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STUDY OF THE SUBJECT MATTER OF BILL C-583, AN ACT TO AMEND THE CRIMINAL CODE (FETAL ALCOHOL SPECTRUM DISORDER)

Report of the Standing Committee on Justice and Human Rights

Mike Wallace
Chair

MAY 2015

41st PARLIAMENT, SECOND SESSION

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has the honour to present its

NINETEENTH REPORT

Pursuant to its Order of Reference of Wednesday, November 26, 2014, the Committee has studied the subject matter of Bill C-583, An Act to amend the Criminal Code (fetal alcohol spectrum disorder) and has agreed to report the following:

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STUDY OF THE SUBJECT MATTER OF BILL C-583: AN ACT TO AMEND THE CRIMINAL CODE (FETAL ALCOHOL SPECTRUM DISORDER)

CHAPTER 1: INTRODUCTION

1.1 COMMITTEE MANDATE AND CONTEXT OF THE STUDY

Each year in Canada and in other countries around the world, children are born with permanent brain injuries resulting from prenatal alcohol exposure. These children suffer from complex behavioural and cognitive problems of varying severity – problems that will persist throughout their lives, be compounded by inadequate support and could lead to involvement with the criminal justice system.

The criminal justice system is ill equipped to identify and respond to people suffering from fetal alcohol spectrum disorder (FASD). Many of the witnesses who appeared before the House of Commons Standing Committee on Justice and Human Rights (the Committee) emphasized that research into FASD is forcing us to challenge the normative assumptions of criminal law, namely that "individuals are responsible for their own actions, that they can control their behaviors in keeping with societal expectations and that they can learn from and be deterred by previous experience."[1]

It was primarily to address this legal issue and to prevent injustice that Ryan Leef, Member for Yukon, tabled a bill in the House of Commons on 5 June 2014 entitled, Bill C-583, An Act to amend the Criminal Code (fetal alcohol spectrum disorder). Bill C-583 had three main objectives. The first was to add a definition of FASD to the *Criminal Code* (the Code). The second was to enable the courts to order an assessment of an accused by a qualified person to determine whether the accused suffers from FASD and, if so, to indicate the relative severity of the disorder. The amendment was based on section 34 of the *Youth Criminal Justice Act*, which allows the courts to require an assessment of a young person who suffers from a physical or mental disorder, including FASD.[2] The third was to establish FASD as a mitigating factor in sentencing in cases where it has been demonstrated that FASD symptoms contributed to the commission of the offence.

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1 House of Commons, Standing Committee on Justice and Human Rights (JUST), 2nd Session, 41st Parliament, brief submitted 9 March 2015 (Canadian Bar Association).

2 Subsection 34(1) reads as follows:

> A youth justice court may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person who is required to report the results in writing to the court,
>
> (*a*) with the consent of the young person and the prosecutor; or
>
> (*b*) on its own motion or on application of the young person or the prosecutor, if the court believes a medical, psychological or psychiatric report in respect of the young person is necessary for a purpose mentioned in paragraphs (2)(*a*) to (*g*) [subsection 34(2) presents the purpose of assessment].

On 26 November 2014, Mr. Leef withdrew Bill C-583 from the *Order Paper* at second reading in the House of Commons, and its subject matter was referred to the Committee for study. The motion passed by the House during debate reads as follows:

> That Bill C-583, An Act to amend the Criminal Code (fetal alcohol spectrum disorder), be not now read a second time but that the Order be discharged, the Bill be withdrawn from the Order Paper, and the subject matter thereof be referred to the Standing Committee on Justice and Human Rights and that the Committee report back to the House within four months of the adoption of this Order.

Given the Committee's workload, the House of Commons granted it a 45-day extension on 24 March 2015 in order to complete its study.

1.2 THE COMMITTEE'S APPROACH AND STRUCTURE OF THE REPORT

The Committee began its study on 25 February 2015 and held four meetings on the subject, during which it heard from 13 witnesses. These witnesses included the sponsor of Bill C-583, representatives from Aboriginal Legal Services of Toronto, the Centre for Addiction and Mental Health, the Fetal Alcohol Syndrome Society of Yukon, the Canadian Bar Association, Alberta Health Services, the Office of the Correctional Investigator, the Society of Obstetricians and Gynaecologists of Canada, the Assembly of First Nations, and the Fetal Alcohol Spectrum Disorder Group of Ottawa, as well as from Rodney Snow and Jacqueline Pei.[3]

This report summarizes the information gathered by the Committee during its hearings and through briefs submitted during the study. The report is divided into five chapters, the first serving as an introduction to the subject. Chapter 2 provides an overview of the scientific knowledge surrounding FASD, its underlying causes, the many disabilities associated with it, and its prevalence in Canada. Chapter 3 looks at the impacts of FASD on the criminal justice system and presents data on the prevalence of FASD in the justice system overall and in the correctional population in particular. The chapter also explores how a person affected by FASD experiences the criminal justice system, as an accused, a victim or a witness. Chapter 5 addresses the courts' response to FASD, focusing on the *Criminal Code* provisions concerning mental health problems and the impact of an FASD diagnosis on sentencing. The last chapter contains the Committee's comments and recommendations related to the key issues raised by witnesses as they discussed the complexity of FASD from a range of perspectives – health, social, legal and economic. This chapter also examines the three objectives of Bill C-583, FASD prevention and the need for more research.

3 The list of witnesses who appeared before the Committee is provided in Appendix A, and the list of briefs in Appendix B.

1.3 DIVISION OF POWERS

In January 2012, the federal, provincial and territorial ministers responsible for justice and public safety agreed that "the response of the justice system to those with FASD continues to be a priority." They also noted the importance of prevention and directed "FPT officials to continue to work together to explore how to best respond to individuals with FASD."[4]

An understanding of the roles and responsibilities of the federal, provincial and territorial governments is needed to fully appreciate the environment in which FASD activities take place. In Canada, health, justice and correctional services are areas of shared jurisdiction between the federal government, the provinces and the territories.

1.3.1 Health

Health was traditionally considered to be a purely private matter. For that reason, the *Constitution Act, 1867* did not specifically assign jurisdiction over health.[5] Today, the federal government has a number of responsibilities related to health, but the provinces are responsible for delivering health care to most Canadians.

In 1982, the Supreme Court of Canada ruled that health "is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question."[6] Jurisdiction over health is therefore derived from a number of subjects listed in the *Constitution Act, 1867*.

Provincial jurisdiction over health is related primarily to the power to make laws regarding "the Establishment, Maintenance, and Management of Hospitals" (s. 92(7)), "all Matters of a merely local or private Nature in the Province" (s. 92(16)) and "Property and Civil Rights in the Province" (s. 92(13)). These provisions are seen as assigning the provinces primary authority over health, including hospital or health care services, health insurance, the training of health care professionals and the practice of medicine.[7] Medical assessments generally fall under provincial jurisdiction except in the case of federal populations such as offenders incarcerated in a penitentiary.

The areas involving health in which the federal government is more directly involved are derived from three constitutional powers: the spending power,[8] the power to

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4 Canadian Intergovernmental Conference Secretariat, *Press release: Federal/provincial/territorial ministers discuss key justice and public safety issues facing Canadians*, 2012.

5 See André Braën, *Health and the Distribution of Powers in Canada*, Commission on the Future of Health Care in Canada, Discussion Paper No. 2, July 2002.

6 *Schneider v. The Queen*, [1982] 2 SCR. 112, p. 142.

7 André Braën, *Health and the Distribution of Powers in Canada*, Commission on the Future of Health Care in Canada, Discussion Paper No. 2, July 2002, p. 7.

8 This power is not explicitly set out in the *Constitution Act, 1867* but is inferred from a combination of federal powers, namely, the power to levy taxes (s. 91(3)), to legislate in relation to public debt and property (s. 91(1A)) and to appropriate federal funds (s. 106).

make laws for the peace, order and good government of Canada (introductory paragraph to s. 91), and, in particular, the criminal law power (s. 91(27)).[9] According to the Supreme Court of Canada, legislation concerning criminal law must pursue an objective that is in the public realm, such as public peace, order, security, health or morality.[10]

1.3.2 Criminal Law

Under the *Constitution Act, 1867*, Parliament has exclusive jurisdiction over criminal law and procedure (s. 91(27)), while the provinces have jurisdiction over the constitution of provincial courts and the administration of justice (s. 92(14)). Federal authority over criminal law has been broadly interpreted by the courts.[11] In addition, [translation] "jurisprudence has recognized that criminal law has a valid role to play in prevention, either by protecting the majority against individuals who present a significant risk to public safety or, inversely, by protecting vulnerable groups."[12]

1.3.3 Corrections

Responsibility for correctional services is divided between the federal government and the provincial and territorial governments, on the basis of the sentence imposed by the court. Adult offenders sentenced to prison terms of two years or more are the responsibility of the federal government, while those sentenced to a term of less than two years are the responsibility of the provincial or territorial governments. Provincial and territorial correctional services are also responsible for persons being held in remand while awaiting trial, offenders serving conditional sentences and young offenders.

Correctional Service Canada is responsible for the care and custody of offenders sentenced to a federal term of incarceration. It is also mandated to supervise offenders on conditional release and offenders subject to long-term supervision orders.

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9 Marlisa Tiedemann, "The Federal Role in Health and Health Care," Library of Parliament, 20 October 2008.

10 See the following Supreme Court decisions: *Reference: Validity of Section 5(A) of the Dairy Industry Act*, [1949] SCR 1; *R. v. Vaillancourt*, [1987] 2 SCR 636; *R. v. Morgentaler*, [1993] 3 SCR 463; *RJR - MacDonald Inc. v. Canada (A.G.)*, [1995] 3 SCR 199.

11 See *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 SCR 571.

12 Pierre Béliveau and Martin Vauclair, *Traité général de preuve et de procédure pénales,* Éditions Yvon Blais, 19th edition, Cowansville, 2012, pp. 15–16. The authors are referring specifically to the Supreme Court of Canada's decision in *Winko v. Colombie-Britannique (Forensic Psychiatric Institute)*, [1999] 2 SCR 625, which recognized the validity of the previous version of s. 672.54 of the *Criminal Code* providing for a verdict of not criminally responsible on account of mental disorder. The Court ruled as follows: "In its purpose and effect, Part XX.1 ["Mental disorder"] reflects the view that NCR accused are entitled to sensitive care, rehabilitation and meaningful attempts to foster their participation in the community, to the maximum extent compatible with the individual's actual situation… Any restrictions on the liberty of NCR accused are imposed for essentially rehabilitative and not penal purposes" (paras. 91 and 94).

1.3.4 FASD and the Federal Government's Role

According to a report prepared by Health Canada's Evaluation Directorate and the Public Health Agency of Canada:

> There is a leadership role for the Government of Canada and the Public Health Agency of Canada in relation to FASD. The *Department of Health Act* and the *Public Health Agency of Canada Act* guide the Public Health Agency's roles and responsibilities for the prevention of illness. The Minister of Health has a broad mandate to protect Canadians against health risks. Under the leadership of the Chief Public Health Officer, and in collaboration with its partners, the Public Health Agency is mandated to lead federal efforts and to mobilize pan-Canadian action in preventing disease and injury.[13]

Other federal departments, such as Justice Canada and Aboriginal Affairs and Northern Development Canada, also have a role to play in the national approach to addressing FASD. Certain federal organizations are mandated to provide primary health care to specific client groups. For example, Correctional Service Canada is responsible for delivering health care to inmates confined to a penitentiary, and Health Canada directs funding for FASD programs and services serving eligible First Nations and Inuit communities.

13 Health Canada and Public Health Agency of Canada, *Evaluation of the Fetal Alcohol Spectrum Disorder (FASD) Initiative 2008-2009 to 2012-2013*, March 2014. The evaluation concluded as follows: "The FASD Initiative is broadly aligned with Government of Canada and Public Health Agency priorities. While not explicitly mentioned as a Government of Canada priority, FASD is recognized as a health, social, justice and economic issue. There are links between FASD Initiative objectives and recently stated Government of Canada priorities with respect to health promotion, mental health, and violence and crime prevention."

CHAPTER 2: FETAL ALCOHOL SPECTRUM DISORDER

This chapter draws on the testimony and briefs received by the Committee to provide an overview of the complex issue of FASD. It begins with a basic description of FASD and its underlying causes, and goes on to discuss identification and diagnosis, and the many problems suffered by people with FASD.

2.1 WHAT IS FETAL ALCOHOL SPECTRUM DISORDER?

FASD is a non-clinical term that refers to a range of cognitive deficits and other disabilities caused by prenatal alcohol exposure. It is an incurable and entirely preventable condition. Prenatal alcohol exposure is the main known cause of birth defects and non-genetic developmental disability in Canada.[14] As the condition is irreversible, most people with FASD will require health, educational and social services throughout their lives.[15]

FASD encompasses five medical diagnoses:[16]

- fetal alcohol syndrome (FAS);
- partial fetal alcohol syndrome (pFAS);
- fetal alcohol effects (FAE);
- alcohol-related neurodevelopmental disorder (ARND);
- alcohol-related birth defects (ARBD).

