
Foetal Alcohol Spectrum Disorders: A consideration of sentencing and unreliable confessions

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*While Foetal Alcohol Spectrum Disorders (FASDs) are now a strong focus of policy-makers throughout Australia, they have received strikingly little consideration in Australian criminal courts. Many people who have an FASD are highly suggestible, have difficulty linking their actions to consequences, controlling impulses and remembering things, and thus FASD raises particular issues for appropriate sentencing and the admissibility of evidence. This article considers the approach of Australian criminal courts to FASD. It reviews the recent case of *AH v Western Australia* which exemplifies the difficulties associated with appropriate sentencing in cases where the accused is likely to have an FASD. The article also considers the implications for Australian courts of the New Zealand case of *Pora v The Queen*, recently heard by the Privy Council. In this case, the Privy Council accepted expert evidence that people with FASD may confabulate evidence, potentially making their testimony unreliable. The article concludes with an overview of developments in criminal policy and legal response in relation to FASD in the United States, Canada and Australia.*

INTRODUCTION

While Foetal Alcohol Spectrum Disorders (FASDs) are now an important focus of policy-makers throughout Australia,¹ they have received strikingly little comment in Australian courts, especially criminal courts. FASD is the umbrella term that describes the range of conditions that result from foetal exposure to alcohol during gestation. Many people who have an FASD are highly suggestible and have difficulty linking their actions to consequences, controlling impulses and remembering things, and thus FASD raises particular issues in the criminal justice process. For example, FASD may be an important consideration in the assessment of fitness to plead, appropriate sentencing and the reliability and admissibility of evidence.

This article begins with an overview of FASD. It then focuses on sentencing and FASD, referring to the recent case of *AH v Western Australia*² to highlight the difficulties FASD presents in considerations of sentencing. Next, the article considers the implications for Australian courts of the New Zealand case of *Pora v The Queen*,³ recently heard by the Privy Council. In this case, the Privy Council accepted expert evidence that some people with FASD may confabulate confessions and other evidence, potentially making their testimony unreliable. Finally, the article explores some key law and policy developments in Canada, the United States and Australia.

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¹ See generally Australian Government, *Responding to the Impact of Fetal Alcohol Spectrum Disorders in Australia: A Commonwealth Action Plan* (2014) <<http://www.health.gov.au/internet/main/publishing.nsf/Content/health-pubhlth-strateg-drugs-alcohol-index.htm>>.

² *AH v Western Australia* [2014] WASCA 228.

³ *Pora v The Queen* [2015] UKPC 9.

FOETAL ALCOHOL SPECTRUM DISORDER

FASD describes the range of effects that result from alcohol exposure to the foetus during gestation. The diagnoses associated with FASD in Australia include Foetal Alcohol Syndrome (FAS), Partial Foetal Alcohol Syndrome (pFAS) and Neurodevelopmental Disorders – Alcohol Exposed (ND-AE).⁴ Depending on the severity of the FASD, the effects can be wide-ranging. Effects may include hearing loss, damage to eyes affecting sight, organ damage and skeletal damage.⁵ From the legal perspective, the issue of most concern is the brain impairment often associated with FASD. Fast and Conry have developed the acronym ALARM to summarise the key issues.⁶ These are attention issues, learning difficulties, adaptation difficulties, reasoning problems (for example, difficulties understanding cause and effect and the impact of actions on others) and memory problems. These primary disabilities that arise directly from alcohol damage to the brain during gestation often contribute to what are described as “secondary disabilities” including disrupted schooling, trouble with the law and increased risk of imprisonment,⁷ inappropriate sexual behaviour,⁸ vulnerability to substance abuse and addiction and co-occurring mental health issues.⁹

FASD is the most common developmental disability. International research suggests that it may be present in approximately 1% of live births.¹⁰ FASD is said to be under-diagnosed¹¹ and it is likely that there are particularly high numbers of children in out-of-home care and many people in detention who have undiagnosed FASD.¹² Under-diagnosis is likely for a range of reasons including inconsistent reporting methods and data collection, the fact that routine assessment for FASD does not occur and that knowledge is still poor.¹³ Diagnosis of FASD relies on information about maternal alcohol exposure, growth deficiency, brain damage and facial features.¹⁴ FASD is associated with facial

⁴ See Sara McLean and Stewart McDougall, *Fetal Alcohol Spectrum Disorders: Current Issues in Awareness, Prevention and Intervention* (Australian Institute of Family Affairs, 2014) 2 <<https://aifs.gov.au/cfca/sites/default/files/publication-documents/cfca-paper29-fasd.pdf>>. Note the diagnosis: ND-AE is subject to approval of the proposed National Diagnostic Criteria for Australia, see Rochelle Watkins et al, “Recommendations from a Consensus Development Workshop on the Diagnosis of Fetal Alcohol Spectrum Disorders in Australia” (2013) 13 *BMC Pediatrics* 156. Note that ND-AE (or in US literature ND-PAE “Neurobehavioral Disorder with Prenatal Alcohol Exposure” replaces previous diagnosis of ARND – “Alcohol-Related Neurodevelopment Disorder” consistent with the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed), see Ira Chasnoff, Anne Wells and Lauren King, “Misdiagnosis and Missed Diagnosis in Foster and Adopted Children with Prenatal Alcohol Exposure” (2015) 135 *Pediatrics* 264, 266.

⁵ Kieran O’Malley, “Fetal Alcohol Spectrum Disorders: An Overview” in Kieran O’Malley (ed), *ADHD and Fetal Alcohol Spectrum Disorders FASD* (Nova Science Publishing, New York, 2007) 11.

⁶ Diane Fast and Julianne Conry, “The Challenge of Fetal Alcohol Syndrome in the Criminal Legal System” (2004) 9 *Addiction Biology* 161, 162.

⁷ It is reported that around 60% of those identified with FASD will have contact with the criminal justice system: see Larry Burd et al, “Fetal Alcohol Spectrum Disorder as a Marker for Increased Risk of Involvement with Corrections” (2010) 38 *Journal of Psychiatry and Law* 559.

⁸ Natalie Brown et al, “A Proposed Model Standard for Forensic Assessment of Fetal Alcohol Spectrum Disorders” (2010) 38 *Journal of Psychiatry and Law* 383, 394.

⁹ Jessica Wheeler, Kara Kenney and Valerie Temple, “Fetal Alcohol Spectrum Disorders: Exploratory Investigation of Services and Interventions for Adults” (2013) 19 *JoDD* 62; Ann Streissguth et al, “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects” (2004) 25 *J Dev Behav Pediatr* 228.

¹⁰ Michela Morleo et al, “Under Reporting of Foetal Alcohol Spectrum Disorders: An Analysis of Hospital Episode Statistics” (2011) 11 *BMC Pediatrics* 14.

¹¹ Chasnoff, Wells and King, n 4, 268; Philip May et al, “Prevalence and Characteristics of Fetal Alcohol Spectrum Disorders” (2014) 134 *Pediatrics* 855, 862.

¹² Svetlana Popova et al, “Canadian Children and Youth in Care: The Cost of Fetal Alcohol Spectrum Disorder” (2014) 43 *Child Youth Care Forum* 83; Samantha Parkinson and Sara McLean, “Foetal Alcohol Spectrum Disorder in Children: Implications for Judicial Administration” (2013) 22 *JJA* 138; McLean and McDougall, n 4, 10.

¹³ Lucy Burns, Emma Black and Elizabeth Elliott, *Fetal Alcohol Spectrum Disorders in Australia: An Update* (Intergovernmental Committee on Drugs Working Party on Fetal Alcohol Spectrum Disorders, 2009); Lucy Burns et al, “Counting Fetal Alcohol Spectrum Disorder in Australia: The Evidence and the Challenges” (2013) 32 *Drug Alcohol Review* 461.

