memories or information that seems to fit
- people with FASD may have a 'disturbed sense of chronology' -earlier memories judged to be currently relevant; stressful situations may result in attempts to problem solve drawing on this disturbed chronology.

Pora v The Queen [2015] UKPC 9



Pora:

Dr McGinn: Neuropsychologist

- executive functions were impaired making it difficult for him to plan,
- **makes impulsive errors and his thinking is limited,**
- cognitive rigidity -difficult to adapt to different circumstances,
- **alcohol exposed,**
- low birth weight,
- **easily led and suggestible,**
- 'swiss cheese' brain damage.

Dr Immelman - consultant psychiatrist

- IQ of 85

Three points that might be associated with confabulation.

- first uncertainty about what the 'correct' answer might be;
- second trusting that the interviewer's questions were benign;
- third he was reluctant to admit a lack of knowledge that he seemed to be expected to know about.

Court process

- Attention- ability to concentrate – way perceived in court – lacks empathy?
- Language- concrete thinkers, use of metaphor by police, lawyers, judiciary: ‘this is the end of the line’
- Reasoning- have difficulty perceiving similarities and differences, generalising information, translating information between contexts and from hearing to action.
- Memory – following evidence or conditions- eg adjournments, bail, disclosure.

Roach and Bailey (2009)

Consider specialised courts. Consider Language.

Slow the pace. Repeat.

AH v The State of Western Australia [2014]

WASCA 228 (10 December 2014)

Behaviour	FASD red flag
2011 offences: stealing cars, burglaries, no clear reason. Always in company.	<ul style="list-style-type: none"> • Opportunistic, risky and impulsive offending. • Cause and effect not thought out. • Highly suggestible?
2012 Medical reports -deficits in verbal skills, memory, executive function, academic skills, mother abused alcohol , school and drug problems.	<ul style="list-style-type: none"> • Learning • Reasoning • Memory • Also secondary disabilities.
Epilepsy and abnormal brain structure	Both may suggest FASD.
2012-2013 various breaches of court orders; more opportunistic and risky offending.	Breaches common- linked to memory, executive function.
2014 Mental health issues	Secondary disability.

Penalties and Sentences Act, s9

- (a) to punish
- (b) to rehabilitate
- (c) deterrence (special and general)
- (d) denunciation
- (e) community protection
- (f) a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).

Already case-law on these principles in cases of cognitive disability- same issues with FASD cases...but not sufficiently on the agenda.

See Verdins

‘the calculus of sentencing the average offender simply does not apply to an offender with FASD’

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

Think ‘can’t’ rather than ‘won’t’. (Diane Malbin)

Look to strengths

- Talkativeness or chattiness
- Curiosity
- Spontaneity
- Love of animals
- Generosity, helpfulness, nurturing ability
- Bright in some areas of cognitive development
- Loyalty, friendliness, affection, trust, gentleness
- Art
- Music
- Gardening
- Mechanics
- Construction
- Athletics – energy, determination, persistence

FASD guidebook for Police Officers – RCMP

Prison

- risk of longer sentence - community protection aspirations (but proportionality?)
- difficulty remembering / following prison rules
- poor social relationships
- poor judgment in group situations
- poor personal hygiene
- Inappropriate programs
- not learning from punishment and/or consequences
- frequent re-offending (in custody)
- mental illness.
- may be victimised in custody
- issues for getting parole

Conditional orders

- difficulty remembering / following conditions of bonds / probation ...leads to further punishment
- modified programs needed- group therapy may be problem...24 hour supervision

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

Sleeping in, delay in completing his biography, not receptive or engaged with group therapy and not reading the materials.

...These barriers are associated with FASD

R v Mumford [2007] Ontario Superior C of J Kitley J

Three things that work: 1. Reframe behaviours

Negative Behaviour	Misinterpretation- “Won’t”	Accurate Interpretation –“Can’t”
<p>Non-compliance Failure to appear Missing probation meetings Not abiding with conditions of release</p>	<p>Willful misconduct Stubborn Disregard for rules of court Indifference Disrespectful</p>	<p>Lose reminder notes and conditions information. Can’t understand the abstract concept of time Have difficulty getting organized.</p>
<p>Repeatedly making the same mistakes Recidivistic actions Correction does not work</p>	<p>Willful misconduct Manipulative</p>	<p>Cannot link cause to effect Cannot see similarities -Can’t remember</p>
<p>Repetitive behaviours Hitching and wiggling around in court; no eye contact</p>	<p>Seeking attention Bothering others Willful misconduct</p>	<p>Neurologically-based need to learn by doing Malbin 2002</p>

2. Adapt the environment

- Check out the individual's understanding of what he or she is being asked
- Provide one direction or rule at a time
- Use a lot of repetition
- Establish a mentor/buddy/ role model system
- Develop and utilise diversion programs
- Utilise support persons - CJGs
- Use simple wording on release forms and probation orders
- Be consistent in probation / parole orders and follow up – every day at the same time is best.

Dubovsky, 2008

3. External brain

- comprehensive and consistent supports to provide ongoing advice, direction, and structure, as well as to advocate on their behalf.
- comprehensive support is often referred to as an "External Brain."

<http://fasdjustice.ca/>

Thankyou!

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