FAS is probably the most widely recognized diagnosis. The term “fetal alcohol syndrome” first appeared in 1973 in an article that presented abnormalities observed in children whose mothers abused alcohol during pregnancy.[17] The article provided a description of the main characteristics of FAS: craniofacial abnormalities, growth deficiency and central nervous system dysfunction. Over time, other terms were proposed to address other signs of prenatal alcohol exposure. Researchers also discovered that cognitive disabilities related to fetal alcohol exposure can occur without any morphological abnormalities. It is now known that FAS represents only the tip of the iceberg when it

14 Public Health Agency of Canada, *Evaluation of the Fetal Alcohol Spectrum Disorder (FASD) Initiative 2008-2009 to 2012-2013*, March 2014.

15 JUST, *Evidence*, 2nd Session, 41st Parliament, 25 February 2015 (Ryan Leef, Yukon). According to information provided by the FASD E.L.M.O. Network, less than 10% of people diagnosed with FASD can live independently as adults. Brief submitted March 2015.

16 JUST, 2nd Session, 41st Parliament, brief submitted 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

17 K.L. Jones and D.W. Smith, “Recognition of the fetal alcohol syndrome in early infancy,” *The Lancet*, 1973.

comes to the range of impairments caused by prenatal alcohol exposure.[18] Since the 2000s, the preferred term in North America to describe the spectrum of disorders caused by alcohol use during pregnancy is "fetal alcohol syndrome disorder" (FASD).

Most FASD victims demonstrate no craniofacial abnormalities. The Committee learned that such facial features are found in fewer than 10% of cases.[19] Research also shows that the facial features are likely to change or even disappear with age. According to a study conducted in the 1990s, "only 10% of their original diagnosed group continued to have clearly recognizable features of FAS."[20]

As we will see later, the victims of fetal alcohol exposure present a unique combination of symptoms that have varying degrees of severity on the fetal alcohol spectrum. According to the experts who appeared before the Committee, research has shown that FASD is not influenced solely by alcohol consumption during pregnancy but also by the interaction of genetic factors (e.g., the resilience of the fetus) and postnatal environmental factors (e.g., inadequate nutrition, an environment unsuitable for child development). This interaction and the fact that FASD symptoms are similar to the symptoms of other disorders make it very difficult to identify people affected by FASD.[21]

2.2 IDENTIFICATION AND DIAGNOSIS OF FASD

In 2005, the Canadian Medical Association released Canadian guidelines for diagnosing FASD.[22] As stated in the paper, "[t]he guidelines are based on widespread consultation of expert practitioners and partners in the field."[23] The Scientific Director of the Society of Obstetricians and Gynaecologists of Canada informed the Committee that updated guidelines will be published shortly.[24] Revision of the guidelines was made possible through funding from the Public Health Agency of Canada[25]. The new guidelines will "talk a little bit more about screening and how to recognize when alcohol use during pregnancy may be a problem."[26]

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18 JUST, 2nd Session, 41st Parliament, brief submitted 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

19 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Dr. Gail Andrew, Professor, University of Alberta, and Medical Director, Glenrose FASD Clinical and Research Services, Edmonton, Alberta).

20 Diane K. Fast and Julianne Conry, *Understanding the Similarities and Differences between Fetal Alcohol Spectrum Disorder and Mental Health Disorders*, Research and Statistics Division, Department of Justice Canada, December 2011, p. 3.

21 A.E. Chudley et al., "Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis," *Canadian Medical Association Journal*, Vol. 172, No. 5, March 2005, p. 2.

22 A. E. Chudley et al., "Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis," *Canadian Medical Association Journal*, Vol. 172, No. 5, March 2005.

23 Ibid.

24 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

25 Ibid.

26 Ibid.

Diagnosing FASD is both complex and expensive. An average assessment costs approximately $4,000 according to Dr. Gail Andrew.[27] However, experts told the Committee that the investment is worthwhile since it has been shown that providing FASD victims with the appropriate support reduces delinquency, crime, victimization and the use of emergency services, and improves quality of life.

A wide range of physical and cognitive assessments are required to screen for disorders caused by prenatal alcohol exposure. It is recommended that assessments be conducted by a multidisciplinary team made up of physicians, psychiatrists, psychologists, speech-language pathologists and occupational therapists. During her testimony, Wenda Bradley emphasized that an assessment should not be limited to a strictly psychological analysis. Instead, the assessment team should "assess all abilities or concerns for the individual with an adaptive functioning focus."[28] Professor Pei shared this point of view and told the Committee that knowledge of a person's unique brain functioning is vital to determining the appropriate response regarding intervention, treatment, support and sentencing.[29]

Similarly, Jocelynn Cook and Dr. Andrew highlighted the importance of diagnosing FASD as early as possible in order to identify a person's neurodevelopmental strengths and weaknesses, and respond more effectively.[30] As Jocelynn Cook told the Committee:

> We know that diagnosis improves outcomes, the earlier the better. Part of that is because people understand the implications of FASD, what it means, and we can try to develop integrated care teams to get families the supports and services that they need. Diagnosis is important. It identifies neurodevelopmental strengths and weaknesses so that we can better match … treatments and interventions.[31]

To make a conclusive diagnosis, it is always preferable to have evidence that the mother consumed alcohol during pregnancy. However, FAS can be diagnosed without such confirmation when the individual exhibits facial anomalies (e.g., thin upper lip and a flat midface), growth deficiency and abnormal development of the central nervous system (e.g., poor fine-motor skills or hand-eye coordination).[32] Individuals with only a few of the facial features but with neurocognitive dysfunction are diagnosed as having partial FAS,

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27 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

28 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

29 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

30 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

31 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

32 Diane K. Fast and Julianne Conry, *Understanding the Similarities and Differences between Fetal Alcohol Spectrum Disorder and Mental Health Disorders*, Research and Statistics Division, Department of Justice Canada, December 2011, p. 3.

and those with none of the FAS facial features but with significant neurocognitive dysfunction are diagnosed as having ARND. That said, for a diagnosis of pFAS or ARND, there must be a confirmed history of alcohol use during pregnancy.[33] By definition, anyone who receives an FASD diagnosis has deficits in several areas of cerebral functioning.

Witnesses raised the issue that proof of prenatal consumption of alcohol is required for a diagnosis of FASD. Sometimes this information is simply unavailable, as in the case of a child who has entered the child protection system and has no contact with his mother, or whose mother is deceased. In other cases, given the stigma associated with FASD, the mother, a family member, an acquaintance or another individual may simply deny there was any exposure to alcohol during pregnancy. Without a diagnosis, some individuals who present various symptoms of FASD may be denied the services given to others who have been formally diagnosed.[34]

The Committee learned that Canada has some screening tools and that steps are being taken to get doctors across the country to "collect the same data when they assess their patients for FASD, whether they have it or not, and to say what they recommend in terms of supports and systems."[35] Significant progress has been made in this regard in Yukon, where the Department of Justice has announced that it will collect standardized data to identify trends and better evaluate the impact of FASD on the demand for and delivery of services.[36]

In its brief to the Committee, the FASD E.L.M.O. Network stated that, in too many instances, FASD is considered only after an individual has received multiple diagnoses and ineffective interventions. The Network is concerned about this situation and emphasized that consistency is critical to positive child development.[37]

Several witnesses stated that many Canadian communities have limited diagnostic capacity. It was suggested that services vary tremendously across the country and that there are generally more diagnostic clinics in Western Canada. In addition, adults seem to have less access to diagnostic services than children.[38]

Poverty – which is often characterized by limited access to social and health services – and stigmatization are also key factors that can make identification and prevention of FASD much more difficult. Because of the prejudices surrounding FASD,

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33 Ibid.

34 This experience was described in a brief to the Committee by one father whose son has all the symptoms of FASD but cannot be diagnosed because there is no confirmation of prenatal exposure to alcohol. House of Commons, JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Raymond F. Currie).

35 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

36 Ibid.

37 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Craig Read and Juanita St. Croix, co-chairs of the FASD E.L.M.O. Network).

38 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

witnesses suggested that some people with FASD feign understanding in their dealings with frontline workers so that they can avoid detection.[39] Women who are pregnant or trying to conceive may deny having a drinking problem – again to avoid the stigma associated with alcohol use. Jocelynn Cook talked to the Committee about FASD prevention and efforts to address the issue of stigma:

> We're trying to change the stigma around alcohol use in pregnancy so there's not the shame and blame context. We're hoping that women are becoming more comfortable talking about alcohol use. We're doing a lot of education so that everybody understands the potential implications of alcohol use during pregnancy. We're working a lot with health professionals and front-line workers so that they know how to talk to women about alcohol use, because there's an art to that and there's a relationship piece to that.[40]

2.3 THE MANY DISABILITIES RELATED TO FASD

The victims of fetal alcohol exposure experience a range of impairments. Fetal alcohol spectrum disorder implies that it affects people to different degrees and produces symptoms of varying intensity. It also implies that people with FASD require different types and levels of support. Witnesses frequently told the Committee that no two people are affected by FASD in the same way.

The severity of the effects of FASD depend on a variety of factors such as the amount of alcohol consumed during pregnancy, the mother's consumption patterns, the timing of exposure during pregnancy, genetics, smoking, drug use, stress and trauma as well as the mother's age, health and overall nutrition.[41] Postnatal factors such as the child's nutrition and socioeconomic environment also influence the severity of impairment.

Prenatal exposure to alcohol affects individuals in many ways and is unique to each individual.[42] The experts who appeared before the Committee explained that fetal alcohol exposure can result in primary and secondary disabilities. Primary disabilities are the direct result of the damage caused by alcohol to the brain and central nervous system, while secondary disabilities develop in cases where affected individuals do not receive proper support. Recent Canadian studies indicate that individuals with FASD had more central nervous system impairment than anticipated.[43] This finding is troubling because nervous system impairment increases the risk of developing secondary disabilities.

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39 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Canada FASD Research Network).

40 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

41 Ibid.

42 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

43 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

The table below presents some of the primary and secondary disabilities frequently linked to FASD.

Primary Disabilities	Secondary Disabilities
Physical birth defects	Mental health problems
Facial abnormalities	Disrupted school experiences
Physical health problems	Drug and alcohol abuse
Learning disabilities (such as attention-deficit hyperactivity disorder and impairment in receptive and expressive language)	Inability to control behaviour (impulsiveness)
Difficulty communicating thoughts and feelings in an appropriate manner	Difficulty holding a job and handling money
Difficulty fully understanding the consequences of actions	Difficulty interacting with others
Difficulty learning from mistakes	Inappropriate sexual behaviour
Delay in processing information	Delinquency and criminality

Dr. Svetlana Popova, a professor and senior scientist in social and epidemiological research at the Centre for Addiction and Mental Health, spoke to the Committee about research findings that reveal the many disabilities affecting people with FASD:

> [A]bout 90% of people with FASD have conduct behavioural problems, disruptive behavioural impulsivity. Also, 80% of people have receptive and expressive language deficit, 70% have developmental and cognitive disorders and developmental delays, 55% have alcohol and drug dependence, 50% suffer from attention deficit hyperactivity disorder, and 45% from brief psychotic disorder. More than 40% have fine and/or gross motor developmental delays and developmental coordination disorder. More than 40% have mental retardation and intellectual impairment. More than 40% have major depressive disorder.[44]

People with FASD commonly suffer from other co-morbid conditions that affect their disabilities such as psychoactive drug use, anti-social personality or conduct disorder, and anxiety – any of which can complicate the task of the people trying to help them. During her research, Dr. Popova found that more than 400 disease conditions are related to FASD.[45] As a result, FASD appears to be "the highest input factor in the medical field."[46]

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44 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

45 Ibid.

46 Ibid.

The most prevalent disease conditions identified among people with FASD are congenital malformations, followed by mental and behavioural disorders. According to research by Professor Jacqueline Pei, 95% of people who suffer from FASD have been diagnosed with mental health problems such as anxiety, depression and schizophrenia.[47]

In her brief to the Committee, Professor Pei stated that disrupted brain development is one of the primary features of FASD.[48] This disruption affects the development of memory, abstract thought, emotions and social behaviours. People with FASD may have difficulty processing information, understanding social norms and expectations, and making the connection between cause and effect.[49] The following information provided by Professor Pei illustrate these difficulties well:

> In particular, individuals with FASD struggle with higher-level tasks relying on complex Executive Functioning (EF) skills including inhibition, decision-making, working memory, integration of information, and cognitive flexibility. Research with youth has found that those with FASD show impairments on decision-making and risk-taking tasks and, relative to individuals without alcohol exposure, they appear unable to change their behaviour and make more positive choices when faced with negative consequences. Rather, they seem to focus on the perceived benefits of the reward instead of the potential negative consequences of the behaviour. These brain-based deficits present risk factors that necessitate support as the presence of intense emotions, illogical thoughts, antisocial urges, and anti-social associates tend to exacerbate self-regulation potential, leaving FASD-affected individuals with difficulties controlling aggression and other maladaptive behaviors.[50]

The Executive Director of the Fetal Alcohol Syndrome Society of Yukon explained how prenatal alcohol exposure affects the brain's executive functioning and told Committee members that service providers encounter a disconnect between appearance and reality when dealing with FASD sufferers:

> People who have FASD may have varying abilities for executive functioning. They may talk very well and appear to understand what you are saying but may not comprehend much of what is said. It is hard to understand that within one person there may be the ability to talk as an adult but only understand what a person in grade 4 might comprehend from that conversation. There may be delays in processing the information and also delays in responding to questions.[51]

The disabilities associated with FASD cast a shadow over its victims, affecting their interaction with the world – at home, at school and at work – and their dealings with

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47 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

48 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

49 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

50 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta)

51 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon)

service providers, including those in the health care and criminal justice systems. As Committee members were told during the hearings, service providers must recognize FASD symptoms to be able to provide the appropriate care and services. Unfortunately, as we will see in the next chapter, workers in the criminal justice system, like many other service providers and stakeholders, are too often distracted by the many disabilities of FASD sufferers and tend to misinterpret their behaviour "as resistant rather than as not understanding, saying that they won't instead of that they can't."[52]

2.3.1 Risk Factors and Protective Factors

Research has shown that risk factors and protective factors can increase or reduce the severity of FASD. Dr. Gail Andrew explained that "[p]renatal brain damage from alcohol can be compounded by adverse environments experienced in the pregnancy and in the early years of life."[53] Elspeth Ross, the Facilitator with the Fetal Alcohol Spectrum Disorder Group of Ottawa and the mother of two children with FASD, provided a list of protective factors:

- early identification and diagnosis;
- parental support;
- a supportive environment;
- a stable home;
- direct involvement with special services;
- support from a mentor;
- appropriate support for persons with FASD and their caregivers.