¹⁴ May et al, n 11, 856-857.

dismorphology, characterised by a shorter distance between each end of the eye socket openings (called the palpebral fissure), a smooth or indistinct philtrum and a thin upper lip.¹⁵ However, many people who are compromised by FASD do not (clearly) have these facial anomalies.¹⁶ Secondly, most people who are compromised by FASD have a normal IQ with a mean in the low 70s for those with facial dismorphology and the low 80s for those without; only around 25% of those diagnosed with FASD have an IQ under 70.¹⁷ Typically people with FASD may receive “an alphabet soup” diagnosis (for example, ADHD – Attention Deficit Hyperactivity Disorder or ODD – Oppositional Defiance Disorder) that misses FASD.¹⁸ A further problem with FASD diagnosis is that there has not been a tool or method consistently recognised for diagnosis in Australia. This latter issue is a priority for the Australian government and a new diagnostic tool has been developed.¹⁹ Furthermore, there are increasing numbers of clinical professionals who are trained for FASD assessments in Australia.²⁰ This is likely to increase the capacity to diagnose and number of diagnoses.

SENTENCING AND FASD

The recent Western Australian decision of *AH v Western Australia*,²¹ involving a 21-year-old Indigenous woman from the Pilbara, highlights some of the issues faced by people with FASD who confront the criminal justice system and the issues around sentencing such a person. It is notable that in this case the Court of Appeal remarked that it was surprising that no consideration had been given to the possibility that AH might be afflicted by FASD.²² The red flags for FASD are identified within the case history outlined below.

AH v Western Australia: A sentencing case study through the lens of FASD

AH had a brief history of offending as a child but her difficulties with the criminal justice system really began when she was 16. In 2009, she was convicted of driving an unroadworthy vehicle without a licence, ordered to complete a 10-hour Community Service Order and disqualified from driving for three months. Just a couple of weeks after committing these offences she drove while unlicensed and was subsequently disqualified from driving and fined. On 3 December 2011, as an 18-year-old, AH committed a series of offences including stealing a car from a person she knew and driving the stolen car around town. A few days later, AH, in company with three others, took cash and cigarettes from an unlocked car. Then on 9 December 2011 she entered an unlocked house with another person, stole car keys and took a car. She was remanded in custody for eight months until August 2012. The first indicator for FASD in the brief history of offending outlined to date is the opportunistic, risky and impulsive style of offending AH was engaged in. The offending provided either only modest outcomes or no perceivable gain to her. This type of risky and impulsive offending has been identified as common among those diagnosed with FASD.²³ Similarly AH almost always offended with others. This, too, is common among those who are diagnosed with FASD and may raise the question of

¹⁵ Susan Astley et al, “Neuropsychological and Behavioral Outcomes from a Comprehensive Magnetic Resonance Study of Children with Fetal Alcohol Spectrum Disorders” (2009) 16 *Can J Clin Pharmacol* 178.

¹⁶ May et al, n 11, 862-863.

¹⁷ E Riley, M Infante and K Warren, “Fetal Alcohol Syndrome” in L Squire (ed), *Encyclopedia of Neuroscience* (Academic Press, Oxford, 2009) Vol 4, 213-220.

¹⁸ Chasnoff, Wells and King, n 4, 266.

¹⁹ Foundation for Alcohol Research and Education, *The Australian Fetal Alcohol Disorders Action Plan 2013-2016*, 8, <<http://www.fare.org.au/wp-content/uploads/research/FARE-FASD-Plan.pdf>>.

²⁰ See Telethon Kids Institute, “FASD Diagnostic Instrument Trial and Implementation” <<http://alcoholpregnancy.telethonkids.org.au/our-research/research-projects/current-research-projects/diagnosis/fasd-diagnostic-instrument-trial-and-implementation>>.

²¹ *AH v Western Australia* [2014] WASCA 228.

²² *AH v Western Australia* [2014] WASCA 228, [9].

²³ GohYi et al, “Development of Canadian Screening Tools for Fetal Alcohol Spectrum Disorder” (2008) 15 *Can J Clin Pharmacol* 344, 346; Timothy Moore and Melvin Green, “Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System” (2004) 19 *Criminal Reports* 99, 99.

whether AH is easily suggestible as a result of brain impairment.²⁴ Both of these aspects of AH's criminal offending may point to executive function difficulties in identifying cause and effect and thinking through the impact of behaviour.

In August 2012, AH was transferred from remand to hospital because of seizures and significant distress in prison.²⁵ An electroencephalogram (EEG) showed abnormality in brain structure. While on remand, AH was examined by several clinicians.²⁶ Neuropsychological review notes identified deficits in verbal skills, weak working memory, impaired executive function and academic skills consistent with mild to moderate intellectual disability. The notes also recorded poor literacy and numeracy and vulnerability to exploitation. A forensic psychologist, Claire Lynn, reported that, due to her mother's alcohol abuse, AH grew up with her grandparents, that AH had struggled through school and that AH lacked literacy. According to Lynn's report, AH occasionally used alcohol and cannabis. Lynn's report recommended: psychiatric evaluation, psychological intervention, educational and vocational intervention and assistance, substance abuse intervention, monitoring and mentoring. Finally, a pre-sentence report was prepared. It specifically identified the need for appropriate community support – but also observed this was difficult to achieve in the remote area where AH lived.

The EEG, clinicians' notes, Lynn's report and the pre-sentence report identify further red flags for FASD. While the abnormal brain structure identified in the EEG identified the reason for AH's seizures, which incidentally have been noted to be common among those with FASD,²⁷ further investigation may also have pointed to abnormal brain structure more directly associated with FASD.²⁸ As outlined earlier, problems with memory, academic skills and vulnerability to exploitation may result from brain injury associated with FASD. Perhaps most importantly, however, was the information that AH grew up with grandparents because her mother abused alcohol. It is often difficult to obtain information about the history of maternal drinking as commonly children have been removed from their mother's care; however, a history of removal emphasises the need to seek information about the reasons for removal.²⁹ In all diagnostic approaches to FASD, information about the mother's alcohol use (during pregnancy) is an important piece of information.

By the time AH was sentenced³⁰ in the District Court, she had spent eight months on remand. Derrick DCJ ordered a community-based order for six months with community supervision, monitoring and support services. He acknowledged the difficulties of supporting AH given her lifestyle and where she lived but observed: "I do not think that it is appropriate to simply throw one's hands up and effectively give up on you by leaving you entirely to your own devices."³¹ AH reported to justice services on two occasions after being sentenced and when she was told that she should report on a different day, she subsequently failed to show up. Efforts were made to locate her and a home visit took place. A warning letter was also issued, in relation to which the Court of Appeal noted the futility of this approach given AH's illiteracy, itinerant lifestyle and her disability.³² The Court of Appeal observed that no assessments were made and no programs were settled and there was no

²⁴ Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42 *UBCLR* 1, 21.

²⁵ Researchers have reported that people with FASD often face significant challenges in correctional settings including difficulty following rules and routine, victimisation and negative social interactions, see Jerrod Brown et al, "Fetal Alcohol Spectrum Disorder in Confinement Settings: A Review for Correctional Professionals" (2015) 4 *Journal of Law Enforcement* 1, 2.

²⁶ *AH v Western Australia* [2014] WASCA 228, [17]-[33].

²⁷ Stephanie Bell et al, "The Remarkably High Prevalence of Epilepsy and Seizure History in Fetal Alcohol Spectrum Disorders" (2010) 34 *Alcohol Clin Exp Res* 1084.

²⁸ Alexa Nardelli, "Extensive Deep Grey Matter Volume Reductions in Children and Adolescents with Fetal Alcohol Spectrum Disorders" (2011) 35 *Alcohol Clin Exp Res* 1404.

²⁹ Fast and Conry, n 6, 162.

³⁰ For two counts of stealing a motor vehicle, one count of aggravated burglary, one count of stealing, and one count of driving while disqualified as a result of the events in early December 2011.

