



Foundation for Alcohol
Research & Education



Fetal Alcohol Spectrum Disorders (FASD) within the Criminal Justice Sector in Queensland

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Executive Summary

This project set out ‘to survey the knowledge, attitudes, practices and training deficits within Queensland criminal justice agencies in regard to Fetal Alcohol Spectrum Disorder (FASD).’

We surveyed and interviewed judicial officers and lawyers about their knowledge, attitudes and practices with regard to FASD. A total of 49 members of the Queensland judiciary and 39 lawyers responded to the survey. Most had heard of FASD, 80 per cent among judiciary respondents and 81 per cent of legal professionals. However, just under half (45 per cent in both groups) had only heard about FASD through the media and none had received training or education on FASD as part of their undergraduate law degrees.

We also attempted to survey correctional services officers and police. We were unable to survey these two groups but we were able to have several meetings with senior representatives of these agencies. These meetings resulted in the research team being able to give presentations on FASD to members of the Queensland Police, Mental Health Intervention Project Police Officers and to members of the Law and Justice Policy Unit at the Department of Premier and Cabinet.

A significant finding of the research has been that no specific policies or approaches were formally identified by any of the four criminal justice groups / agencies surveyed or officials with whom we spoke on FASD. There is an urgent need for FASD information to be made available to those working in this sector and for policies to be developed. There was an interest from police and correctional staff in receiving more information.

The judicial officers and lawyers who we surveyed who stated they were aware of FASD, all agreed that there were insufficient resources, especially in relation to diagnosis and assessment of FASD and supervision for sentences, that were accessible to those working in the criminal justice system with offenders with FASD.

This study has been important in identifying ongoing gaps in knowledge and concerns about service delivery and justice system responses to those who have FASD with the legal profession, judiciary, police and corrective services in Queensland. The study demonstrates the clear need for education and resources on FASD. In particular the following actions are recommended to take place:

- Material about FASD be introduced into the Supreme Court of Queensland Equal Treatment Benchbook.
- A Queensland Bar Association resolution/policy on FASD be developed.

- Materials on FASD be developed for undergraduate law school degrees.
- Professional developmental opportunities that include FASD be developed as part of the continuing legal education for those working in the Criminal Justice System in Queensland.
- A Model of Care for use by Indigenous Community Justice Groups be developed in order for them to better support offenders with FASD.

We recommend that in interests of reducing cost and delay in implementation, some of the above recommendations could be achieved by adapting existing Canadian resources to the Australian context.

1. Research Aims and Objectives

This project set out 'to survey the knowledge, attitudes, practices and training deficits within Queensland criminal justice agencies in regard to Fetal Alcohol Spectrum Disorder (FASD).' We aimed to survey: judicial officers and lawyers; correctional services officers; and police.

We were able to survey and interview judicial officers and lawyers about their knowledge, attitudes and practices with regard to FASD.

We also attempted to survey correctional services officers and police. We were unable to obtain approval from these organisations to conduct the survey but had several meetings with their senior relevant staff. Our findings are described below.

2. Survey of Queensland Judiciary¹

2.1 Method

Queensland Judges and Magistrates of the Supreme, District and Magistrates courts were surveyed between September and October 2011. The method used in this study was based on a survey used in a Canadian study undertaken in New Brunswick, Canada in 2007.² A copy of the survey instrument is appended to this report (appendix 1). As in the Canadian study the Queensland study included questions about personal background, awareness of FASD, impact of FASD on practice and training, and information needs. The research was approved by the University of Queensland Human Ethics reviewers. Chief justices of the Supreme, District and Magistrates courts in Queensland supported this research and encouraged their colleagues, via email communication, to complete the online survey or to download the survey and return via post to the researchers.³ A Senior Judge in the Magistrates Court was particularly supportive commenting:

FASD is likely to have an increasing impact on the work of the courts. This study seems most timely. I will immediately forward your material to all magistrates. I should warn you that the

¹ This part of the research has been published as: Douglas, H; Hammill, J; Russell, EA; Hall, W 'Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland's Criminal Justice System' (2012) 21 Journal of Judicial Administration 178-188; the research was also presented by Professor Heather Douglas as: 'Objective Legal Criteria on Foetal Alcohol Syndrome?', Psychiatry, the Law and Addiction: Institute of Australasian Psychiatrists, Alice Springs 24 March 2012.

² Cox L, Clairmont D and Cox S, "Knowledge and Attitudes of Criminal Justice Professionals in Relation to Fetal Alcohol Spectrum Disorder" (2008) 15(2) CJCP 306-313.

³ Our thanks to Chief Justice de Jersey (Queensland Supreme Court), Chief Justice Wolfe (District Court) and Justice Butler (Magistrates Court) for their support.

magistrates are busy and previous surveys have had low return rates. I will do my best to encourage participation.⁴

Ultimately 49 members of Queensland judiciary completed the survey. This included 37 magistrates, nine judges of the District Court and two judges of the Supreme Court. The overall response rate was not high enough to make generalised statements about current knowledge and practice among the judiciary in Queensland. In Queensland there are currently 28 judges of the Supreme Court, (equating to a 7 per cent response rate), 39 judges in the District Court (equating to 23 per cent response rate) and 85 magistrates (equating to a 44 per cent response rate). The high workloads of magistrates and members of judiciary have been observed by researchers.⁵

2.2 Demographic information

Of those that responded around half were men (53 per cent) and half were women (47 per cent). Not surprisingly nearly all of the judges who completed the survey were over 40 years old (97 per cent), with the largest group being in the 50-59 years age bracket (47 per cent). Consistent with the age of respondents, nearly all of the judges graduated from law school before 2000 with the largest group graduating in the 1980-1989 period (46 per cent). Survey responses were received from courts throughout Queensland. It is recognised that many Queensland judges go on circuit to different parts of the state and Judges were asked to identify the location (by postcode) of the court in which they most commonly presided. To protect confidentiality, responses have been coded to districts in table 2.1 below.