She emphasized that people with FASD "need … support and understanding; help navigating the system; flexibility; patience; perseverance; and hope."[54]

The evidence clearly showed that creating a structured and supportive environment for people with FASD plays a significant role in preventing the development of secondary conditions and involvement in the criminal justice system.

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52 Ibid.

53 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

54 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

2.4 UNSAFE LEVELS OF ALCOHOL CONSUMPTION DURING PREGNANCY

The Scientific Director of the Society of Obstetricians and Gynaecologists of Canada and other witnesses told the Committee that research has not determined the quantity of alcohol that would cause damage to a fetus.[55] While some studies indicate that excessive alcohol consumption, such as four or more drinks on one occasion, could have severe effects,[56] experts agree that consuming even small amounts of alcohol during pregnancy can cause physical defects, brain injury and irreversible impairment of the nervous system.[57] As Jocelynn Cook explained to the Committee:

> The important thing to know is that the brain is developing throughout gestation and is always susceptible to alcohol. We used to be able to give alcohol to mice on a certain day of gestation—just one day—and they'd be born with limb and kidney defects. You can give it on a different day and they'll have facial features. But the problem, as I said, is that the brain is always susceptible.[58]

Given that there is no safe time during pregnancy to consume alcohol and no safe amount for a mother to consume,[59] the evidence is clear: abstinence is the best option for women who are, or who may become, pregnant.[60] This is also the position of the Public Health Agency of Canada.

According to the information provided during Committee hearings, there is an increase in risky patterns of alcohol consumption among women of child-bearing age. This trend worries experts, who reminded the Committee of the harmful effects of alcohol consumption in general and especially during pregnancy.[61] The situation is made even more troubling by the fact that close to 50% of pregnancies are unplanned.[62]

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55 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

56 As Jocelynn L. Cook explained in her brief: "Animal studies do suggest that binge drinking (four or more drinks on one occasion) is associated with more severe effects but not in every case." Brief submitted to the Committee in March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

57 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada). See also Society of Obstetricians and Gynaecologists of Canada, "Alcohol use and pregnancy consensus guidelines," *Journal of Obstetrics and Gynaecology Canada*, Vol. 32, No. 8, August 2010.

58 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

59 Public Health Agency of Canada, *Fetal Alcohol Spectrum Disorder (FASD)*, 2014.

60 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada). See also Society of Obstetricians and Gynaecologists of Canada, "Alcohol use and pregnancy consensus guidelines", *Journal of Obstetrics and Gynaecology Canada*, Vol. 32, No. 8, August 2010.

61 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

62 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

Jocelynn Cook emphasized that public awareness initiatives are essential in the current social context:

> Drinking alcohol is sexy in a lot of ads. It's very socially acceptable. Helping women to understand not just the harmful effects of alcohol on fetal growth and development but also the harmful effects of alcohol on health in general...[63]

Based on the testimony received, certain women may be at higher risk of giving birth to children with FASD. Risk factors for prenatal alcohol exposure include lower maternal education level, lower socioeconomic status, paternal substance abuse during pregnancy, and reduced access to prenatal and postnatal care and services.[64] Jocelynn Cook presented the Committee with a list of possible reasons why women consume alcohol while pregnant:

- alcohol abuse;
- family history of alcohol use;
- history of in-patient treatment for alcohol or substance abuse or mental health problems;
- previous birth of a child with FASD;
- lack of contraception or an unplanned pregnancy;
- physical, psychological or sexual abuse;
- low income or limited access to health care.[65]

Service providers in contact with women who are pregnant or trying to conceive must understand these factors so that they are better able to identify those women at greater risk of having a child with FASD and can take the appropriate action.

2.5 INCIDENCE AND PREVALENCE OF FASD IN THE CANADIAN POPULATION

There is no conclusive evidence regarding the prevalence of FASD in the Canadian population. The Public Health Agency of Canada estimates that FASD occurs at a rate of 1 out of every 100 live births and prevalence is between 2% and 5%.[66] According to Dr. Popova, some segments of the population are more affected by FASD, such as northern communities, where FASD prevalence can range from 2.5% to 19%.

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63 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada.

64 A. E. Chudley et al., "Fetal alcohol spectrum disorder: Canadian guidelines for diagnosis," *Canadian Medical Association Journal*, Vol. 172, No. 5, March 2005.

65 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

66 Public Health Agency of Canada, *Evaluation of the Fetal Alcohol Spectrum Disorder (FASD) Initiative 2008-2009 to 2012-2013*, March 2014.

Chief Cameron Alexis told the Committee that some First Nations communities have disproportionately high rates of FASD.[67] Lastly, Dr. Popova noted that people who have been in the child welfare system[68] and the criminal justice system have higher prevalence rates than the general population. Although she acknowledged that the studies on which these rates are based have many methodological limitations, she believes that "most likely the prevalence [of FASD] is much higher in both northern communities and the general population."[69] Dr. Popova is currently attempting to determine the prevalence of FASD in a sample of primary students. She expects to publish her findings in about a year.[70]

Jonathan Rudin, Program Director at Aboriginal Legal Services of Toronto, stressed to Committee members that "FASD is not an aboriginal issue." He added that "[w]e do not know … the prevalence rates of FASD in the general population in Canada" and so it is "impossible to assume or to guess that those rates are higher in the aboriginal population."[71] That was also the conclusion of the National Collaborating Centre for Aboriginal Health, which published a report in 2009 stating that "the true extent of FAS and FASD in Aboriginal and non-Aboriginal populations is not known and thus no assessment of higher prevalence is possible."[72] The report goes on to state that "[p]ublished estimates of the prevalence and incidence of FASD and FAS are too methodologically diverse to provide the basis for Aboriginal-specific rates."[73]

2.6 FASD AND THE COSTS TO CANADA

FASD is a complex issue that involves significant costs for all levels of government as well as caregivers and other stakeholders. It is estimated that the costs associated with FASD range from $1.3 billion to $2.3 billion annually.[74] Dr. Popova stressed that this is a conservative estimate and the most significant component of the overall cost was that of "productivity losses due to disability and premature mortality of people with FASD."[75]

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67 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Chief Cameron Alexis, Alberta Regional Chief, Assembly of First Nations).

68 A Manitoba study showed that 17% of children in the child welfare system suffered from FASD. Some were diagnosed and others were not. Don Fuchs et al., *Children with FASD Involved with the Manitoba Child Welfare System: The Need for Passionate Action*, Canadian Plains Research Center, University of Regina, 2009.

69 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

70 Ibid.

71 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto).

72 Michael Pacey, *Fetal Alcohol Syndrome & Fetal Alcohol Spectrum Disorder Among Aboriginal Peoples: A Review of Prevalence*, National Collaborating Centre for Aboriginal Health, 2009.

73 Ibid. See also Michael Pacey, *Fetal Alcohol Syndrome & Fetal Alcohol Spectrum Disorder Among Aboriginal Canadians: Knowledge Gaps*, National Collaborating Centre for Aboriginal Health, 2010.

74 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

75 Ibid.

The second highest component according to Dr. Popova was the cost of incarcerating people with FASD in provincial and federal correctional system, which accounted for about 30% of the total. She noted that the cost of federal and provincial correctional services reached close to $378 million annually.[76] In her presentation, Dr. Popova noted the following with respect to the costs of FASD to Canada:

> FASD affects virtually all sectors of our society. It includes direct health care costs; direct law enforcement costs, which include the police, courts, and corrections, including probation; and other direct costs, which include children in care, special education, home support services, supportive living, job skills training, social assistance, prevention and research, and many other costs. Costs also include productivity losses of parents, caregivers, and affected individuals. The costs also include intangible costs, which means the cost of pain, suffering, stress, frustration, and guilt of the mothers, which cannot be estimated in terms of money.[77]

It is estimated that each individual with FASD creates roughly $1.5 million to $2 million in direct costs to the federal, provincial and territorial governments over a lifetime.[78] This includes additional costs for education, health and other support services, but excludes the lost potential of the individual, the family and caregivers.[79] Many witnesses reported that the people who care for a child with FASD bear a heavy burden psychologically, socially and financially, as well as in their professional and marital lives.

In closing, a key point raised by experts who testified before the Committee was that a rapid diagnosis of FASD followed by appropriate interventions helps to mitigate the negative impacts of the disorder, especially the health repercussions, and thereby reduce the many direct costs to government.

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76 Ibid.

77 Ibid.

78 Institute of Health Economics, *Consensus Statement on Legal Issues of Fetal Alcohol Spectrum Disorder (FASD)*, Alberta, September 2013.

79 In its 2006 report, the House of Commons Standing Committee on Health estimated the direct costs to be $1.5 million over the course of an affected individual's lifetime. See *Even One Is Too Many: A Call for a Comprehensive Action Plan for Fetal Alcohol Spectrum Disorder*, September 2006.

CHAPTER 3: THE IMPACT OF FASD ON THE CRIMINAL JUSTICE SYSTEM

While there is no conclusive data on the prevalence of FASD in the Canadian criminal justice system, studies have shown that people with FASD are over-represented in the system, including the prisons and penitentiaries. This chapter presents the information received by the Committee regarding FASD's impact on the criminal justice system and how those with FASD interact with the system as accused, victims and witnesses.

3.1 FASD AND THE CRIMINAL JUSTICE SYSTEM

> [The *Fetal Alcohol Syndrome Society of Yukon*] feels strongly about the need for special consideration for people with FASD who are involved in the justice system as victims, witnesses, and offenders, and sometimes in more than one role at a time.[80]

This excerpt from the testimony of the Executive Director of the Fetal Alcohol Syndrome Society of Yukon sums up the feelings shared by other witnesses regarding the manner in which people with FASD should be treated by participants in the criminal justice system, including police officers, prosecutors, defence attorneys, judges, correctional and probation officers or parole board members.

3.1.1 Prevalence of FASD in the Justice System

There is still very little empirical data on FASD's impact on the criminal justice system. However, studies show that "individuals with FASD have a disproportionate level of contact with the justice system in which involvement in the justice system can be as a victim, witness or offender."[81] The Committee was told that 76% of the 37 clients monitored by the Fetal Alcohol Syndrome Society of Yukon had been involved in the justice system.[82] Other studies estimate that close to 60% of individuals with FASD have been in trouble with the law.[83] According to studies of young offenders, young people with FASD have received criminal charges – and a greater number of these charges – earlier in their lives than young offenders without FASD.[84] Various factors may explain why those

80 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

81 JUST, 2nd Session, 41st Parliament, brief submitted March 2015, p. 2 (Canada FASD Research Network).

82 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015.

83 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

84 However, the charges against young offenders with FASD seem to be less serious than those against other young offenders. House of Commons, JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

with FASD reoffend more frequently, such as mental health problems and a general inability to learn from past experience.[85]

During her appearance, Wenda Bradley told the Committee that "there are many people within our society who are affected by FASD but who have not been recognized and who keep circling in and out of the justice system as well as many other systems within our society."[86]

Witnesses highlighted the difficulty for the criminal justice system to identify people with FASD and address their needs appropriately. Most FASD sufferers go unrecognized, as Jonathan Rudin explained to the Committee:

> The difficulty and the challenge for the justice system is that in court the FASD-affected individual looks like anybody else.… If you walk into court with a cane and dark glasses, we know you're blind and we take that into account. FASD is largely an invisible disability and that is why it's so important that we find ways of addressing it in criminal justice. Failing to do so means that we miss these individuals and we don't sentence them properly.[87]

Witnesses also stated very clearly that people with FASD are over-represented in the criminal justice system because they suffer from permanent brain injury as a result of FASD. These serious dysfunctions force us to examine the premise underlying the criminal justice system. According to Rodney Snow:

> [C]riminal law assumes that individuals make informed choices, that they decide to commit crimes, and that they learn from their own behaviour and the behaviour of others. Fourth, these assumptions are often not valid for individuals with FASD, so our criminal justice system fails them and it fails us.[88]

3.1.2 Involvement in the Criminal Justice System as a Victim or Witness

Based on the testimony received, there is no question that people with FASD are at greater risk of being the victim of an offence or a witness to one. For most of these people, the criminal justice system is complicated and intimidating. It is easy to see why such individuals could have trouble understanding the legal process and could require greater support. As Professor Pei noted in her brief, "the neurocognitive, adaptive, and social

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85 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

86 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

87 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto).