³¹ *AH v Western Australia* [2014] WASCA 228, [35]

³² *AH v Western Australia* [2014] WASCA 228, [37]

meaningful supervision during this period. In the later appeal against sentence in relation to a breach of the community-based order, the Court of Appeal observed that: “If AH was to be assisted in any meaningful way, and the community protected from the risk which she posed, something more than standard methodology was required but it was not provided.”³³

It was an offence of possessing a smoking utensil that led to a breach of the community-based order in January 2013 and AH was required to be resentenced. She was held on remand for two months during which time a psychologist’s report, a psychiatrist’s report and two pre-sentence reports were prepared.³⁴ These reports identified poor insight, that she was easily confused, she had difficulty problem-solving and planning and a low IQ (55-70). The reports recommended engagement with mental health services, community monitoring, and that a guardian be provided. It is notable that AH appears to have entrenched herself in the criminal justice system through breaches of court-ordered conditions. It has been observed by others that the memory problems and impulsivity associated with FASD often result in breaches of court orders.³⁵ The fact that AH did make contact with the relevant justice services, just on the wrong days, points to issues associated with her disability rather than to a considered refusal to engage with her sentencing requirements. There is also a risk of higher sentence if breaches are perceived by probation officers and sentencing judges as an active refusal to engage (and therefore an aggravating feature) rather than as resulting from the offender’s disability.³⁶

On 22 July 2013, Judge Deane resentenced AH and recommended “relevant agencies take a collaborative approach”.³⁷ He was aware that apart from trying to make contact with AH, no resources had been applied to her case to address her issues. He recommended that AH should be referred to disability services and be provided with a guardian and support for treatment needs in the community. He placed AH on a community-based order with a program requirement for six months. Guardianship applications and establishing disability services were not commenced during this period and AH subsequently committed a collection of “opportunity” offences, including stealing cars and burglary on two separate occasions. While on bail for these offences at a youth accommodation service, she was charged with possession of cannabis and remanded in custody. A further neuropsychological report was called for and it made similar recommendations to previous reports.³⁸ She was then sentenced to several terms of imprisonment with a total effective term of two years. In sentencing her, Judge Herron observed she had been “given opportunities” and that “deterrence was important”.³⁹

Courts throughout Australia are guided by similar aims of sentencing. In Western Australia, for example, aims include punishment, rehabilitation, deterrence, denunciation and community protection.⁴⁰ Similar aims guide Canadian judges where it has been observed there that “the calculus of sentencing the average offender simply does not apply to an offender with FASD”.⁴¹ Similarly, as the Court of Appeal in AH later observed, the aims of deterrence and punishment were “less significant” factors than rehabilitation given AH’s vulnerabilities and disabilities.⁴² However, it is important that rehabilitation is understood in a particular way in cases involving people with an FASD. Strategies to

³³ *AH v Western Australia* [2014] WASCA 228, [40].

³⁴ *AH v Western Australia* [2014] WASCA 228, [41]-[66].

³⁵ Roach and Bailey, n 24, 49.

³⁶ Diane Malbin, *Fetal Alcohol Spectrum Disorders: A Collection of Information for Parents and Professionals* (The Asante Centre, Maple Ridge, 2006) 55. See also the Canadian case of *R v Powderface* (2014) ABPC 193, [8].

³⁷ *AH v Western Australia* [2014] WASCA 228, [69].

³⁸ *AH v Western Australia* [2014] WASCA 228, [86]-[87].

³⁹ *AH v Western Australia* [2014] WASCA 228, [95]-[99].

⁴⁰ See *Robinson v The Queen* [1998] WASCA 278.

⁴¹ *R v Harper* [2009] YKTC 18, [39].

⁴² *AH v Western Australia* [2014] WASCA 228, [125]. See also *R v Tsiaras* (1996) VR 398, 400; *R v Verdins* [2007] VSCA 102.

support rehabilitation must be focused more on changing the environment and support structures around the offender rather than on changing the offender as individuals do not “recover” from FASD.⁴³

The two-year sentence of imprisonment was ultimately appealed and at the first Court of Appeal hearing, members of the Court⁴⁴ specifically asked questions about assessments, housing and supervision. The matter was adjourned so that these matters could be followed up. Tragically, by the time the matter was returned for resentence in August 2014, AH was acutely psychotic and in the prison hospital. The Crown reported that efforts were under way to secure accommodation and guardianship on her release. The Court of Appeal observed that neither the protection of the community nor the aim of deterrence justified a prison sentence and found that incarceration had contributed to the deterioration of AH’s mental health. The Court ordered that all terms of imprisonment be concurrent, meaning in effect that they were already served, and directed AH should be released when she became well enough.⁴⁵ The question of whether an early diagnosis of FASD would have made any difference to AH is addressed in the following section.

An FASD diagnosis and sentencing in Australia

The availability of a diagnosis does not provide a neat conclusion to a sentencing hearing. As the Full Court in the Victorian case of *R v Verdins* pointed out:

Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the enquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future.⁴⁶

Despite this caution, in AH’s case, and others like it, an early diagnosis may have made a difference to the expectations of those dealing with her in the criminal justice process. For example, instead of the standard community based order being applied to her by Derrick DCJ, a more carefully tailored and flexible approach may have been developed.⁴⁷ Instead of turning AH away when she arrived to report on incorrect days, there might have been a less rigid approach applied to her case by probation officers.⁴⁸ Importantly, a recent Court of Appeal decision in Canada found that the sentencing judge did not err in principle by crafting an individualised sentence, outside the normal range, that took particular account of the offender’s FAS.⁴⁹ In AH’s case,⁵⁰ ultimately an earlier diagnosis may have helped to avoid the later problems with breaches of court orders that she encountered.

Pursuant to Australian sentencing jurisprudence it is clear that FASD, along with any other disability, will be relevant to sentencing.⁵¹ It is less clear what judges should do when confronted with an offender who has an FASD. There has been significant discussion in Canadian⁵² and American case

⁴³ Roach and Bailey, n 24, 21; Michael Jeffery, “An Artic Judge’s Journey with FASD” (2010) 38 *Journal of Psychiatry and Law* 485.

⁴⁴ *AH v Western Australia* [2014] WASCA 228, [100] (Martin CJ, Mazza JA and Hall J); note a single judgment was delivered by the Court of Appeal.

⁴⁵ *AH v Western Australia* [2014] WASCA 228, [127]-[129].

⁴⁶ *R v Verdins* [2007] VSCA 102, [13].

⁴⁷ In Canada, some judges have considered how best to put in place supervisory conditions in cases involving offenders who have an FASD: see, for example, *R v Harper* (2009) YKTC 18; *R v Obed* (2006) NLTD 155.

⁴⁸ A more flexible, although structured, approach has been recommended by others, see Clare Townsend, Kate Hammill and Paul White, “Fetal Alcohol Disorder, Disability and the Criminal Justice System” (2015) 8 *Indigenous Law Bulletin* 30, 31-32.

⁴⁹ *R v Charlie* (2015) YKCA 3, [39]. Charlie had numerous previous convictions for theft and “failing to comply” offences. On this occasion he was sentenced for robbery. He was sentenced to serve nine weeks (plus 14 months already served).

⁵⁰ *AH v Western Australia* [2014] WASCA 228.

⁵¹ See *R v Verdins* [2007] VSCA 102; *Thompson v The Queen* (2005) 157 A Crim R 385.

⁵² See, for example, FASD ONE Justice Committee, *Fetal Alcohol Spectrum Disorder and the Justice System*, a Canadian

law about the relevance of FASD in sentencing. Recent research reviewed criminal cases heard in American federal courts up until 2011 that had considered FASD and identified 1,713 cases, with 131 “substantively relevant” to capacity, intent and sentencing.⁵³ In Canada, a search of CanLII⁵⁴ for the terms “FASD” and foetal/fetal alcohol spectrum disorder reveals 229 cases, most of them relevant to criminal justice issues. In contrast to Canada and the United States, a search of reported cases in Australia reveals only a handful of publicly available reported Australian criminal law cases that have considered FASD. While it is likely that magistrates and judges across Australia do hear submissions about FASD from time to time, the lack of reported cases means that sentencing jurisprudence on the issue is under-developed in Australia. While only a few cases are reported, they provide some assistance to how FASD may be considered by Australian courts.

