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FASD and the Criminal Justice System: A Review

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Issue:

Involvement in the criminal justice system (CJS) has long been identified as a significant adverse outcome for many individuals with FASD.¹ The legal issues associated with FASD have substantial financial implications, with estimates of annual justice-related costs at \$1.2 billion per year in Canada, functioning as one of the greatest cost drivers linked with FASD.² Although there is growing interest in how to shape judicial responses, treatment, and policy to better address the needs of this population, the extent to which interventions and reforms are grounded in empirical evidence is unclear. Uninformed changes could not only prove to be ineffective but may even lead to unanticipated negative outcomes. The purpose of this issue paper is to provide a summary of the current state of the evidence on FASD in the CJS.

Background:

There have been many initiatives across Canada geared toward informing clinical and policy responses to better address the issue of FASD in the justice system, including numerous conferences, symposia, and meetings; resolutions from the [Canadian Bar Association](#); a [consensus statement](#) from the Institute of Health Economics; efforts at [legislative reform](#) to the *Criminal Code*; and a specific Call to Action in the [Truth and Reconciliation report](#).

Recently, a governmental *Steering Committee on FASD and Access to Justice* comprised of justice officials from across the country was formed to better understand the impact of FASD on individuals involved in the system. [Several recommendations](#) were generated geared toward improved access to justice for people with FASD. These were broad ranging and emphasized policy-based solutions, enhanced clinical and justice practices in the criminal justice context, and the development of an evidence-base through research to inform future decisions. Key recommendations included: evaluating the possibility of creating increased opportunity for court-ordered mental health assessments including consideration of FASD; conducting a review of the CJS in order to identify means to more adequately support vulnerable persons, including those with mental disorders and neurocognitive disabilities not limited to FASD; exploring programs to prevent justice involvement and reduce recidivism among justice-involved individuals with FASD; engaging in improved information sharing practices; embedding FASD into forensic mental health services; developing training programs for justice professionals; and conducting research related to prevalence, screening, and restorative justice.

Indeed, many groups across the country are calling for practice and policy reform related to FASD, but it is important that this reform be relevant to current practices and grounded in sound research evidence. We recently undertook a [systematic review of the literature](#) on CJS involvement among individuals with FASD, focused on studies contributing new empirical data. Studies on the criminalization of drinking during pregnancy, family law, and/or child welfare/custody cases were not included.

FASD awareness and knowledge. There have been a number of studies on the views and perspectives of justice professionals related to FASD. Researchers have found that there is a clear need and desire for additional knowledge, education, resources, and training opportunities among these professionals.³⁻⁶ Importantly, FASD is also emerging as a relevant issue for consideration in the courtroom.⁷⁻⁹

Prevalence and screening. No clear consensus currently exists on FASD prevalence in the CJS and reported rates vary. In North American studies of justice-involved youth and adults in justice contexts, estimates range from 10% to 23.3%.¹⁰⁻¹⁴ Researchers in Australia also point to the over-representation of FASD among justice-involved youth, with a recent estimate of 36% in one youth detention centre.¹⁵ Importantly, prevalence estimates also depend on how data is collected. For instance, researchers who surveyed Directors of Corrections in the early 2000s reported that only 13 of 148,979 offenders in Canada and 1 in over 3 million offenders in the US had a documented FAS diagnosis.^{16,17} This method is considerably different from active case ascertainment approaches, where researchers actively seek out individuals who may have FASD. Given the limited access to diagnostic services and lack of routine assessment in justice contexts, these figures highlight the extent to which FASD is likely currently under-identified.

Considering the consistently high rates of FASD in justice settings that are currently emerging, better screening tools and access to assessment are needed. There have been efforts to establish screening methods, ranging from training correctional officials to identify individuals who may have FASD, to intensively screening all inmates via medical evaluation.¹⁸ Although few studies empirically evaluate screening tools in this context, preliminary evidence has shown the potential utility of some measures.^{14,19}

Justice-based profiles and perspectives. Limited evidence suggests that individuals with FASD in forensic and correctional contexts experience different risk patterns and needs (e.g., earlier onset of behaviour problems, and higher rates of impairment, abuse, trauma, and parental substance use) compared to justice-involved individuals with and without other disabilities.²⁰⁻²² In a Canadian case study, researchers described the lives of two male offenders with FASD as marked by severe early adversity, trauma, social isolation, instability, and mental illness, but also notable strength and resilience.²³ In several studies evaluating the experiences, risks, and needs of Canadian justice-involved youth with FASD compared to those without FASD, researchers have shown that although justice-involved youth with FASD may be at increased risk for recidivism, resilience and protective factors may buffer that risk.²⁴ In the same sample, youth with FASD also had significantly more impaired psycholegal abilities, such as understanding their rights and the criminal justice process.²⁵ Other researchers reported that justice-involved youth with FASD assessed during forensic treatment presented with significant and varied deficits in verbal ability, cognitive flexibility, working memory, complex processing

speed, and language-based academics.²⁶ In the adult population, Brown and colleagues²⁷ found that a small sample of justice-involved men referred for FASD assessment displayed significantly greater interrogative suggestibility compared to the norm.