88 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Rodney Snow). Similar comments were made by many witnesses who appeared before the Committee or submitted briefs, including the Correctional Investigator of Canada, Professor Jacqueline Pei, the Executive Director of the Fetal Alcohol Syndrome Society of Yukon, and the representative of the Aboriginal Legal Services of Toronto.

difficulties associated with FASD may influence an affected individual's ability to navigate the legal process."[89]

Elspeth Ross, the Facilitator with the Fetal Alcohol Spectrum Disorder Group of Ottawa, described the difficult experience of one young victim suffering from FASD.

> One mother reports that her son was assaulted and subsequently appeared as a witness. One day on the stand was a gruelling process for someone easily confused. The accused got off and now the young man has no faith in the system for protection, and is marked for daring to testify.[90]

The Committee heard that all participants in the criminal justice system must be made aware of FASD in order to facilitate access to justice and increase confidence in the system. They must also be able to recognize the special needs of those affected by FASD so that they can support them appropriately throughout the criminal process.

In its brief, the Canada FASD Research Network stated that there are "examples of great work that court workers are doing to best prepare their clients who are cognitively impaired to be sure they are the best witness possible on the stand." The Network believes this support is vital to ensuring full participation by those with FASD:

> In the absence of supports, people with FASD can experience a lack of meaningful access to or participation in the justice system as prosecutors, judges or juries often dismiss what appear to be "unreliable" witnesses (that mix up dates, that can't recall events, etc.).[91]

3.1.3 Involvement in the Criminal Justice System as an Accused

Professor Pei cited research showing that people with FASD who are charged with criminal offences often have difficulty understanding arrest, interrogation and trial processes.[92] These people may also "be more inclined to give false confessions or false testimonies"[93] and "may waive their rights or take responsibility for crimes of others."[94]

Studies of young offenders show that punishment alone does not reduce criminal recidivism. According to Professor Pei, punishment that does not include intervention tailored to the offender's needs could actually increase recidivism.[95] During his

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89 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

90 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

91 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Canada FASD Research Network).

92 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

93 Ibid.

94 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

95 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

appearance before the Committee, the Correctional Investigator warned of the undesired effects the criminal justice system could have on certain individuals with FASD:

> The response of the criminal justice system may, in fact, exacerbate individual difficulties associated with fetal alcohol spectrum disorder. For example, sending an FASD-affected person to jail to "learn a lesson" may be an exercise in futility. A sentence founded on specific or general deterrence is not likely to be meaningful for an FASD person.[96]

Research into the treatment and management of offenders provides vital information on the type of intervention that works best for people with FASD. During her appearance, Professor Pei focused on the risk-needs-responsivity (RNR) model, which has shown promise in reducing recidivism among FASD sufferers and is the basis for treatment by Correctional Service Canada, according to the Executive Director and General Counsel of the Office of the Correctional Investigator.[97] The RNR model tailors treatment and intervention according to the following three principles:

- Risk – the intensity of the treatment and intervention must correspond to the person's level of risk. More intensive treatment should be given to higher-risk offenders and less intensive treatment to those with a lower risk of reoffending.

- Needs – treatment and intervention must target the risk factors and needs that led to the person's criminal behaviour or that drive it (criminogenic needs must be targeted).

- Responsivity – treatment and intervention must be tailored to the person's style and mode of learning.[98]

The Committee was told that when RNR is implemented with fidelity, studies show that it reduces recidivism by 35%.[99] When RNR principles are not followed, however, not only is the intervention ineffective but it could actually be harmful to outcomes.[100] As Professor Pei explained in her brief:

> [F]idelity in the implementation of this model is of critical importance, not only to maximize positive outcomes but also to minimize the potential of utilizing strategies that could

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96 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

97 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Ivan Zinger, Executive Director and General Counsel, Office of the Correctional Investigator of Canada).

98 In the case of Correctional Service Canada, applying the principle of responsivity can mean adjusting program delivery to account for cultural differences, cognitive impairments, mental health problems or physical handicaps. The program content can be tailored to make it clearer and simpler, or to focus more on reinforcement. That being said, the Correctional Service does not always have enough resources to adapt programs to meet the specific needs of all groups in the inmate population, a population which presents complex challenges, as noted by Ivan Zinger. JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Ivan Zinger, Executive Director and General Counsel, Office of the Correctional Investigator of Canada).

99 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

100 Ibid.

> unintentionally increase the possibility of criminal recidivism. This is particularly true for complex populations, such as individuals with an FASD, whose needs may be unique, and sentencing and intervention responses may need to be modified in light of the unique pattern of cognitive diversity present for the individual.[101]

One of the difficulties in dealing with those affected by FASD is that it is hard to properly assess their level of risk. As Professor Pei explained, people with FASD may look like high-risk offenders, but an in-depth assessment generally reveals that they are lower risk. Professor Pei is concerned by this tendency to over-estimate the risk posed by FASD offenders and she emphasized that certain sentences and treatment approaches may cause considerable damage and encourage recidivism.[102] To demonstrate the importance of tailoring interventions to the needs of FASD offenders, Professor Pei gave an example of a person with FASD who completely changed his behaviour after receiving the proper treatment based on a detailed cognitive assessment.[103]

3.2 FASD AND THE CORRECTIONAL SYSTEM

3.2.1 Prevalence of FASD in Prisons and Penitentiaries

As the Correctional Investigator of Canada told the Committee, it is difficult to reliably determine the prevalence of FASD in Canada's correctional institutions because there is significant variation in methods of case identification and diagnosis. Studies of offender populations indicate prevalence rates of 10% to 25%.[104] While there is no conclusive evidence on the prevalence of FASD in Canadian prisons and penitentiaries, a 2011 study by Correctional Service Canada,[105] designed to test a screening tool for FASD and determine the prevalence of FASD among a sample of male offenders recently admitted to a medium-security penitentiary in Manitoba, showed that 10% of them had FASD, while "15% … met some of the diagnostic criteria, but were missing information critical to making or ruling out a positive diagnosis."[106] According to the study, the rate of FASD is at least 10 times higher in the federal correctional population than in the general population. The study also identified neuropsychological deficits that were unrelated to fetal alcohol exposure in 45% of the participants. Significantly, "none of

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101 Ibid.

102 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

103 The example provided can be found in her testimony. JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

104 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

105 A total of 91 inmates participated in the study. See P.H. MacPherson et al., *Fetal Alcohol Spectrum Disorder (FASD) in a correctional population: Prevalence, screening and characteristics*, Research Report R-247, Ottawa, 2011.

106 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

the offenders diagnosed in this research study had been previously identified as being FASD-affected."[107]

Based on Canadian data, researchers have estimated that young people with FASD are 19 times more likely to be incarcerated than other young people in a given year.[108] Dr. Popova, one of the study's authors, told the Committee that the prevalence of FASD among incarcerated youth ranged from 11% to 23%.

During her testimony, Wenda Bradley informed the Committee of a study launched by the Yukon government in 2014 to determine the prevalence of FASD in the territory's correctional system.[109] According to Dr. Andrew, who also discussed the study with the Committee, assessing the inmates who agree to participate in the study will help to create a profile of FASD inmates and the services available to them, and evaluate the effectiveness of various screening tools. The results of this study are greatly anticipated.

3.2.2 Identification of offenders with FASD by Correctional Service Canada

The 2011 study by Correctional Service Canada concluded as follows:

> There is a population ... within Correctional Service Canada who are affected by FASD who are currently not being recognized upon intake, and are not being offered the types of services or programs that meet their unique needs.... Screening to identify those at risk for an FASD is necessary and has been demonstrated as feasible in a correctional context.[110]

The Correctional Investigator informed the Committee that Correctional Service Canada "still does not routinely screen for FAS disorder among newly admitted." According to the Correctional Investigator, most offenders arrive at prison undiagnosed and remain that way. As a result, this vulnerable group does not receive the appropriate care and treatment in a system that is ill-prepared to receive them:

> A correctional system that relies on obeying orders and rules that incentivize appropriate conduct and requires an offender to demonstrate behavioural progress is not particularly accommodating to persons afflicted with FASD. Similarly, a parole and pardon system that is predicated on the need and capacity to express remorse and learn from past mistakes is also not well-suited to FASD-affected persons.…
>
> Prisons are really based on people being able to obey rules, follow instructions, and if you don't, you again bring negative attention to yourself. These are the individuals who are constantly running afoul of institutional rules and regulations, being charged with both minor and major infractions of institutional rules, perhaps receiving punitive sanctions inside because they've been charged with a major infraction where they've had to appear

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107 Ibid.

108 Svetlana Popova et al., "Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review," *Canadian Journal of Public Health*, Vol. 102, No. 5, 2011, pp. 336–340.

109 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

110 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

> before an independent chairperson. These are folks who don't fare well in front of parole boards. They tend to spend longer time in higher security levels, and they tend to attract segregation placements, etc., so their correctional outcomes are compromised. That's a burden on the system, as well as being a burden on them. They're also more difficult to manage and more expensive for the system.[111]

The lack of FASD identification upon admittance to custody is a concern because, as Professor Pei explained, persons with FASD "may become vulnerable targets for victimization, may end up learning more criminal acts without understanding why they were incarcerated in the first place, and may be unable to conform to the custodial environment."[112]

3.2.3 How Offenders with FASD Adjust to Incarceration

A study conducted in 2014 by Correctional Service Canada showed that offenders with FASD have greater difficulty adjusting to incarceration than other offenders. The study's findings corroborated other research which showed that people with FASD experience poor social adjustment in various contexts.[113]

As the Correctional Investigator told the Committee, the study also showed that offenders with FASD were more likely to be involved in violent institutional incidents, both as instigators and as victims. They were also more likely to incur institutional charges. Lastly, they were much less likely to complete their correctional programs.[114]

During his appearance, lawyer Jonathan Rudin stated that generally, people with FASD do not work well in groups because they have difficulty interpreting social cues. He believes that cognitive behavioural therapy, which is the treatment available to many people in the correctional system, is not well suited to offenders affected by FASD.[115]

In its 2013 resolution on FASD and the criminal justice system, the Canadian Bar Association recommended that the federal government amend the *Corrections and Conditional Release Act* "to expressly require Correctional Service Canada to accommodate FASD as a disability when providing correctional services to inmates who have or likely have FASD."[116]

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111 Ibid.

112 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

113 P. Mullins et al., *Institutional Adjustment of Offenders Living with Fetal Alcohol Spectrum Disorder (FASD) in a Canadian Federal Penitentiary*, Research Report R-284, Ottawa, 2014.

114 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

115 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto).

116 For more information, consult the 2013 resolution by the Canadian Bar Association, *Accommodating the Disability of FASD to Improve Access to Justice*, and the Background Document.

As the Correctional Investigator told the Committee, Canadian penitentiaries currently have no correctional programs that are specially designed for FASD offenders. Although the Correctional Service does its best to tailor interventions to the needs of these clients, service delivery seems to be hampered by a shortage of resources. The Correctional Service does not seem to always have enough resources to implement adaptations that meet the special needs of all groups in the prison population – a population that presents complex challenges, as Ivan Zinger told the Committee:

> [N]ow we have over 60% of the inmate population requiring psychological or psychiatric services.
>
> On average, the educational attainment of offenders is a grade 8 education. We have 75% of the offenders coming into the system with substance abuse issues. About two-thirds of them were intoxicated at the time of their index offence. Then you add the 30% who have hepatitis C and the almost 5% who have HIV. Almost a quarter of the inmate population is aboriginal. Almost 10% of them are black offenders.
>
> It becomes very difficult for Correctional Service Canada to try to address the employment needs, the mental health needs, and the vocational needs. It's a really big challenge, and I would certainly say that resources absolutely sometimes can be a part of the challenge here.[117]

The message provided by the Office of the Correctional Investigator was the following: given that "[w]e cannot ask correctional services to try to solve a problem that should have been settled in the community, with more adequate screening services,"[118] we must provide community support to prevent people with FASD from getting into trouble with the justice system, and we must introduce diversion programs.[119]

117 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Ivan Zinger, Executive Director and General Counsel, Office of the Correctional Investigator of Canada).

118 Ibid.

119 "Prevention and diversion should be front-end considerations. By the time a case makes it to sentencing." JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator, Office of the Correctional Investigator).

CHAPTER 4: THE COURTS' RESPONSE TO FASD

This chapter presents the courts' response to FASD, consisting of an overview of the case law regarding the *Criminal Code* provisions on mental disorders in cases where the accused has FASD, and the effect of an FASD diagnosis on sentencing.