In those Australian cases where FASD is clearly identified, a central concern is often balancing the needs for community protection (which arise specifically because a person with FASD may be extremely impulsive) and in understanding the realistic possibilities of “rehabilitation” for a person with FASD. Unsurprisingly, identifying an appropriate sentence is often extremely difficult. For example, *R v Moore*⁵⁵ involved a prosecution appeal against the sentence imposed with respect to one count of rape and one count of aggravated burglary. The observations of the Justices of the Court of Appeal, Redlich and Neave JJA, who quoted from the initial sentencing remarks, identify key issues associated with FASD:

Your early life was marked by your parents’ alcoholism, drug use and the violence in the home. Your mother’s alcohol use during pregnancy has caused you alcohol foetal syndrome. You were taken from your parents by your aunt when about two years ... Your father died when you were 13 or 14 ... Your intellectual disability, largely caused by the alcohol foetal syndrome, made school increasingly difficult. By mid-teenage you had slid into alcohol and drug use, including inhalants.⁵⁶

Neave and Redlich JJA, the majority, allowed the appeal. They recognised a link between impaired cognitive skills and judgment and the offending. However, they focused on the gravity of the offences (which were recognised as “opportunistic”) and Moore’s prior criminal history, noting the sentencing judge’s remark that his “prospects for rehabilitation were not good”.⁵⁷ It was not clear what was understood in relation to prospects for rehabilitation. If they were focused on seeing some individual change in the offender it is true that prospects were “not good”, indeed rehabilitation in this sense would be extremely unlikely with this type of offender. Ultimately the majority increased the sentence of imprisonment observing that, because of his disability, Moore would require “intensive support” if he was to control his behaviour and this would need to be provided in custody or on parole.⁵⁸

In the Northern Territory case *R v Doolan*,⁵⁹ the offender was charged with assault with threats (he threatened a person with a shard of glass) and aggravated criminal damage. Disability services had been involved with Doolan’s care since he was 11 years old. It was accepted that he had a moderate to severe intellectual disability and that he suffered from “foetal alcohol effects”.⁶⁰ A psychiatrist and psychologist gave evidence of a personality disorder and autism. He was described as aggressive and impulsive. Doolan was ultimately found to be unfit to plead as a result of his “severe cognitive

website that archives relevant case law <<http://fasdjustice.ca>>.

⁵³ Anne Douds, Holly Stevens and William Sumner, “Sword or Shield? A Systematic Review of the Roles FASD Evidence Plays in Judicial Proceedings” (2013) 24 *Criminal Justice Policy Review* 492, 493.

⁵⁴ An online repository of full text reports from Canada’s courts.

⁵⁵ *R v Moore* [2009] VSCA 264. See also *R v Cameron* [2014] QCA 55.

⁵⁶ *R v Moore* [2009] VSCA 264, [4] (Neave and Redlich JJA).

⁵⁷ *R v Moore* [2009] VSCA 264, [24] (Neave and Redlich JJA)

⁵⁸ *R v Moore* [2009] VSCA 264, [30] (Neave and Redlich JJA).

⁵⁹ *R v Doolan* [2009] NTSC 60.

⁶⁰ *R v Doolan* [2009] NTSC 60, [9].

impairments”.⁶¹ While this case is not actually a sentencing case,⁶² it is nevertheless helpful in considering some of the issues associated with FASD and sentencing. Doolan was becoming increasingly dangerous in his community. Witnesses gave evidence that he needed 24-hour care in a secure facility. Martin CJ found it necessary to make a supervision order. A lack of appropriate facilities necessitated that Doolan be housed in a correctional centre.⁶³ The judge observed: “residence in a correctional centre is not the ideal locality for Mr Doolan and others like him. He is not on remand and he is not a convicted offender. He requires special assistance.”⁶⁴ Nevertheless, efforts were made by the judge to ensure that the environment was improved as much as possible through good access to disability workers, therapeutic activities and the opportunity to be moved out of the unit under supervision to visit family.⁶⁵ Given the need for intensive supervision required for an offender like Doolan, brief periods of supervision in community settings mixed with secure placements are more likely to be manageable by family and community members called upon to supervise and support. Such an approach requires a rethinking of how sentences might be best structured for an individual with FASD. In some jurisdictions, legislative reforms would be required to accommodate such flexibility.

Children with FASD present particular difficulties in sentencing. For example, DAT⁶⁶ was 13 years old and he had also entered premises with intent to commit an indictable offence and attempted to go into some premises with others to obtain alcohol. He was also resentenced on a wilful damage charge; he had thrown a rock at a car shattering the windscreen. The case involved a review of the sentence handed down in a Children’s Court. On appeal, the judge noted that the defendant “has had a difficult and unfortunate upbringing. He’s been diagnosed as suffering from foetal alcohol syndrome and as a result of an accident he acquired a brain injury ... his capacity to learn and rehabilitate is reduced”.⁶⁷ Furthermore the judge observed that: “he is a child of severely reduced capacity, so in that sense his criminal culpability is reduced and it would be wrong, in all those circumstances, for him to have convictions recorded for those offences”.⁶⁸ The judge did not record convictions and reduced the sentence. However, because of his extensive criminal history, he was sentenced to six months imprisonment to be released after serving 50% of the sentence.

Given the different legislative and jurisprudential approach to sentencing children in Australian jurisdictions,⁶⁹ it is typical that in cases involving children who have FASD judges will focus more on the “rehabilitative potential” of the offender in relation to determining the sentence. As noted earlier, however, the notion of rehabilitation will need to be understood differently in cases involving children with FASD. In the case of MBQ, a 12-year-old Indigenous boy was found guilty of raping a 3-year-old girl. On the Attorney-General’s unsuccessful appeal against sentence, McMurdo P commented:

Lack of appropriate sexual education and developmental immaturity arising from foetal alcohol syndrome (FAS) may have contributed. He was culturally adopted in 2007 by his foster parents who

⁶¹ Similarly see *Western Australia v Tax* [2010] WASC 208.

⁶² A similar story involving Rosie Fulton played out in the media in 2014: see John Stewart, “Intellectually Impaired Aboriginal Woman Rosie Fulton to be Freed After 21 Months in Jail with No Conviction”, *Lateline*, 26 June 2014 <<http://www.abc.net.au/news/2014-06-25/aboriginal-woman-in-jail-without-conviction-to-be-freed/5550790>>.

⁶³ Similarly see the debates around Rosie Doolan’s case: Sasha Petrova, “Rosie’s Treatment Just the Tip of the Iceberg”, *Northern Territory News*, 10 May 2014 <<http://www.territorystories.nt.gov.au/bitstream/10070/251128/31/CAD04JUL14PG031-MAI-COLOUR-PRIMARY.PDF>>; “Disabled Aboriginal Woman Rosie Fulton Returns to Alice Springs After Two Years in Jail Without Conviction”, *ABC News*, 2 July 2014 <<http://www.abc.net.au/news/2014-07-01/rosie-fulton-returns-to-alice-springs-after-two-years-imprisoned/5561744>>.

⁶⁴ *R v Doolan* [2009] NTSC 60, [22].

⁶⁵ *R v Doolan* [2009] NTSC 60, [23]-[24]. It is notable that since Doolan’s case was heard a specialist facility has been built in the Northern Territory.

⁶⁶ *R v DAT* [2011] QChC 20.

⁶⁷ *R v DAT* [2011] QChC 20, [20].

⁶⁸ *R v DAT* [2011] QChC 20, [30].

⁶⁹ See generally Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) Ch 19.

relocated to the remote town in 2008 ... FAS may have indirectly contributed to his commission of the offences. It can result in cognitive and behavioural deficits including mental retardation, learning difficulties, hyperactivity, attention deficits and poor social skills. Those with FAS typically are impulsive and have difficulty foreseeing the consequences of their actions. They may have a poor sense of personal boundaries, lack judgment and be susceptible to peer pressure.⁷⁰

It was also accepted that MBQ had an IQ of 65-85 and a mental age of nine. Supervision was ordered by the initial sentencing judge and no conviction was recorded.