To better understand the lived experiences of justice-involved adults with FASD, Currie and colleagues²⁸ examined service access and factors that might influence outcomes. Justice involvement was associated with substance use; lack of access to an FASD-trained support worker; lower daily structure, routine, and supervision; and later life diagnosis. Pei and colleagues²⁹ explored the perspectives of another group of justice-involved Canadian adults with FASD and their service providers, and identified biopsychosocial factors that influenced system involvement and described what helped them to move beyond the system, including hope for a better future, willingness to change, and resilience.

Very little work has been done to specifically examine offending patterns of individuals with FASD, although in one early study researchers suggested that crimes against persons were the most common offense type in this population, and the nature of their first trouble with the law was most often theft or shoplifting committed between the ages of 9 and 14 years.¹ Importantly, staying in school and absence of substance abuse were related to lower rates of legal problems. More recent research in one sample of justice-involved youth with FASD demonstrated lengthy and entrenched offending patterns in many youth, earlier first contact with police compared to those without FASD, and higher historical and clinical risk factors related to increased recidivism risk.²² Although individuals with FASD are also thought to experience increased rates of victimization, including in those who are justice-involved, little research is available to characterize this additional vulnerability.³⁰

Interventions. Despite our growing knowledge of the needs of individuals with FASD who are justice-involved, there is a critical lack of research on FASD-informed justice interventions. To date, there has only been one published study in this area. Canadian researchers described a program for justice-involved adults with suspected FASD and found that service providers perceived the program to be building capacity, humanizing offenders, and creating bridges, but also identified barriers to moving forward, such as challenges with translating program progress to long-term supports, and overcoming systemic limitations.³¹ Although this study is an important step toward better understanding how to support offenders with FASD, more work is needed to explore the implementation, feasibility, and impact of such efforts.

Recommendations:

1. FASD impacts people differently at an individual level. Individuals with FASD each experience varied strengths, abilities, challenges, and needs. An integrated and individualized response to justice-involved youth and adults with FASD is indicated to address core underlying issues and achieve just and successful outcomes.
2. A “one size fits all” approach will not be appropriate or sufficient for improving outcomes of individuals with FASD who are justice-involved. Rather, an alternative approach may be to develop justice-based interventions that recognize and support “cognitive diversity,” and incorporate a high degree of flexibility and individualization to address the needs of each individual being served.

3. Expanding the framework within which FASD and criminality are considered might serve to improve outcomes, and alternative justice measures may be appropriate in some cases.
4. We must consider the potentially damaging consequences of associating FASD with CJS involvement. It is important to understand that many individuals with FASD *do not* encounter the CJS, and that the difficulties experienced by individuals with FASD who end up involved in the CJS are not necessarily *unique* to FASD. Rather, the constellation of challenges and life experiences that individuals with FASD experience may lead to increased risk for a range of adverse outcomes, including CJS involvement.
5. The factors underlying CJS involvement involve broad social justice issues such as poverty, unstable housing, racialized practices, and concurrent disabilities. Accordingly, the social determinants of health and issues underlying CJS involvement must be prioritized.
6. Numerous gaps exist in the literature, requiring further exploration, including: justice-specific FASD screening and assessment practices, FASD-informed justice interventions, FASD education and training for justice professionals, risk assessment in FASD (e.g., whether measures should be adapted), as well as crime prevention among individuals with FASD and identification of protective factors that support resiliency and prosocial behaviours. Important insight into these gaps may be gained from research with other populations, including those with mental health challenges and other disabilities.

Summary:

There is an urgent need for a stronger connection between research, practice, and policy related to FASD and the CJS. Researchers, service providers, and policy-makers are eager to pursue change, however there is limited empirical evidence to guide this change. More research to accurately identify individuals with FASD who are justice-involved, examine their trajectories within the CJS, and explore how we might better respond, is urgently needed to inform next steps and evidence-based policy. There are significant risks in developing programs and initiatives that are not informed by high quality research. Accordingly, this summary highlights the current strengths in the literature while also speaking to the need for increased research and dissemination of existing evidence in order to cohesively and confidently move toward improved outcomes for individuals with FASD.

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