4.1 EFFECT OF AN FASD DIAGNOSIS ON *CRIMINAL CODE* PROVISIONS REGARDING MENTAL DISORDERS

4.1.1 Unfit to Stand Trial

Part XX.1 of the Code establishes the regime governing the treatment of people who have been found unfit to stand trial or not criminally responsible on account of mental disorder (ss. 672.1 to 672.95). This comprehensive regime was codified in 1992.[120]

The court can order an assessment of the mental condition of the accused at any stage of the proceedings if it has reasonable grounds to believe that the assessment is necessary to determine whether the person has a mental disorder or is unfit to stand trial.[121] If the accused is found unfit to stand trial, the court must hold an inquiry no later than two years after this verdict and every two years thereafter to determine whether sufficient evidence can be adduced at that time to put the accused on trial. In the interim, the accused who has been deemed unfit to stand trial can be detained in a hospital.[122]

The issue of whether or not FASD renders an accused incapable of appreciating the nature and quality of his or her acts is a question of fact on a case by case basis. It appears that in a number of cases, the courts have recognized that an accused can be

120 The *Not Criminally Responsible Reform Act* (Bill C-14) amended Part XX.1 of the Code in 2014 to stipulate that public safety is the paramount consideration in the decision-making process. The Act also created a scheme for finding that certain persons who have been found not criminally responsible on account of mental disorder are "high-risk accused" (see s. 672.64).

121 *Criminal Code*, ss. 672.11(*a)* and (*b*). The court cannot make an assessment order for the purpose of determining the sentence of an offender suspected of having FASD (*R. v. Gray*, 2002 BCSC 1192). The Supreme Court of British Columbia ruled in *Gray* that "there is nothing in the Code that gives the court the jurisdiction to order a specific type of assessment such as an assessment to determine whether the accused has schizophrenia, has brain damage caused by meningitis or fetal alcohol syndrome. Rather what the court can order is that a medical practitioner conduct an assessment into the mental condition of the accused to determine whether he understands the nature and quality of the act he is accused of committing or whether he understands that it was wrong" (para. 55). The only option currently available to the court at the time of sentencing is to order a presentencing report with a specific focus on developmental disorder under s. 721 of the Code. In Gray, the lower court judge felt the situation was at an impasse: "To establish the accuracy of his claim, he needs a medical assessment. For all practical purposes, he cannot get a medical assessment in the Province of British Columbia because, for adults, that type of assessment has been privatized … [and] sections 721(4) and 723(3) [do] not authorize the Court to order a publicly funded FAS assessment to be carried out at a private clinic" (paras. 25–26).

122 *Criminal Code*, ss. 672.29 to 672.33. See also ss. 672.22 and 672.23 concerning presumption of fitness and burden of proof. The review board that made the disposition must review it within 12 months and every 12 months thereafter (s. 672.81).

declared unfit to stand trial because of cognitive and intellectual impairments associated with FASD.[123]

4.1.2 Mental Disorder Defence

Section 16 of the Code stipulates that everyone is presumed to be of sound mind. The burden of proof that an accused was suffering from a mental disorder and is therefore exempt from criminal responsibility is on the party that raises the issue.

If the judge or jury finds that the accused did commit the offence in question but was suffering from a mental disorder at the time and is therefore exempt from criminal responsibility, a verdict of not criminally responsible on account of mental disorder must be rendered.[124]

This verdict is different from an acquittal. At this stage, the court or a review board takes into account the safety of the public – which is the paramount consideration – and the mental condition, social reintegration and other needs of the accused, and makes one of the following dispositions: (i) orders that the accused be discharged absolutely if the court or the review board believes the accused is not a significant threat to public safety; (ii) orders that the accused be discharged subject to conditions; or (iii) orders the accused to be detained in custody in a hospital.[125]

The defence provided for in section 16 applies only to cases where the mental disorder is so severe that it rendered the individual incapable of appreciating the nature and quality of the act or of knowing that it was wrong. According to Kent Roach and Andrea Bailey's analysis, although FASD has been recognized by the courts as a mental disorder, "it has not been held to be severe enough to prevent accused from appreciating the physical consequences of their actions or knowing that they are wrong."[126] This view was supported by Professor Pei during her appearance before the Committee:

> What we do know and understand about the brain is that while understanding may be reduced or diminished, and while there are components of the brain, like inhibitory control and self-regulation, that may be operating at a much lower level developmentally than we would like for an adult, a lot of these individuals do understand right and wrong. Sometimes the NCR, the not criminally responsible, system actually provides a level of treatment intensity that is not an appropriate fit.
>
> We are faced with a system where you may be putting somebody with an FASD who understands right and wrong but can't inhibit or control his or her behaviour with

123 Paul Verbrugge, *Fetal Alcohol Spectrum Disorder and The Youth Criminal Justice System: A Discussion Paper*, Research and Statistics Division, Justice Canada, October 2003.

124 *Criminal Code*, s. 672.34.

125 *Criminal Code*, s. 672.54. The review board that made the disposition must review it within 12 months and every 12 months thereafter for as long as the disposition remains in force. Under certain circumstances, the review period can be extended for up to three years (*Criminal Code*, ss. 672.81 and 672.84).

126 Kent Roach and Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing*, 2008, p. 57. See also JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Canadian FASD Research Network).

somebody who has experienced a schizophrenic episode where they absolutely had no idea of what reality was or was not.[127]

Courts may accept this type of defence for persons with FASD,[128] possibly because they do not often have the expertise to recognize signs of FASD or simply do not have timely access to qualified medical practitioners able to conduct a proper assessment and make a formal diagnosis.[129] As explained by Dr. Andrew, "[w]hen I look at the impairments in brain function that I can assess every day in clinic, most of the individuals who get diagnosed with FASD would qualify for that level of impairment [under section 16], but they do need the in-depth assessment."[130]

As Professor Pei noted in her brief, "[a]lthough some judges have begun to consider the impact of FASD in their sentencing decisions, formal assessments for the disorder are rarely undertaken and this consideration holds more weight for juvenile as opposed to adult offenders, who are deemed less capable of rehabilitation."[131] In a study of 107 court cases in which FASD was suspected, a formal diagnosis was made in only 32% of the cases.[132] In light of an FASD diagnosis, the Judicial Committee of the Privy Council recently decided to reject the confession of a New Zealand man made in his youth and to quash his conviction more than 20 years after he had twice been convicted of murder.[133]

In summary, although Canadian courts have defined mental illness and mental disorders rather broadly to include individuals with FASD,[134] the *Criminal Code* provisions

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127 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

128 See *DJ v. Yukon Review Board*, 2000 YTSC 513.

129 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 February 2015 (Ryan Leef, Yukon).

130 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

131 JUST, 2nd Session, 41st Parliament, brief submitted in March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

132 Petra Jonas Vidovic, *Neuro-cognitive impairments and the criminal justice system: a case analysis of the impact of diagnoses of FASD and ADHD on the sentencing of offenders in the courts of three Canadian provinces*, doctoral dissertation submitted to the School of Criminology, Simon Fraser University, 2012, pp.117 and 196.

133 *Pora v. The Queen (New Zealand)*, [2015] UKPC 9, para. 58: "The combination of Pora's frequently contradictory and often implausible confessions and the recent diagnosis of his FASD leads to only one possible conclusion and that is that reliance on his confessions gives rise to a risk of a miscarriage of justice." As Dr. Gail Andrew remarked to the Committee, "Problems with memory can lead to confabulation." (JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services)

134 In *R. v. Cooper*, Justice Dickson described the term "mental disorder" as embracing "any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion." *R. v. Cooper*, [1980] 1 SCR 1149, para. 51. In *Revelle v. R.*, the Supreme Court of Canada held that organic brain damage, which causes a departure from normal consciousness, is a disease of the mind. ([1981] 1 SCR 576).

pertaining to mental disorders were not clearly designed with FASD in mind.[135] There is no consensus on that question because the courts rarely accept FASD as a defence of not criminally responsible.

4.2 EFFECT OF AN FASD DIAGNOSIS ON SENTENCING

4.2.1 Sentencing Principles

The Code's main sentencing provisions are set out in Part XXIII, particularly sections 718 to 718.2. The fundamental sentencing principle is proportionality: a sentence imposed by a court must be proportional to the gravity of the offence and the degree of responsibility of the offender.

The purposes of sentencing include denouncing unlawful conduct and deterring the offender and other persons from committing offences. As a number of witnesses noted, general or specific deterrence may prove ineffective for some individuals with FASD, who are unable to learn from their mistakes.

The remaining sentencing objectives are to separate offenders from society, where necessary; assist in rehabilitating offenders; provide reparations for harm done to victims or to the community; and promote a sense of responsibility in offenders and acknowledgement of the harm done to victims and the community.

Courts must also take into account any aggravating or mitigating circumstances, the principle that similar offences should have similar sentences, the obligation to avoid unduly long or harsh consecutive sentences, and the obligation to consider less restrictive sentences and all available sanctions other than imprisonment that are reasonable in the circumstances before imposing a prison sentence, particularly for Aboriginal offenders.

Most court decisions that refer to FASD raise sentencing-related issues. Overall, these decisions are contradictory and divided on the way to handle the disorder.[136] In addition, according to Jonathan Rudin, courts hear a lot of misinformation about FASD.[137]

A 2008 analysis of court decisions by Kent Roach and Andrea Bailey showed that the courts' recognition of FASD is not always used as a mitigating factor in sentencing:

> The recognition of FASD by the court sometimes works to the advantage of the accused, but sometimes does not. For example, FASD sometimes is used as a mitigating factor in sentencing, but it has also been used as an aggravating factor with respect to concerns

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135 See Kent Roach and Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing*, 2008, p. 35.

136 Petra Jonas Vidovic, *Neuro-cognitive impairments and the criminal justice system: a case analysis of the impact of diagnoses of FASD and ADHD on the sentencing of offenders in the courts of three Canadian provinces*, doctoral dissertation submitted to the School of Criminology, Simon Fraser University, 2012, p. 70, which refers to the Provincial Court of Newfoundland and Labrador decision in *R. v. Faulkner*, 2007 CanLII 6337.

137 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto).

> about future danger and the need for incapacitation or long term and intense supervision.[138]

Moreover, an analysis of court decisions in British Columbia, Saskatchewan and Ontario appears to show that judges often – in about 74% of cases – choose to impose traditional prison sentences in confirmed cases of severe FASD. According to the author of this analysis, these types of sentences are counterproductive for the purposes of rehabilitation and reducing recidivism in such cases.[139] The author of this analysis also argues the following:

> Punishment is not an effective deterrent to those who struggle from a serious cognitive impairment because many are unable to understand the consequences of their actions. This is why so many criminals who have FASD or ADHD are repeat offenders.[140]

Making reference to section 718.1 of the Code, which sets out the fundamental principle of sentence proportionality, the Ontario Court of Justice has concluded that "to punish behaviour which results from a clinically recognized disability runs contrary to the principles of criminal law, certainly where treatment is available."[141]

Moreover, according to the Court of Appeal for British Columbia, it is important to consider the fact that "persons with a condition such as FASD generally do poorly in prison and are often victimized by other inmates."[142] Witnesses such as Jonathan Rudin note that one of the reasons for the high number of prison sentences in these cases may be judges' perceptions that prison gives offenders with FASD the structured environment necessary to protect the public.[143] Given the general lack of targeted programs in the community and in provincial prisons, judges sometimes consider a federal sentence the best solution for offenders with FASD.[144]

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138 Kent Roach and Andrea Bailey, *The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law From Investigation to Sentencing*, 2008.

139 Petra Jonas Vidovic, *Neuro-cognitive impairments and the criminal justice system: a case analysis of the impact of diagnoses of FASD and ADHD on the sentencing of offenders in the courts of three Canadian provinces*, doctoral dissertation submitted to the School of Criminology, Simon Fraser University, 2012, p. 112. However, most of the offenders considered for this study had committed violent offences and had a criminal record (Ibid., p. 115).

140 Ibid., p. 245.

141 *R. v. Dayfoot*, 2007 ONCJ 332, para. 153.

142 *R. v. Ramalho*, 2004 BCCA 617, para. 7.

143 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto). In *R. v. Keewatin*, the Court of Queen's Bench for Saskatchewan wrote: "A better focus may be on the need to protect the public which includes the need to separate offenders from society where necessary and the need to attempt to provide a realistic framework for the offender's rehabilitation - which in the case of FASD offenders may not be true rehabilitation, but rather a structured modification of their behaviour." (2009 SKQB 58, para. 50). See also the decision in *R. v. Pickerill*, 2005 BCPC 324, para. 8.

144 In *R. v. Pauls*, the Provincial Court of British Columbia stated: "[T]hat means (by being in a federal custodial setting) you will get the assistance of a lot more structured programs than you might in the provincial system by being in a federal custodial sentence." (2005 BCPC 602, para. 6). See also the decision in *R. v. Keewatin*, 2009 SKQB 58, para. 42.

In addition to imposing a prison sentence, courts sometimes hear applications to have accused with FASD declared dangerous offenders, as they can pose a high risk of reoffending.[145] Faced with such an application in *R. v. Mumford*, the Ontario Superior Court of Justice instead decided to order a long-term offender designation.[146] The Court believed that the risk of reoffending could be controlled in the community and therefore imposed a prison sentence followed by long-term supervision.