In another case, JL, a 12-year-old girl, unsuccessfully appealed against a sentence of eight months imprisonment for a charge of assault occasioning actual bodily harm.⁷¹ She had not had contact with her mother for some years as a result of her mother's alcohol issues and had grown up in the care of child protection services. Placements had continually broken down because of "volatile behaviour, non-compliance with directions, lack of engagement and absconding".⁷² The court referred to various reports that indicated FASD, citing below average intelligence and a conduct disorder. A psychological assessment clearly outlined FASD and its effects. JL had a long history of breaches of previous court orders including failing to attend at rehabilitation programs as directed. Given previous breaches, the magistrate had delayed sentencing to give her an opportunity to attend a rehabilitation program. She had failed to attend and when she returned to court for sentence the magistrate found that the only prospect of rehabilitation was through a period of incarceration.⁷³ On appeal Crispin J agreed that incarceration was "inescapable" in the circumstances.⁷⁴ The comments of Crispin J seem to suggest a failure on the part of the accused – that she "would not" submit to a rehabilitation program rather than that she "could not" because of her disability. American social worker, Diane Malbin, has worked with people with FASD for many years and emphasises the need to understand the reasons for non-compliance⁷⁵ in order to craft an appropriate sentence.

A couple of Australian cases have noted that FASD has been excluded by treating psychologists and psychiatrists. Importantly, these cases demonstrate that FASD was considered by the relevant experts. For example, FASD was excluded by the psychiatrist in the case of *Director of Public Prosecutions v Kendrick* where FASD was considered in part because the offender presented with a "severe language disorder".⁷⁶ Of course, not all cases where indicators of FASD are present will result in a positive diagnosis of FASD. Nevertheless it is important in those cases where indicators are present to consider it and prosecutors, defence lawyers and judicial officers can play a role in ensuring it comes to the attention of experts, pre-sentence report writers and to the court.⁷⁷

UNRELIABLE CONFESSIONS AND CONFABULATIONS

Confabulation has been described as an act of "honest lying".⁷⁸ Sullivan-Bisset identifies five common features of confabulatory explanations: "they (1) are false or ill-grounded; (2) are offered as the answer to a question; (3) have a motivational component; (4) fill a gap, and (5) are reported without

⁷⁰ *R v MBQ; Ex parte Attorney-General (Qld)* [2012] QCA 202, [8]-[9] (McMurdo P). See also *TM v Karapanos* [2011] ACTSC 74, [85] where the judge noted "a real possibility of" FASD.

⁷¹ *JL v Morfoot* [2005] ACTSC 77. She was also sentenced for three months, to be served concurrently, for breach of probation and community service order, but she did not appeal these sentences.

⁷² *JL v Morfoot* [2005] ACTSC 77, [8].

⁷³ *JL v Morfoot* [2005] ACTSC 77, [19].

⁷⁴ *JL v Morfoot* [2005] ACTSC 77, [25].

⁷⁵ Malbin, n 36, 55; Dianne Malbin, *Trying Differently Rather than Harder: Fetal Alcohol Spectrum Disorders* (Perfect Paperback, Cambridge, 2002).

⁷⁶ *Director of Public Prosecutions v Kendrick* [2013] VCC 1100, [84]. See also *Attorney-General (Qld) v Cobbo* [2014] QSC 150, [36].

⁷⁷ See generally David Boulding and Susan Brooks, "Trying Differently: A Relationship-centred Approach to Representing Clients with Cognitive Challenges" (2010) 33 *In J Law Psychiatry* 448.

⁷⁸ Jerrod Brown et al, "Confabulation: Connections between Brain Damage, Memory and Testimony" (2014) 3 *Journal of Law Enforcement* 3.

any intention to deceive.”⁷⁹ Confabulation was first applied to Korsakoff’s patients by the German psychiatrist Karl Bonhoeffer but it has also been identified in schizophrenia, Alzheimer’s disease and in cases of traumatic brain injury.⁸⁰ Its causes are debated in the literature, in part due to the fact that mainly case study methods have been used to research it.⁸¹ Generally the literature appears to accept that those who confabulate are unaware of the falsehood of their statements as the confabulation arises from impaired memory processing and from the person’s cognitive deficits.⁸² Kopelman has distinguished between provoked and spontaneous confabulation.⁸³ Provoked confabulations are memory fabrications given in response to questions. Clearly provoked confabulation has serious implications for the criminal justice system, which relies on an individual’s answers to questions, as it can lead to incorrect testimonies, false confessions, and potentially to unjust convictions.⁸⁴ The tendency of those with a brain injury, in particular FASD, to confabulate has been identified in the literature.⁸⁵ As Conry and Fast observe in relation to FASD specifically:

an accused person with [FASD] may give a false confession or a false statement and, in court, may appear confused or give contradictory explanations. A witness ... may interpret questions too literally or deny something that seems obviously true. The victim with [FASD] may not clearly remember details of time, place, and sequence, and may be easily influenced by leading questions.⁸⁶

Researchers such as Fast and Conry have attempted to identify why people with FASD may confabulate. One explanation is that people with FASD may have a “disturbed sense of chronology”, resulting in earlier memories being judged to be currently relevant, and stressful situations may result in attempts to problem solve, drawing on this disturbed chronology.⁸⁷ The recent case of *Pora v The Queen* considered confabulation and its role in producing a false confession where the defendant was believed to have an FASD.

Pora v The Queen

In New Zealand in 1992 Susan Burdett was raped and murdered in her home. A year later Teina Pora, then 17 years old, was arrested in relation to a stolen motor vehicle. Subsequent police interviews with Pora conducted over four days resulted in a confession in relation to Burdett’s rape and murder. In reviewing the case, the Privy Council noted that Pora was very inconsistent about the role he played and in many respects his narrative of events did not fit with the known facts about the incident.⁸⁸ Nevertheless he was charged with rape and murder and a jury trial took place in May 1994. At the trial there was some argument that the confessions had been unfairly obtained but they were ultimately admitted and Pora was convicted and sentenced to life imprisonment.⁸⁹

⁷⁹ Ema Sullivan-Bissett, “Implicit Bias, Confabulation and Epistemic Innocence” (2015) 33 *Consciousness and Cognition* 548, 549.

⁸⁰ Mohammed Shakeel and Nancy Docherty, “Confabulations in Schizophrenia” (2015) 20 *Cognitive Neuropsychiatry* 1; M Shanks et al, “Awareness and Confabulation” (2013) 28 *Neuropsychology* 406, 407.

⁸¹ German Berrios, “Confabulations: A Conceptual History” (1998) 7 *J Hist Neurosci* 225.

⁸² Jerrod Brown et al, “Confabulation in Correctional Settings: An Exploratory Review” (2015) 4 *Journal of Law Enforcement* 1; Martha Turner et al, “Confabulation: Damage to a Specific Inferior Medial Prefrontal System” (2008) 44 *Cortex* 637; Armin Schneider, Christine von Daniken and Klemens Gutbrod, “The Mechanisms of Spontaneous and Provoked Confabulations” (1996) 119 *Brain* 1365.

⁸³ Michael Kopelman, “Varieties of Confabulation and Delusion” (2010) 15 *Cognitive Neuropsychiatry* 14.

⁸⁴ Krista Davis, Mary Desrocher and Timothy Moore, “Fetal Alcohol Spectrum Disorder: A Review of Neurodevelopmental Findings and Interventions” (2011) 23 *Journal of Developmental and Physical Disabilities* 143. Studies of children have identified a tendency to confabulate when pushed to answer questions. See Stacia Stolzenberg and Kathy Pezdek, “Interviewing Child Witnesses: The Effect of Forced Confabulation on Event Memory” (2013) 114 *J Exp Child Psychol* 77.

⁸⁵ Saul Kassin et al, “Police-Induced Confessions: Risk Factors and Recommendations” (2010) 34 *Law and Human Behavior* 3.