In conclusion, courts asked to sentence offenders with FASD often face a number of sizable challenges. These challenges were summarized by the Youth Justice Court of Yukon in *R. v. J. (E.L.)* in a clear manner and are emblematic of the problems faced by courts across Canada:

> [A] case such as this stands inconveniently in the way of those who see a neat, simple and obvious solution to the problem of youth crime, that being, of course, to get some judges who will impose really tough sentences as a deterrent. Those critics should read the psychological reports on this youth. They will quickly see that things are not quite so simple.
>
> …[A] case such as this clearly points out the inadequacy of the tools provided to deal with such offenders. In short, the options available to the Court reduce themselves to locking this youth up in jail or returning him to the community where there are few supports, and where inevitably, he will cause further disruption, and where he presents a significant danger to himself and others…. Putting someone in jail is a punishment, it is not therapy, and it is not supposed to be a means of managing those with mental deficits.
>
> I also want to emphasize that the long term management of Mr. J. remains a concern, but is beyond the reach of the criminal courts. It will require the earnest and continuing effort of the Health and Social Service agencies charged with dealing with the case.[147]

145 The criteria for the dangerous offender designation are set out in section 753 of the Code. In addition, the assessment of the risk of reoffending, and ultimately the sentencing of an individual with FASD, is often based on evidence given by medical experts, as noted by the Territorial Court of Yukon: "The sentence of this Court, to maximize the chances of protecting the public, must significantly be moulded by medical recommendations." (*R. v. Sam*, [1993] Y.J. No. 112, cited in Larry N. Chartrand and Ella M. Forbes-Chilibeck, "The Sentencing of Offenders With Fetal Alcohol Syndrome," *Health Law Journal*, Vol. 11, 2003, p. 46).

146 *R. v. Mumford/R. v. W.E.J.M.*, [2007] OJ No. 4267, upheld by 2009 ONCA 844.

147 *R. v. J. (E.L.)*, [1998] YJ No. 19, paras. 9, 10 and 23.

CHAPTER 5: COMMITTEE COMMENTS AND RECOMMENDATIONS

FASD is a complex issue that affects all Canadians and requires our full attention. Unfortunately, every year in Canada, children are condemned to live with permanent disabilities caused by prenatal alcohol exposure. These disabilities will last their entire lives and may worsen without adequate support. During the Committee's study, a 17-year-old with FASD provided moving testimony describing the many difficulties he has faced because of FASD, but also the interventions that have helped him overcome them.[148] The Committee also heard parents of children with FASD tell their stories – touching stories that attest to their strength, courage and resilience.

Risky alcohol consumption among women of child-bearing age is on the rise in Canada. This is a troubling trend that calls for concerted action from all stakeholders in the fight against FASD, from governments, NGOs and researchers to the many people who work with individuals with FASD. Developing an effective response to FASD also requires involving Aboriginal communities in finding solutions. Their involvement will ensure that solutions are rooted in their beliefs, traditions and cultural practices.

Understanding the issues surrounding FASD is an important first step, but the witnesses agreed that, to genuinely address them, governments need to make a strong commitment and take concrete action. As Ryan Leef told the Committee, "[i]t doesn't all fall under the purview of the federal government. Nonetheless, the federal government can take a role in engaging in those discussions and providing either the necessary financial support, legislative support, or the networking that can often be realized by federal counterparts in this role."[149]

In 2003, the Minister of Health issued a national framework for action on FASD entitled *Fetal Alcohol Spectrum Disorder (FASD): A Framework for Action*. It had five objectives:

(1) increase public and professional awareness of the issue;

(2) develop and increase capacity;

(3) create effective national screening, diagnostic and data reporting tools;

(4) expand the knowledge base and facilitate information exchange; and

(5) increase commitment for action on FASD.[150]

148 The youth's statement, submitted to the Committee as a brief, is provided in Appendix C.

149 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 February 2015 (Ryan Leef, Yukon).

150 Public Health Agency of Canada, *Fetal Alcohol Spectrum Disorder (FASD): A Framework for Action*, 2003.

Many of the recommendations made by the witnesses who appeared before the Committee are consistent with these objectives. This final chapter details the Committee's comments and recommendations regarding the main issues witnesses raised during the study. Since jurisdiction over health care and justice matters is shared by the federal, provincial and territorial governments, the recommendations adopted by the Committee concern only those aspects that fall under federal jurisdiction. Ultimately, the Committee's recommendations are intended to reduce the number of people with FASD, improve the lives of those who suffer from the disorder and better address their needs to ensure they do not develop secondary disabilities.

5.1 BILL C-583

At the meetings of the federal, provincial and territorial ministers of justice and public safety held in 2009, 2010, 2011 and 2012, the participants discussed access to justice for individuals with FASD. In 2010, they decided to make this issue a priority and engage in a dialogue with the Canadian Bar Association to find solutions from an access-to-justice standpoint.

In 2013, the Canadian Bar Association adopted a resolution entitled "Accommodating the Disability of FASD to Improve Access to Justice."[151] Following on the Association's 2010 resolution on the same issue, this resolution urged the federal government to amend the Code and other legislation according to five principles: FASD should be defined in law; the courts should have the power to order assessments; FASD should be made a mitigating factor in sentencing; the courts should have the power to make orders approving external support plans for individuals with FASD; and Correctional Service Canada should be required to accommodate individuals with FASD who are sentenced to prison for two years or more.

Bill C-583, An Act to amend the Criminal Code (fetal alcohol spectrum disorder), drew on the Canadian Bar Association's resolutions. One of the bill's provisions would have enabled courts to order assessments of accused to determine whether they have FASD.

Studies tend to show that many offenders with FASD go undiagnosed. As a result, courts do not take their condition into account. While it would be better to diagnose individuals before they come in contact with the criminal justice system, experts agree that courts should be able to order assessments of accused when it is suspected that they may have FASD. As mentioned above, while section 34 of the *Youth Criminal Justice Act* (YCJA) authorizes courts to order that a young person with FASD be assessed at any stage of proceedings, the Code contains no provision authorizing courts to take such action. Bill C-583, which was withdrawn from the *Order Paper* by Mr. Leef, attempted to correct this issue. Although some youth court judges have used section 34 to order FASD-specific assessments, a close examination of these cases indicate that courts used a

151 Canadian Bar Association, Resolution 13-12-A, "Accommodating the Disability of FASD to Improve Access to Justice," August 2013.

combination of the section 34 assessment power and the guiding principles of the YCJA (example: rehabilitation and reintegration).

Bill C-583 also proposed adding a paragraph to section 718 of the Code to make FASD a mitigating factor in sentencing, where it was determined that FASD symptoms contributed to the commission of the offence. On this point, Wenda Bradley argued as follows:

> FASD should also not be considered a mitigating factor, but instead an essential factor of consideration for a person before the courts. Respecting persons with FASD, by recognizing the effect this physical disability has on their lives, is critically important. Ensuring that an assessment is available through this amendment for persons before the court would enable an understanding of the functional deficits that underlie real-life problems associated with prenatal alcohol exposure. It is important to recognize that FASD is not a fixable, psychological disorder but is in fact a permanent organic brain disability.[152]

Some witnesses who appeared before the Committee noted the need for an appropriate assessment. They also unanimously said that the organic brain damage caused by FASD – which affects an individual's abstracting abilities, memory, information processing, comprehension of social rules and expectations, and ability to link cause and effect – must be taken into account in assessing accused at every stage of the process.[153]

However, some witnesses believe that specifically recognizing FASD-related disorders in the Code would be discriminatory. The Regina FASD Community Network said the following on this subject:

> Naming FASD specifically in the Criminal Code could serve to further stigmatize and criminalize FASD. While some individuals with FASD have contact with the criminal justice system many do not. Moreover, there is a need to understand that contact with the justice system can be as witness and victims of crime. There is a need to help make the justice system better equipped to help individuals with a wide-range of disabilities. But naming FASD in the Criminal Code is likely to further create associations between FASD and criminality which will only serve to further stigmatize this condition.[154]

As stated by the Canadian Academy of Psychiatry and the Law[155], in a letter to the Committee, the Minister of Justice and Attorney General for British Columbia argued that it would be discriminatory for any reform to recognize FASD but no other cognitive or functional impairments. She noted the following:

> British Columbia has legitimate concern for individuals with FASD in the criminal justice system, but our perspective is that any proposals for reform should also consider the

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152 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Wenda Bradley, Executive Director, Fetal Alcohol Syndrome Society of Yukon).

153 JUST, 2nd Session, 41st Parliament, *Evidence*, 11 March 2015 (Dr. Svetlana Popova, Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health).

154 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Regina FASD Community Network).

155 JUST, 2nd Session, 41st Parliament, brief submitted February 2015.

needs of those with mental disorders, or suffering from other cognitive disabilities, functional impairment and development delay, which may lead to, and impact their involvement with the justice system.[156]

In light of these considerations:

Recommendation 1

The Committee recommends that more resources be allocated to crime prevention and diversion programs for individuals with fetal alcohol spectrum disorder.

5.2 PREVENTION AND AWARENESS

5.2.1 Upstream Investment

The testimony and briefs provided to the Committee revealed the need to focus on upstream prevention. The evidence heard was consistent on one point: individuals with FASD need help before they become involved in the criminal justice system. As the sponsor of Bill C-583 said during his appearance, prevention "starts with investments and support in education, social support, housing, employment opportunities, skills development [and] health care."[157] As noted above, allocating resources upstream is a good investment, as research shows that, without appropriate support, people with FASD are more likely to end up in the child welfare system, develop various health problems – including mental health disorders – live in poverty or be homeless, suffer from addictions, get into trouble with the law and wind up in prison.

The Committee heard that prevention initiatives must be based on research findings and operate on several levels. It is important to establish initiatives that inform the public about the risks of alcohol consumption during pregnancy and to take measures that specifically target women who are at greater risk of having children with FASD, such as giving pregnant women with substance abuse problems priority access to addiction services. Finally, prevention efforts must also aim to improve the lives of individuals with FASD, for example, by increasing access to diagnostic services and tailored support services, and providing postnatal support to new mothers to improve their health and that of their children.

5.2.2 Awareness Campaigns

During the study, a number of witnesses argued that greater public awareness of FASD is required. Better awareness appears to be vital to addressing the general lack of knowledge about FASD and its effects and eliminating confusion about how much alcohol

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156 JUST, 2nd Session, 41st Parliament, brief submitted November 2014 (Suzanne Anton, Minister of Justice and Attorney General for British Columbia). The Correctional Investigator of Canada made similar statements during his appearance. JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator of Canada, Office of the Correctional Investigator of Canada).

157 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 February 2015 (Ryan Leef, Yukon).

is safe to drink during pregnancy. This confusion persists even though research has clearly shown that even low or moderate alcohol consumption can damage the fetus.

Awareness of FASD is a key factor in reducing its incidence and ensuring interventions are better tailored to people with the disorder. A number of proposals were put forward during the study. For example, one recommendation was to make professionals who work with women who are pregnant or trying to conceive more aware of the importance of openly discussing health and pregnancy issues, including drug and alcohol consumption and violence.

Some witnesses also lamented the major gaps in awareness efforts. Notably, Chief Cameron Alexis pointed out that "[a]wareness in the first nations communities is lacking."[158]

Professor Cook argued that "[g]eneral education about FASD and its implications plays a critical role in influencing attitudes, approaches, interactions and understanding between front line individuals, affected individuals and their caregivers." She also maintained that "[t]hese changes can improve experiences and outcomes."[159]

Considering that a growing number of women of child-bearing age are drinking excessive amounts of alcohol and that half of pregnancies are unplanned, some witnesses called on governments to launch public awareness campaigns right away.[160] Keeping in mind that a woman's ability to change her alcohol consumption is affected by underlying factors such as poverty and violence, as well as access to support services, Dr. Andrew told the Committee the following:

> I'm all in support of awareness prevention campaigns through posters, coasters, or whatever it takes, but there have been really good studies that show awareness of the harmfulness of drinking during pregnancy does not necessarily change the behaviour. The stories of my birth mothers are horrendous. We have looked broadly at the social determinants of health. They are living in poverty and in domestic violence. They are in situations where even if they desperately want to change behaviour, they cannot without help. That's where we need those high-risk mother programs to actually bring them into harm reduction and a therapeutic environment.[161]

To reduce the economic and social costs of FASD, governments must speak with one voice. The federal, provincial and territorial governments need to work together to inform the public and the people who work with those who suffer from FASD that it is a serious but preventable problem and that the quality of life of its victims can be improved.

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158 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Chief Cameron Alexis, Alberta Regional Chief, Assembly of First Nations).

159 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

160 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

161 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Dr. Gail Andrew, Medical Director, Fetal Alcohol Syndrome Disorder Clinical Services, and Site Lead, Pediatrics, Glenrose Rehabilitation Hospital, Alberta Health Services).

In light of these considerations:

Recommendation 2

The Committee recommends that the federal government work with the provinces and territories to encourage the development of a fetal alcohol spectrum disorder awareness campaign targeting the general public and specific populations vulnerable to FASD.

5.2.3 Increased Investment in Training for Criminal Justice System Officials

As some witnesses revealed, the FASD training received by officials in the criminal justice system is clearly inadequate. During her appearance, Elspeth Ross made the following observation:

> The RCMP had some good training a few years ago from Ottawa and from Manitoba. They were even training judges at one point, but that's all finished now. I've looked at this for a long time, and it seems to be going.... That's my conclusion.[162]

During the study, the Committee also learned that Correctional Service Canada currently provides no FASD-specific training to its staff. Its training covers mental health disorders in general.[163] The Committee is concerned about this situation and, like several witnesses, recognizes that training is vital to both reducing the incidence of FASD and better addressing the unique needs of people with the disorder.

A number of witnesses suggested that FASD training be mandatory for all justice system stakeholders. For example, Elspeth Ross made the following remark to the Committee:

> Lawyers, judges, court and probation workers, police officers, social workers, and prison guards all need training and continuing education [on FASD].[164]

In light of these considerations and the federal government's areas of jurisdiction:

Recommendation 3

The Committee recommends that Royal Canadian Mounted Police and Correctional Service Canada officers receive training on fetal alcohol spectrum disorder as part of their standard training.

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162 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

163 JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Howard Sapers, Correctional Investigator of Canada, Office of the Correctional Investigator of Canada).

164 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Elspeth Ross, Facilitator, Fetal Alcohol Spectrum Disorder Group of Ottawa).

5.3 CRITICAL LACK OF RESOURCES

Many of the witnesses who appeared before the Committee deplored the great disparity in resources for FASD in Canada, particularly for diagnostic capacity and community support services. To improve the quality of life of people with FASD, no matter where they live, and to prevent them from developing secondary disabilities, the Committee was urged to acknowledge the pressing need to increase access to diagnostic and assessment services. The members of the Canada FASD Research Network described current diagnostic capacity as follows:

> While there are an estimated 380,000 people currently living with FASD in Canada, there is presently a capacity to perform only 2000-2500 assessments for FASD (in children and adults combined) each year. Wait times for accessing a community diagnostic clinic after referral extend from at least six months to over one year. Most provinces and territories presently have no appropriate diagnostic teams or clinicians who are able to assess adults.[165]

While the Committee is aware that some progress has been made in this area in recent years, it nonetheless believes, like many witnesses, that more capacity is required across the board to meet the needs of individuals with FASD.[166] Canada must open new assessment clinics.

Recommendation 4

The Committee recommends that Correctional Service Canada continue to evaluate community-based best practices to screen offenders for FASD and that FASD be built into the existing mental health evaluation upon admission to a penitentiary.

Recommendation 5

The Committee recommends that Correctional Service Canada consider strategies to help the integration and rehabilitation of individuals with fetal alcohol spectrum disorder who are sentenced to two years or more in prison.

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165 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Members of the Canada FASD Research Network).

166 Jocelynn Cook reported that the situation appears to be improving: “In Canada we have many more diagnostic clinics than we did in the past. They're continuously opening in different places. Quebec has its first one now; it's exciting.” JUST, 2nd Session, 41st Parliament, *Evidence*, 23 March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

5.4 URGENT NEED FOR DATA COLLECTION AND FURTHER FASD RESEARCH

Canada is fortunate to have prolific FASD researchers. As Professor Pei pointed out to the Committee, Canada is a leader in the field, but a great deal of work remains to be done:

> We are being looked to, and I think that's a double-edged sword. To say we are a bit of the leaders, it means that we are on the public stage and people are looking to see how we respond. I think that puts more of an onus on us to respond appropriately.[167]

Like witnesses such as Elspeth Ross, Professor Pei said she would like to see stronger national leadership on FASD. Such leadership could reduce provincial and territorial disparities in the way services are delivered and support networks are created, and improve our knowledge and interventions.[168]

During his appearance, Ryan Leef underscored the important work of NeuroDevNet in identifying FASD biomarkers. The Committee was told that the Government of Canada invested $1.1 million in NeuroDevNet for work on FASD and autism.[169]

> NeuroDevNet's Fetal Alcohol Spectrum Disorder (FASD) Research Group is examining gene-environment interactions, predictive biomarkers, and the relationship between structural alterations in the brain and functional outcomes. A fundamental question to be addressed in this research project is how genetic and environmental factors interact with gestational alcohol exposure to produce neurobehavioural and neurobiological deficits in children.[170]

The Committee encourages the continuation of this research and, like the witnesses, hopes it will lead to a more accurate way of identifying those who have FASD and offer better-targeted prevention options. The Committee agrees with the witnesses that research is what will enable us to better understand the factors underlying the many manifestations of FASD, better focus our interventions and combat FASD in a more effective and coherent way.

The Committee also learned about the vital work being done by the Canada FASD Research Network. This organization recently created a centralized database for FASD data from across the country. The database currently contains the files of 289 individuals with FASD. Professor Cook noted the following in her brief:

> In Canada, there is a paucity of information on this population, which is desperately needed to build effective, cost-efficient and accessible programming. This data is

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167 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 March 2015 (Jacqueline Pei, Associate Professor, University of Alberta).

168 Ibid.

169 JUST, 2nd Session, 41st Parliament, *Evidence*, 25 February 2015 (Ryan Leef, Yukon).

170 For more information, see *Fetal Alcohol Spectrum Disorder* on Neurodevelopmental Network's website.

available in the diagnostic clinics that evaluate and diagnose these patients, but needs to be collected succinctly and using standard mechanisms.[171]

The Committee congratulates the Canada FASD Research Network and, like the witnesses who appeared before it, recognizes that providing standardized data to all researchers is an important step toward finding effective solutions.

For these reasons:

Recommendation 6

The Committee recommends that the federal government work with the provinces and territories, and key stakeholders such as the Canada FASD Research Network, to support innovative research to improve our understanding of fetal alcohol spectrum disorder; inform us about the disorder's risk factors and protective factors; and help improve health outcomes.

Recommendation 7

The Committee recommends that the federal government work with the provinces and territories to encourage standardized data collection on fetal alcohol spectrum disorder in Canada.

171 JUST, 2nd Session, 41st Parliament, brief submitted March 2015 (Jocelynn L. Cook, Scientific Director, Society of Obstetricians and Gynaecologists of Canada).

LIST OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that more resources be allocated to crime prevention and diversion programs for individuals with fetal alcohol spectrum disorder.

Recommendation 2

The Committee recommends that the federal government work with the provinces and territories to encourage the development of a fetal alcohol spectrum disorder awareness campaign targeting the general public and specific populations vulnerable to FASD.

Recommendation 3

The Committee recommends that Royal Canadian Mounted Police and Correctional Service Canada officers receive training on fetal alcohol spectrum disorder as part of their standard training.

Recommendation 4

The Committee recommends that Correctional Service Canada continue to evaluate community-based best practices to screen offenders for FASD and that FASD be built into the existing mental health evaluation upon admission to a penitentiary.

Recommendation 5

The Committee recommends that Correctional Service Canada consider strategies to help the integration and rehabilitation of individuals with fetal alcohol spectrum disorder who are sentenced to two years or more in prison.

Recommendation 6

The Committee recommends that the federal government work with the provinces and territories, and key stakeholders such as the Canada FASD Research Network, to support innovative research to improve our understanding of fetal alcohol spectrum disorder; inform us about the disorder's risk factors and protective factors; and help improve health outcomes.

Recommendation 7

The Committee recommends that the federal government work with the provinces and territories to encourage standardized data collection on fetal alcohol spectrum disorder in Canada.

APPENDIX A
LIST OF WITNESSES

Organizations and Individuals	Date	Meeting
House of Commons	2015/02/25	64
Ryan Leef, Yukon		
Aboriginal Legal Services of Toronto	2015/03/11	66
Jonathan Rudin, Program Director		
Alberta Health Services		
Gail Andrew, Medical Director Fetal Alcohol Syndrome Disorder Clinical Services, Site Lead Pediatrics, Glenrose Rehabilitation Hospital		
Canadian Bar Association		
Fia Jampolsky, Fetal Alcohol Spectrum Disorder Working Group member		
Centre for Addiction and Mental Health		
Svetlana Popova, Senior Scientist, Assistant Professor, Social and Epidemiological Research, University of Toronto		
Fetal Alcohol Syndrome Society of Yukon		
Wenda L Bradley, Executive Director		
As an individual	2015/03/23	67
Rodney Snow		
Alberta Health Services		
Gail Andrew, Medical Director Fetal Alcohol Syndrome Disorder Clinical Services, Site Lead Pediatrics, Glenrose Rehabilitation Hospital		
Centre for Addiction and Mental Health		
Svetlana Popova, Senior Scientist, Assistant Professor, Social and Epidemiological Research, University of Toronto		
Office of the Correctional Investigator		
Howard Sapers, Correctional Investigator		
Ivan Zinger, Executive Director and General Counsel		
Society of Obstetricians and Gynaecologists of Canada		
Jocelynn Cook, Scientific Director		
As an individual	2015/03/25	68
Jacqueline Pei, Associate Professor, University of Alberta		
Assembly of First Nations		
Cameron Alexis, Alberta Regional Chief		

Organizations and Individuals	Date	Meeting
Fetal Alcohol Spectrum Disorder Group of Ottawa Elspeth Ross, Facilitator **Fetal Alcohol Syndrome Society of Yukon** Wenda L Bradley, Executive Director	2015/03/25	68

APPENDIX B
LIST OF BRIEFS

Organizations and Individuals

Alberta Health Services

Boylan, Brenda and Isaiah

British Columbia Ministry of Justice

Canada Fetal Alcohol Spectrum Disorder Research Network

Canadian Academy on Psychiatry and the Law (The)

Canadian Bar Association

Centre for Addiction and Mental Health

Currie, Raymond

Fetal Alcohol Spectrum Disorder E.L.M.O. Network

Ministry of Justice and Attorney General of Saskatchewan

Pei, Jacqueline

Regina Fetal Alcohol Spectrum Disorder Community Network

Society of Obstetricians and Gynaecologists of Canada

Tawton, Debbie

Waterloo Region Fetal Alcohol Spectrum Disorder Action Group

APPENDIX C
ISAIAH'S BRIEF

My name is Isaiah. I'm 17 years old in grade 11.

At the age of 4½ months, I was placed in foster care. Knowing she could not provide a stable home, my birth mother asked my foster mom to adopt me.

My mom tells me I was a handful. I was extremely active where she could not turn her back on me even briefly. Fearless, hyperactive, unstoppable likened to the "energizer bunny", inquisitive to a point where she had to screw down all the heating vents in our home. She had to put locks on all doors, high enough I couldn't reach even with chairs because apparently I was good at improvising even at this young age. I would climb up the kitchen door knobs and I could undo kitchen and drawer locks. Once I stuck a coin between the two prongs of a plug causing a small fire. If you look up the word frustration in the dictionary, you'll see my picture.

I am not like other children. Learning not to repeat the same things constantly is a life skill to this day I have not been able to grasp. Discipline was and still is of little consequence to me. You see I have what is called FASD. My birth mom drank while she was pregnant, giving me brain damage and a life time of challenges.

I was 8 years old and didn't quite understand what FASD was, but knew it had to do with the fact my mom drank alcohol. As the years progressed, my job being a kid was to go to school. Going there is a living hell for someone who has FASD. This disorder is invisible to the naked eye and clearly misunderstood. This is my fifth year at the same school and they still don't get me.

My peers observe me like a National Geographic Documentary on animals. I listen to them whispering things about me loud enough for me to hear but not the teachers. I have been taught some lessons at the hands of my peers. I realize they play one way when the teachers are looking and another way when they are not. I unfortunately, don't know the difference.

I have been teaching my teachers. The roles have been reversed. You have those teachers who just don't get you and are so frustrated, they're scrambling half way through the year looking for their lost marbles. Sometimes I have great teachers who take the time to ask me questions and try to teach to my strengths. These are the true heroes and restore my faith in humanity. I can safely say if it weren't for a few outstanding teachers, I wouldn't be able to face another day at school.

School is very exhausting for someone who has a disability. Those of us, who have learning disabilities, have to work harder to learn what others find easier. Hence the accommodations, which are put in place to level the playing field equal to that of non-disabled or neuro-typical classmates.

I am continually asked questions to ensure I'm paying attention. At a very young age I could not sit through school without something to fidget with. It was in grade 4 when I

started to pull out my eyelashes during class. The teachers would take everything away that I was fiddling with because they thought I wasn't paying attention. This continued until all my eyelashes were gone I then started on my hair. By grade 7 my most favorite teacher of all time, took an interest in me, he started to test me and asked all kinds of questions. Wow, this guy was really neat and interested in me. He was the one that encouraged the use of fidgets. He would test me verbally, which by the way is one of my strengths.

The following year a teacher would gear her math questions to my outside school interests. She would draw a sling shot instead of a triangle and then get me to measure the angles to test me. My best marks in school come from the teachers who have the most patience and take an interest in me. I was also seeing a psychologist who understood FASD and she helped me stop pulling my eyelashes out.

I have ADHD like symptoms. It's not that I can't pay attention; I pay attention to everything around me. That's why it's so distracting.