⁸⁶ Julianne Conry and Diane Fast, *Fetal Alcohol Syndrome and the Criminal Justice System* (Law Foundation of British Columbia, Vancouver, 2000) 3.

⁸⁷ Brown et al, n 78.

⁸⁸ *Pora v The Queen* [2015] UKPC 9, [14].

⁸⁹ *Pora v The Queen* [2015] UKPC 9, [16].

In December 1998, another man, Malcolm Rewa, was convicted of the rape of Burdett.⁹⁰ Subsequently in 1999, Pora successfully appealed his convictions for the rape and murder but at this appeal hearing he provided no explanation to the Court of Appeal about why his earlier confessions had been made. The success of the appeal on this occasion was based on the claim that had DNA evidence which matched Rewa's mode of offending been available at Pora's original trial, the jury may not have convicted.⁹¹ Pora's convictions were quashed and a retrial was ordered on this basis. However, it is relevant that the Court of Appeal did note that the Crown case had been based solely on the appellant's confessions and it observed that the possibility of falsely confessing to serious criminal offending was now well recognised.⁹² The Court of Appeal also referred to the appellant's immaturity at the time that he confessed to the crimes and his marked lack of literacy skills.⁹³ There had not been any reference to any other form of mental impairment of the appellant.⁹⁴ A retrial was ordered and took place in 2000. Pora was again found guilty. An appeal against conviction the same year was dismissed. At this second appeal the reliability of the confession was not explored.⁹⁵

In March 2015, Pora appealed to the Privy Council⁹⁶ on two grounds: that the confessions showing Pora's complicity in the offences were unreliable and certain evidence concerning another person should have been admitted. In relation to the unreliability of the confessions, the appellant's legal team sought admission of evidence from three experts.

A clinical and forensic psychologist, Professor Gudjonsson, argued the confessions were unreliable. The Privy Council questioned his independence and ruled his evidence inadmissible. The Privy Council noted that it had to make its own decision on whether the confessions were indeed unreliable and whether they should have been admitted. Professor Gudjonsson had not mentioned FASD.⁹⁷

A clinical neuropsychologist Valerie McGinn⁹⁸ was asked to address whether Pora had a neurodevelopment disability. She concluded that Pora suffered from alcohol-related neurodevelopment disorder (an FASD).⁹⁹ She observed that his executive functions were impaired, making it difficult for him to plan, that he makes impulsive errors and his thinking is limited. She identified cognitive rigidity, meaning that it was difficult for him to adapt to different circumstances. She observed that his records showed that he was alcohol-exposed and had low birth weight. Further she noted Pora was easily led and suggestible. She described him as having "swiss cheese brain damage with some processes remaining intact while others are in deficit"¹⁰⁰ and this meant that some things in his brain work while others do not. She also identified that Pora had no capacity for abstract thought; he had visual memory deficits, and finally that his memory and executive deficits were associated with a proneness to confabulation. She described Pora as acting like a child aged 8-10 years old. The Privy Council found that her evidence was "crucial" as evidence that he suffered from FASD and that her evidence provided an explanation for the confession.¹⁰¹

⁹⁰ *Pora v The Queen* [2015] UKPC 9, [12].

⁹¹ *Pora v The Queen* [2015] UKPC 9, [18].

⁹² *Pora v The Queen* [2015] UKPC 9, [19].

⁹³ *Pora v The Queen* [2015] UKPC 9, [19].

⁹⁴ *Pora v The Queen* [2015] UKPC 9, [19].

⁹⁵ *Pora v The Queen* [2015] UKPC 9, [20]-[21].

⁹⁶ In 2003, New Zealand abolished appeals to the Privy Council. *Pora v The Queen* may be one of the last New Zealand cases to go to the Privy Council. See *Supreme Court Act 2003* (NZ).

⁹⁷ *Pora v The Queen* [2015] UKPC 9, [23]-[34].

⁹⁸ *Pora v The Queen* [2015] UKPC 9, [35]-[43].

⁹⁹ Using the Australian diagnostic tool currently under review this is Neurodevelopmental Disorders-Alcohol Exposed (ND-AE): see Watkins et al, n 4, 156.

¹⁰⁰ *Pora v The Queen* [2015] UKPC 9, [40].

¹⁰¹ *Pora v The Queen* [2015] UKPC 9, [40].

A third expert, Dr Immelman, a consultant psychiatrist, gave evidence confirming a FASD diagnosis. His evidence was also admitted. He noted an IQ of 85 and three points that might be associated with confabulation. First, uncertainty about what the “correct” answer might be; secondly, trusting that the interviewer’s questions were benign; and thirdly, Pora’s reluctance to admit a lack of knowledge that he seemed to be expected to know about.¹⁰²

The appeal succeeded with the Privy Council finding that reliance on the confession gave rise to the risk of a miscarriage of justice. No retrial was ordered.¹⁰³ The case of *Pora v The Queen* again demonstrates the vulnerability of individuals with FASD in the criminal justice system. While the case is persuasive only in Australian jurisdictions, it suggests that the judiciary may be increasingly willing to entertain evidence about FASD and its relevance to witness testimony.

FASD and confabulation in the Australian context

Similar to the search for reported cases that mention FASD and sentencing in Australia, there is a dearth of Australian cases concerning FASD and evidence. In *Western Australia v Cox*,¹⁰⁴ one of the few reported cases that consider FASD and evidence, the main issue was whether the accused’s statement to police should be excluded from evidence; however, relevantly there was also some discussion about whether the victim of the accused’s alleged sexual assaults was capable of giving evidence. The complainant was described in the following terms:

The complainant is an Aboriginal woman in her twenties. She is said to be an incapable person because of mental impairment which she has suffered all her life as a result of foetal alcohol syndrome. Her mother is now deceased as a result of her alcoholism and the complainant’s upbringing appears to have been supervised by her grandmother ... her linguistic capacity in English very limited. I have been advised and accept that her capacity to give meaningful testimony is uncertain.¹⁰⁵

The victim was found to be unable to give evidence largely as a result of FASD and this heightened the importance of the confession made by the accused to police in this case. The prosecution case was that the complainant came to Cox’s house asking for food, and that he requested sex in return for food. Ultimately Martin J found that the accused’s confession should be admitted.¹⁰⁶

The difficulties for suspects with a disability who are interviewed by police are well recognised and in some jurisdictions legislation requires a support person to be present in this context.¹⁰⁷ For example, such a protective provision exists in Queensland legislation;¹⁰⁸ however, in order to “activate” the provision the interviewing officers must “reasonably suspect” the person has an impaired capacity. Given that FASD may be difficult to identify and may be undiagnosed, a reasonable suspicion may not arise and as a result support may not be provided. Clearly it is always important for legal professionals to scrutinise confessions and witness testimony. Part of this scrutiny should include addressing the question of whether FASD may be a relevant consideration and thus whether there may be a danger of confabulation. The case of *Pora v The Queen* clearly demonstrates the risks of confabulation where a person has FASD.

¹⁰² *Pora v The Queen* [2015] UKPC 9, [44]-[48].

¹⁰³ See Judicial Committee of the Privy Council, *Pora v The Queen: Retrial Decision* (2015) <<https://www.jcpc.uk/news/pora-v-the-queen-retrial-decision.html>>.

¹⁰⁴ *Western Australia v Cox* [2008] WASC 287.

¹⁰⁵ *Western Australia v Cox* [2008] WASC 287, [2].

¹⁰⁶ *Western Australia v Cox* [2008] WASC 287, [97]; see also *R v KU; Ex parte Attorney-General (Qld)* [2008] QCA 54 where the victim of a “gang rape” had been diagnosed with FASD but her testimony was not challenged at trial as the accused men and boys entered pleas of guilty.

¹⁰⁷ See generally Lorana Bartels, *Police Interviews with Vulnerable Adult Suspects*, Report No 21 (Australian Institute of Criminology, Canberra, 2011) and see the discussion in Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Ch 22.

¹⁰⁸ See, for example, *Police Powers and Responsibilities Act 2000* (Qld) s 422 – Questioning Persons with Impaired Capacity.

LAW AND POLICY FORM

FASD policy and law reform in Canada and the United States

In comparison to Australia, Canadian and American research and interest about FASD and criminal justice has flourished. In recent years there have been several issues of journals devoted to FASD¹⁰⁹ in those jurisdictions and, as noted earlier, it is much more likely that FASD will be discussed in cases reported in Canada and the United States.

In the United States, a number of Bills that directly relate to FASD have been introduced. While many are described as being related to prevention and funding, a significant number are related to criminalisation and involuntary commitment.¹¹⁰ Over 20 States now criminalise women for behaviours that are thought to be harmful to the foetus, for example drinking excessive amounts of alcohol.¹¹¹ However, the legal profession in the United States appears to be generally at odds with the Parliaments. In both the United States and Canada, lawyers' associations have made strong public "resolutions" about the need to identify and respond to FASD. In 2012 the American Bar Association passed a resolution about FASD, overviewing the disabilities associated with FASD and the difficulties a person with FASD experiences when they become involved in the justice system. It concluded that there is a clear need for increased awareness and training about FASD and encouraged legal practitioners and judges to collaborate with medical, mental health and disability experts to "promote appropriate legal representation and advocacy" for individuals with FASD.¹¹² The resolution supported increased public awareness about FASD, especially among women of child-bearing age.

The Canadian Bar Association passed a resolution about FASD in 2010 which it updated in 2013.¹¹³ While the 2010 resolution was general, calling for general recognition and response to FASD, the 2013 resolution recommended specific law reforms including: the introduction of a definition of FASD into legislation; providing a power to judicial officers to order FASD assessment; a specific provision identifying FASD as a mitigating factor in sentencing; a sentencing option for judges to order an approved support plan and that legislation expressly require Canadian correctional service authorities to accommodate FASD as a disability. These Bar Association resolutions may be worthy of consideration by similar professional groups in Australia as they are likely to assist in the education of practitioners about FASD.

There have been some attempts by parliamentarians to introduce private member's bills on FASD. In March 2014, Canadian MP Ryan Leef of the Yukon Territory introduced a private member's bill, Bill C-583 (*An Act to Amend the Criminal code (Fetal Alcohol Spectrum Disorder)*), to Parliament. The Bill proposed to introduce into legislation the recommendations made by the Canadian Bar Council's 2013 resolution on FASD. Specifically it sought to amend the Canadian *Criminal Code* to include a definition of FASD, allow courts to order assessments of individuals who may have FASD, and clarify that courts are expressly permitted to take FASD into account as a mitigating factor. In relation to sentencing Bill C-583 proposed that:

¹⁰⁹ See, for example, (2010) 38(4) *Journal of Psychiatry & Law*; (2013) 4(1) *First Peoples Child and Family Review*; (2009) 15(3) *Developmental Disabilities Research Reviews*.

¹¹⁰ See <<https://www.govtrack.us/congress/bills/browse?congress= ALL &text=FASD>> using search terms FASD / fetal alcohol spectrum disorder.

¹¹¹ Erin Linder, "Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction" (2005) U Ill L Rev 873; Vic Larcher and Joe Brierley, "Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Spectrum Disorder (FASD) – Diagnosis and Moral Policing: An Ethical Dilemma for Paediatricians" (2014) 10 Arch Dis Child 1136, 1137. Indeed some women have faced foetal homicide charges: see Ed Pilkington, "Outcry in America as Pregnant Women Who Lose Babies Face Murder Charges", *The Guardian*, 24 June 2011 <<http://www.theguardian.com/world/2011/jun/24/america-pregnant-women-murder-charges>>.

¹¹² American Bar Association, *Resolution and Report* (August 2012) <http://www.americanbar.org/groups/child_law/tools_to_use/attorneys/fasd-resolution.html>.

¹¹³ Canadian Bar Association, *Resolution: Accommodating the Disability of FASD to Improve Access to Justice* <<http://www.cba.org/cba/resolutions/pdf/13-12-A-pdf.pdf>>.

(f) if, in the court's opinion, the condition was relevant or contributed to the commission of the offence, evidence that an offender suffers from FASD shall be deemed to be a mitigating factor if it impairs the offender's ability:

- i) to make judgments,
- ii) to foresee and understand the consequences or risks of his or her actions,
- iii) to control impulse behaviour, or
- iv) to internally modify the control of his or her behaviour.¹¹⁴

The Bill was defeated at second reading but Leef has stated that he intends to bring it back to Parliament.¹¹⁵

Currently s 718.2 of the *Criminal Code 1985* (Can) is similar to sentencing legislation in most Australian jurisdictions in that it allows the court to take into account "any relevant aggravating or mitigating" circumstances. However, although s 718.2 identifies several aggravating factors, no mitigating factors are specifically identified. The underlying concern, that Leef's proposed Bill was attempting to respond to, is that current legislation potentially allows the Court to find that FASD is an aggravating feature, or at least not a mitigating factor. However, Canadian jurisprudence to date suggests that Canadian courts do generally construe FASD as a mitigating factor. For example, in the recent Canadian case of *R v Powderface*,¹¹⁶ the Court was asked to address the question of the mitigating effect the presence of FASD should have in sentencing a major sexual assault. In this case both the defendant, Powderface, and the victim suffered from FASD. In sentencing the accused, Tjosvold J referred to a number of earlier Canadian sentencing judgments which had taken account of FASD. He identified several principles in relation to sentencing defendants who have FASD. These included that the role of specific deterrence decreases in proportion to the offender's cognitive deficits¹¹⁷ and that while general deterrence and denunciation may have a role to play this will depend on the severity of the cognitive deficits. Tjosvold J accepted that moral blameworthiness must be commensurate with the magnitude of cognitive deficits associated with FASD; the more acute the cognitive deficits the greater the importance of mitigating factors and the less weight accorded to denunciation and deterrence¹¹⁸ and therefore the lower the sentence.¹¹⁹

In Alaska, Bill SB 151 (*An Act Relating to Mitigation at Sentencing in a Criminal Case for a Defendant Found by the Court to have been Affected by a Fetal Alcohol Spectrum Disorder*) passed the Senate in 2012. This legislation purports to cast FASD as a mitigating factor in sentencing¹²⁰ and is a specific response to mandatory sentencing in that State. Excluding serious assaults, the legislation allows flexibility in sentencing where:

the defendant committed the offense while suffering from a condition diagnosed as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this paragraph, "fetal alcohol spectrum disorder" means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy.¹²¹

¹¹⁴ Bill C-583, *An Act to Amend the Criminal Code (Fetal Alcohol Spectrum Disorder) 2013* (Can) <<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6497442>>.

¹¹⁵ See Parliament of Canada <<http://www.parl.gc.ca/LEGISInfo/BillDetails.aspx?Language=E&Mode=1&billId=6487744>>.

¹¹⁶ *R v Powderface* [2014] ABPC 193. See also *R v Ramsay* [2012] ABCA 257.

¹¹⁷ Referring to *R v Ramsay* [2010] ABCA 267; *R v Quash* [2009] YKTC 54.

¹¹⁸ Referring to *R v Harper* [2009] YKTC 18. See also *R v Blanchard* [2011] YKTC 86, [20].

¹¹⁹ Referring to *R v FC* [2012] YKTC 5. This approach is notably similar to the common law position in Australia: *R v Tsiaras* (1996) VR 398, 400; *R v Verdins* [2007] VSCA 102.

¹²⁰ See Alaska FASD Partnership, *2012 Newsletter* <http://dhss.alaska.gov/abada/Documents/pdf/201207_FASDnewsltr.pdf>.