I have difficulty with writing things down or copying from the board so in my IEP, I am allowed teacher notes. This seemed to be problematic for some teachers. When my mom wrote a note to one of my teachers about this he came up to me one day and said "Why don't you ask one of your friends for a copy of their notes". I had to tell him I had no friends, in front of the whole class. Awkward! I'm not sure he knew what to say to that. This teacher would stand in front of the class and just talk and talk like he was teaching philosophy. We were to be taking notes after notes. This is where I have a disability called working memory. It's holding on to a piece of information long enough to be able to write it down while the teacher speaks. Yikes! I can only follow one instruction at a time and teachers expected me to write a book.

I have sensory problems with sight, sound, smells, and touch, so the atmosphere in a gym with hundreds of students overwhelms me to the point where I simply pass out and wake up on the ground. It's a great way to get a holiday but I wouldn't recommend it.

I gave up my locker. I prefer to wear my backpack around the school, avoiding the sounds and sight of all the students in the hallway which I find overwhelming. Besides, the weight of my backpack also helps me feel secure like a weighted vest. I avoid many field trips offered because of anxiety and how I feel in wide open areas, with lots of people and unfamiliar places.

In church the sound of a singer's voice during the hymns is amplified for the geriatric people, however, it's like taking a drill press to my ears. Sometimes the sound of voices like that science teacher I had in grade 8, nails on a blackboard to me. I wear headphones as part of my attire to drown out external sounds to help me concentrate on school work.

Often when walking down school corridors, I would smell the same perfume my grandma wore and I'd perk up wondering why grandma was there? In elementary school, the smell of my resource teacher's perfume was so pungent to me; I could only

concentrate on the burn of my poor nostrils thinking I had accidently snorted sulphuric acid. Forget about, focussing on what she was trying to teach me!

I take things literally, often getting into trouble for doing what was asked. Once, a frustrated teacher said “Isaiah, please hold your tongue”. I obliged and was immediately sent to the office.

Often at supper, my father would tell me to eat properly. However, he never defined properly. This became problematic until my mother clued into the fact I didn’t understand what he meant by properly. What he was inferring, was to slow down and take my time chewing. It was becoming obvious to me everybody thinks I can read their mind.

We are concrete people. We have problems with abstract thinking. The time is flying by. Where, I can’t see it. My grade 9 gym teacher told me to grow a thicker skin; I thought mine was see through.

Memory problems are also an annoyance. I am sure I have spent half my life looking for things I have lost. I keep reminding my mother it is for this reason I do not need exercise. Teachers say it’s convenient, especially when I was to hand in assignments.

We are 10 second people living in a one second world, a frustration for most people around me because they are waiting for a reply while I’m still processing the question. They just get pissed off at me and think I’m ignoring them. Like all those instructions at school coming at me at once! Overwhelming and I shut down. Too much talk is disastrous. One thing at a time please!

I have executive dysfunction. So my brain can’t work like your brain and manage my every thought. I still have not been able to organize myself, let alone school work. Most of you here are able to see the future and make decisions based on learned generalized concepts where I cannot. It was once mentioned to my mother how a lot of us who have FASD lack empathy. It’s not that we don’t have empathy, it’s because we are not able to feel or visualize what others are experiencing. Feelings are abstract, so when something happens to another person, where most of you are sad or distraught and can feel what people may be experiencing, I won’t be displaying that same emotion. I’m not the person going through it therefore I am unable to generalize that learned concept to other things like most of you.

Having FASD, we are known to perseverate or get stuck. Well I got stuck on a texting relationship with a girl who consumed my every thought, every hour of my life. My thirst for a relationship like my neuro-typical peers, took over my life. I have poor coping skills and I tend to live in the moment so you can imagine when this relationship abruptly came to a halt. Not being able to cope, my thoughts turned to suicide. I reached out to social media. Soon police were knocking on our door and a few trips to CHEO ensued. CHEO was not able to help and only prevented me from doing anything while I was there for the 4 or 5 hours. The real help came from my mom who took many hours of talking and keeping me busy against my will and a counsellor from the Wabano Centre. Eventually my

appointment for a medication consult with a psychiatrist arrived and life became more bearable for me.

I have talked about my deficits but I do possess many strengths. I am very computer savvy. My highest mark was woodworking where I made a tool box and bedside table. I can put together furniture and helped my mom build a 4 foot by 6 foot rabbit cage for my Flemish Giant Rabbit, Jack who is the size of a medium dog. I'm a medic and often put my dad back together because he walks into things or scrapes himself often. I help teachers with words they are searching for during class. I am quite witty and make my teachers laugh. Right now I'm taking auto mechanics and love it. I have a great auto mechanics teacher who is so laid back and I absolutely love his class. I enjoy welding and my teacher is showing me how to do so. He is even willing to give up his lunch time for me. I love chemistry and do as many experiments my scared parents will allow. I love fishing. I can make cookies and cakes but my executive dysfunction prevents me from cleaning up.

It has been the hardest year yet on me. As I get older society's expectations of me climb. It is very exhausting to be on guard every minute. Try not to be inappropriate, impulsive, reactive and not be disrespectful. This is so difficult for me and sometimes downright impossible. Being a concrete person I cannot see this code of conduct between student and teacher. Just because the teacher is condescending to you, you cannot be condescending back, because that means you are being disrespectful. How does that make sense? I cannot control this. This is what my mom calls emotion mirror. If teachers and people around me stay calm, I stay calm, if you talk to me with respect I respond with respect. Behaviours are symptoms; environments need to change because my brain can't.

Having a loving, caring, committed, knowledgeable family, advocate on my behalf to the schools, doctors and police are essential to keeping me safe. Having doctors tell women to stop drinking and the reason is detrimental to limit the incidence of FASD. You see, I didn't have a choice, but now I live with the consequence. Perhaps more women will stop if the message is "don't drink; you are causing permanent brain damage to your unborn child". I know if this message reaches pregnant women most won't take that drink. To not tell them, is negligent to us, the affected, living this life full of challenges in an ignorant society.

It is a real struggle for people to understand just how vast the symptoms are and how they affect each one of us differently.

Our first hurdle is within our own families to understand us. Why we do what we do and then, help us get that important diagnosis. I don't blame my mother, nor should anyone, as I know mothers do not intentionally want to cause harm. 50% of women don't even know they are pregnant and may have likely consumed alcoholic beverages without knowledge of their pregnancy.

We need to speak out about this disorder, so the stigma against mothers is dropped, allowing them to come forward without shame or guilt.

Our second challenge is educating society. We are struggling to fit in because nobody understands our uniqueness. School, teachers and peers are very ignorant. This causes us great stress which we don't handle well and it makes our lives more difficult. I wish at times, I could draw a wheelchair on my forehead, allowing people to understand I have a disability even though at first glance it may not appear to be the case.

My goal from about age 14 has been to speak up and raise awareness of this disorder, so that teachers and schools can get on board and make it easier for us to succeed with as little mental exhaustion as possible. Spreading awareness gets rid of stigmas and educates people. This is my goal.

Thank you for listening.

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 64, 66, 67, 68, 69, 73 and 74) is tabled.

Respectfully submitted,

Mike Wallace

Chair

Supplementary report of the New Democratic Party on the study of the Standing Committee on Justice and Human Rights: Study on the Subject Matter of Bill C-583, *An Act to amend the Criminal Code (fetal alcohol spectrum disorder)*.

Ève Péclet, MP for La Pointe-de-l'Île
Françoise Boivin, MP for Gatineau
Jean Crowder, MP for Nanaimo-Cowichan

The focus of the study by the Standing Committee on Justice and Human Rights was the subject matter set out in Bill C-583, *An Act to amend the Criminal Code (fetal alcohol syndrome disorder* (hereafter "FASD")). The New Democratic Party supports the Committee's final report but cannot remain silent on certain aspects of major importance that unfortunately are not reflected in the recommendations.

We heard from presenters about the problems associated with FASD in the prison and legal system in general. All of the presenters were clear in stating that the justice system has significant shortcomings in terms of evaluating and diagnosing FASD among accused persons. In order to fill this legal vacuum and avoid injustices, it is essential that judges be given the option of ordering an evaluation of an accused if they deem it necessary. The experts also agree that the diversion of people suffering from FASD and/or other cognitive or functional deficiencies must be a priority given the current state of affairs. We note that certain presenters, notably the Attorneys General for British Columbia and Saskatchewan and the Canadian Academy of Psychiatry and the Law, mentioned that FASD should not be the only disorder recognized under the *Criminal Code* because it would lead to discrimination against people suffering from other disorders, other cognitive or functional deficiencies or a developmental delay in the Canadian justice system.

The New Democratic Party therefore recommends that:

- **The *Criminal Code* be amended to allow the court to require, at any step in the proceedings, that the accused person be evaluated by one or more competent persons to determine if he/she is suffering from a mental disorder, other cognitive or functional deficiencies or a developmental delay and, if that is the case, to identify the degree of seriousness of the disorder.**

- **The *Criminal Code* be amended to provide that mental disorders, other cognitive or functional deficiencies or a developmental delay constitute a mitigating circumstance in determining the sentence in cases where it has been shown that they contributed to the perpetration of the offence.**

- **The necessary resources for prevention and for diversion of persons with FASD, other cognitive or functional deficiencies or a developmental delay be increased and priority be given to treatment and rehabilitation so that the courts have a viable alternative to incarceration.**

If the government recognizes the importance of detecting FASD when inmates are admitted to federal correctional institutions (Recommendation 4), it must not ignore the importance of providing programs adapted to the needs of FASD victims. Many presenters showed that conventional programs are not appropriate for this vulnerable population and that, unfortunately, FASD victims do not receive the care required while incarcerated.

The New Democratic Party therefore recommends, as a complement to Recommendation 4:

- **That the Government of Canada work with the Correctional Service of Canada to introduce programs adapted to victims of FASD who receive prison sentences of two years or more;**

- **That the Government of Canada work with Health Canada and the Correctional Service of Canada to support the sharing of research and information on FASD to determine best practices in the area of detection and reintegration and rehabilitation programs.**

Like the presenters who appeared before the committee, the New Democratic Party believes that it is essential to focus on prevention in order to avoid prosecution of FASD victims. Many presenters noted that there is a flagrant lack of access to diagnostic services and that the vast majority of FASD victims will never be diagnosed. As a result, they will never receive the necessary care and risk ending up back in the justice system.

The New Democratic Party recommends that:

- **The Government of Canada work with the provinces and territories to improve access to FASD diagnostic and evaluation services, notably by encouraging the creation of new evaluation clinics and supporting the establishment of a network of appropriate support.**

Liberal Supplemental:
Fetal Alcohol Spectrum Disorders and Criminal Justice

1. Bill C-583 was a private member's bill introduced by Ryan Leef, the Conservative MP for the Yukon. C-583 proposed two changes to the *Criminal Code*: **(1)** enabling the courts to assess whether an accused has a form of fetal alcohol spectrum disorder (FASD); and **(2)** making FASD a mitigating factor in sentencing where it impaired the offender's behavioural control. C-583 had significant support across party lines, including the Liberal Party.

2. On November 26, 2014, Mr. Leef unexpectedly withdrew C-583 at second reading in the House, referring its contents to the Committee for study. Mr. Leef told the Committee that he did so because he "didn't see [he] was going to have the time to get it through with the time [he] had left." The time we spent on this study could have been spent on reviewing C-583 in earnest, and many bills have passed this Parliament in less time than Mr. Leef's bill required. It was disappointing that Mr. Leef withdrew C-583 under apparent Government pressure; the bill would have materially improved our criminal justice system.

3. It appears that the Conservatives agreed to this study to prevent the House from voting on whether FASD should be a mitigating factor in criminal sentencing. This conclusion follows from the Conservative-controlled Committee's failure to recommend the two legal reforms proposed by Bill C-583: **(1)** a court power to assess FASD; and **(2)** the introduction of a mitigating factor in sentencing. The evidence we heard at Committee overwhelmingly supported making these two changes to the *Criminal Code*; yet the report omits such recommendations. The Conservatives' maneuver on FASD was cynical – using a disingenuous study to obstruct a dialogue on legally meaningful legislation. The tactic was a moral failure that will especially harm northern communities, which are disproportionately affected by FASD as a result of historic and ongoing systemic injustices.

4. The study's evidence established that FASD can physiologically impair a person's ability to make judgements, control or modify their behaviour, and foresee and understand the consequences of their actions. The evidence also established that an FASD-affected offender could be less receptive, or even immune, to the deterrent effects of imprisonment. Both of these findings entail that the courts could better serve the interests of justice with the two measures proposed by C-583: **(1)** the power to assess individuals for FASD; and **(2)** the statutory authorization to tailor sentences to fit the crimes of FASD-affected individuals. To effectively prevent crime, the evidence also established that Canadian society requires a third measure: that FASD-affected individuals have access to support programs in their communities and while incarcerated.

5. The Canadian Bar Association (CBA) made these three proposals in its 2013 resolution "Accommodating the Disability of FASD to Improve Access to Justice." In response to Mr. Leef's withdrawal of C-583, and to more fulsomely capture the CBA's proposals, I introduced Bill C-656 on March 10, 2015. C-656 requires the Correctional Service of Canada to provide programs designed to address the special requirements or limitations of persons suffering from FASD. It was important to Liberals that a meaningful piece of legislation be placed on the Order Paper for Parliament's consideration. At Committee, Mr. Leef pledged to support C-656. I appreciate his support, but would have preferred him to follow through with his own bill.