¹²¹ Senate Bill 151, *An Act Relating to Mitigation at Sentencing in a Criminal Case for a Defendant Found by the Court to Have Been Affected by a Fetal Alcohol Spectrum Disorder 2012* (Alaska) amending AS 12.55.155(d)(20) <<http://legiscan.com/AK/bill/SB151/2011>>. For an overview, see Alaska FASD Partnership, "SB 151: FASD as a Mitigating Factor Passes Legislature", *2012 Newsletter*, 1-3 <http://dhss.alaska.gov/abada/Documents/pdf/201207_FASDnewsltr.pdf>.

The provision is limited; it does not apply to serious assaults and the person must produce evidence that he or she is substantially impaired by FASD.¹²²

Policy responses to FASD in Australia

In Australia, several reports on FASD have been produced in recent years, mainly focused on prevention and screening. For example, in their 2011 report on incarcerated adolescents the Royal Australasian College of Physicians recommended that health screening, including screening for FASD, should be provided for at risk adolescents.¹²³ Other examples of reports on health prevention strategies include the Lillewan project¹²⁴ in the Fitzroy Valley in remote Western Australia. This project commenced in 2010 and is continuing. With the assistance of health professionals, the Fitzroy Valley community, especially the Indigenous women, has developed an FASD strategy focused on prevention, diagnosis and response to FASD. In relation to criminal justice, two reports, one from Western Australia¹²⁵ and one published by a Commonwealth Parliamentary Committee,¹²⁶ were released in 2012. The Western Australian report devoted a chapter to the criminal justice system and FASD, and observed that where a person with FASD has had some contact with the justice system, by the time they are 40 years old they will have cost the community up to one million dollars.¹²⁷ It recommended that funding be made available for justice and corrective services so that better identification processes can be accessed and also for the development of programs related to the sentencing process to assist people with FASD.¹²⁸ The 2012 Commonwealth report also examined FASD and the criminal justice process. It recommended that education materials be developed to raise awareness of FASD which could be particularly targeted to police, court officials and officers in correctional facilities and juvenile detention units, that FASD should be recognised as a disability and that it should also be recognised that people with FASD have a cognitive impairment so that they are eligible for diversionary laws and programs.¹²⁹

Unlike in the United States, there has been almost no support in Australia for punitive approaches towards women who drink alcohol when pregnant.¹³⁰ The Foundation for Alcohol Research and Education (FARE) has supported research into establishing the current knowledge of those working in the justice systems in Western Australia and Queensland. This research found there were clear gaps in knowledge, identified difficulties in accessing diagnosis services and support and a desire on the part of those working in the justice system to have better information.¹³¹ The Western Australian *Equality*

¹²² To date there do not appear to be any reported cases.

¹²³ Royal Australasian College of Physicians, *The Health and Well-Being of Incarcerated Adolescents* (2011) 6.

¹²⁴ Elizabeth Elliott et al, "There's Hope in the Valley" (2012) 48 *J Paediatr Child Health* 190.

¹²⁵ Legislative Assembly Education and Health Standing Committee, Parliament of Western Australia, *Foetal Alcohol Spectrum Disorder: The Invisible Disability*, Report No 15 (September 2012) ii, Ch 9 <[http://www.parliament.wa.gov.au/C8257837002F0BA9/\(Report+Lookup+by+Com+ID\)/1740F63B37A1314A48257A7F000766DD/\\$file/Final+FASD+Report+with+signature.pdf](http://www.parliament.wa.gov.au/C8257837002F0BA9/(Report+Lookup+by+Com+ID)/1740F63B37A1314A48257A7F000766DD/$file/Final+FASD+Report+with+signature.pdf)>.

¹²⁶ House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm* (2012) [5.133], [5.138], [5.139] <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=spla/fasd/report.htm>. See also Ian Freckleton, "Fetal Alcohol Spectrum Disorder and the Law in Australia: The Need for Awareness and Concern to Translate into Urgent Action" (2013) 20 *JLM* 481.

¹²⁷ Legislative Assembly Education and Health Standing Committee, n 125. Note Svetlana Popova et al, "Cost Attributable to Fetal Alcohol Spectrum Disorder in the Canadian Correctional System" (2015) 41 *International Journal of Law and Psychiatry* 76.

¹²⁸ Legislative Assembly Education and Health Standing Committee, n 125.

¹²⁹ House of Representatives Standing Committee on Social Policy and Legal Affairs, n 126.

¹³⁰ See, for example, People's Alcohol Action Coalition, Submission to the Legislative Assembly of the Northern Territory Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, 6 June 2014 <http://www.nt.gov.au/lant/parliamentary-business/committees/fasd/Submissions/Submission_Number_23_People's_Alcohol_Action_Coalition.pdf>. Although note that this type of approach was considered briefly in the Northern Territory, see "Drinking Alcohol During Pregnancy Targeted as NT Government Considers Rights of Unborn Child", *Lateline*, 14 March 2014 <<http://www.abc.net.au/news/2014-03-14/nt-government-considering-rights-of-unborn-child/5320016>>.

¹³¹ Heather Douglas et al, *Fetal Alcohol Spectrum Disorder (FASD) within the Criminal Justice Sector in Queensland*

before the Law Bench Book, developed to provide assistance to judicial officers, includes sections on FASD that provide general background information, suggestions for communication techniques and relevant services.¹³²

CONCLUSION

Given the high level of public engagement with the issue of FASD in Australia, understanding of FASD is likely to grow steadily¹³³ and it is likely to become increasingly relevant in Australian courts.¹³⁴ While current legislative and common law appear to be adequate to respond to FASD, there are a number of issues. The first relates to the invisibility and lack of knowledge about FASD by many criminal justice practitioners,¹³⁵ which may mean that FASD is often not considered or taken into account when assessing the admissibility of evidence or appropriate sentencing. There are now a variety of indicators for FASD identified in research and case law which should place practitioners and judicial officers on notice about the need to consider FASD in appropriate cases and to request consideration of FASD in pre-sentence reports and expert assessments. The second issue is availability of diagnostic capacity for FASD. While this is still limited, it is growing in Australia and increasing funds have been made available for the establishment of diagnostic centres for FASD.¹³⁶ There is an ongoing need to consider appropriate sentencing options for those who have FASD; this consideration will need to account for the fact that the aims of sentencing are often not well suited to sentencing those with FASD. Unlike many other brain injuries, people with FASD will not experience improvement in their brain function; the focus will need to be on developing sentencing responses that help to “rehabilitate” and structure their environments appropriately.¹³⁷

(February 2013) <<http://www.fare.org.au/wp-content/uploads/research/12-feb-version-3-Douglas-et-al-FINAL-REPORT.pdf>>; Raewyn Mutch et al, *Fetal Alcohol Spectrum Disorder: Knowledge, Attitudes and Practice within the West Australian Justice System* (April 2013) <<http://www.fare.org.au/wp-content/uploads/2013/04/Final-report-fasd-justice-system.pdf>>.

¹³² Western Australian Supreme Court, *Equality before the Law Bench Book* (2009) [4.2.7], [4.4.7], [4.5.3.5] <http://www.supremecourt.wa.gov.au/files/equality_before_the_law_benchbook.pdf>.

¹³³ Note there are now some cases that have recognised FASD in relation to child protection applications: see *APT v Director-General, Department of Family and Community Services* [2013] NSWADT 116. See also Parkinson and McLean, n 12.

¹³⁴ Freckelton, n 126.

¹³⁵ Heather Douglas et al, “The Importance of Foetal Alcohol Spectrum Disorder for Criminal Law in Practice: Views of Queensland Lawyers” (2012) 32 Qld Lawyer 153; Heather Douglas et al, “Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland’s Criminal Justice System” (2012) 21 JJA 178.

¹³⁶ \$9.2 million in funding was announced by the Commonwealth Government in 2014: Fiona Nash, “Government Funds National Strategy to Target Fetal Alcohol Spectrum Disorders” (Media release, 25 June 2014) <<http://www.health.gov.au/internet/ministers/publishing.nsf/Content/health-mediarel-yr2014-nash031.htm>>.

¹³⁷ For overview of the literature about sentencing those with FASD: see Heather Douglas, “The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder” (2010) 34 Crim LJ 221.