Table 2.1: Most common location of court presided in.

| Most common location of court presided in: | Percentage: | Most common location of court presided in: | Percentage: |
|---|--------------------|---|--------------------|
| Brisbane | 46 per cent | Central Coast area | 5 per cent |
| Gold Coast area | 5 per cent | North Queensland | 10 per cent |
| South East area | 24 per cent | Far North Queensland | 10 per cent |

⁴ Email communication with Dr Douglas, 8 September 2011.

⁵ Mack K, Anleu SR and Wallace A, "Everyday Work in the Magistrates Courts: Time and Tasks" (2011) 21 JJA 34 at 35.

2.3 Results

2.3.1 Judiciary knowledge about FASD

Eighty per cent of respondents reported that they had ‘ever heard of FASD’.⁶ The largest group of these respondents (45 per cent) had heard of FASD through the media, 26 per cent had heard about FASD from a legal practitioner, 21 per cent had heard about it at a conference and 16 per cent from a client or a party to a proceeding. None of the respondents had heard about FASD at university. A number of respondents provided other sources including professional reports, such as medical reports and child protection reports.

Of those 39 respondents who had ‘ever heard of FASD’, most (82 per cent, n = 32) were able provided a definition of FASD. In all but one case this definition demonstrated a clear understanding of FASD resulting from the maternal ingestion of alcohol during pregnancy. A number of respondents (30 per cent) stated that FASD resulted from the mother’s ‘excessive’ alcohol consumption during pregnancy. A minority of answers (18 per cent) observed that FASD may produce distinct facial features. Almost half (48 per cent) observed that cognitive impairment was associated with FASD but as many descriptions (48 per cent) did not identify any specific impairments associated with FASD. These descriptions referred generally to ‘disorders’; ‘conditions’ or ‘impacts’ associated with FASD.

Respondents who were aware of FASD were asked to rate four statements that were provided. The statements and response rates are set out in table 2.2.

Table 2.2: Rated Statements

| Statement | Agree | Neither agree nor disagree | Disagree | Don’t know |
|---|--------------|-----------------------------------|-----------------|-------------------|
| FASD is an identifiable syndrome | 50 per cent | 13 per cent | 6 per cent | 31 per cent |
| FASD is relevant to my work as a legal professional | 75 per cent | 16 per cent | 3 per cent | 6 per cent |
| FASD is really only an issue for youth | 0 | 13 per cent | 71 per cent | 16 per cent |
| FASD assessment would lead to more appropriate consequences for behaviour | 69 per cent | 9 per cent | 3 per cent | 19 per cent |

⁶ At this point in the survey those respondents who answered ‘no’ were directed to another part of the survey focussed on training and information needs.

2.3.2 Judiciary and FASD in the court room.

Respondents who had heard of FASD were asked about how often they ‘knew’ that parties or witnesses who appeared before them had a diagnosis of FASD. Half (52 per cent) answered they had ‘never’ seen a case; 3 per cent said ‘once’; 24 per cent answered ‘2-5 times’; 12 per cent answered ‘6-10 times’ and 9 per cent answered ‘11 or more times’. Respondents in cases where they ‘knew’ a party or witness had a diagnosed FASD were aware of a positive diagnosis (50 per cent) or had been advised by the party or witness (or the party’s lawyer) that the person had FASD (50 per cent). The minority of respondents who had known a party or witness had FASD were also asked whether they used a trained support person to help them communicate with a party or witness. Nearly all (90 per cent) answered that they had ‘never’ used a trained support person because in most cases (77 per cent) ‘no such service’ existed. A few answered that such services were too expensive (18 per cent) or difficult to access because of location (18 per cent).

Respondents who had heard of FASD were also asked about how often they ‘suspected’ that parties or witnesses who appeared before them had a FASD diagnosis. Participants were given a list of responses to choose from. The factors and response rates are set out in table 2.3.

Table 2.3: What factors made you suspect a witness or party has a FASD

| Factor | Responses | Factor | Responses |
|-------------------------------------|-------------|---------------------------------|-------------|
| Physical appearance | 50 per cent | Does not show empathy | 32 per cent |
| Obvious low IQ | 77 per cent | Has memory problems | 55 per cent |
| Inability to learn from mistakes | 23 per cent | Poor attention span | 73 per cent |
| Repeat offender | 46 per cent | Know the mother is an alcoholic | 73 per cent |
| Unable to follow court instructions | 50 per cent | No fixed abode | 5 per cent |
| Illiterate | 18 per cent | Other | 14 per cent |

Most judges who suspected FASD (82 per cent) had ‘never’ sent an accused person for assessment to confirm the suspected FASD diagnosis. The most commonly selected reasons for not seeking an assessment (61 per cent) was that the judge ‘did not know where to send the person’. A smaller number (39 per cent) selected the reason that ‘it would be pointless because it would not change the result’. One respondent commented that there was ‘no clear pathway and funding apparent’. Some respondents suggested that another department would be responsible for the matter or decided to ‘leave it to Probation and Parole to direct person as part of their general discretion ...’.

2.3.3 Judiciary and Information needs

Regardless as to whether they had heard of FASD or not, 85 per cent of respondents wanted more information. 85 per cent wanted guidelines on how to deal with FASD, 77 per cent wanted information about where to refer people with suspected FASD for diagnosis and treatment, 53 per cent wanted more research on FASD; and 47 per cent wanted a list of qualified experts. A third (38 per cent) wanted to receive information by email, 29 per cent sought this through continuing professional development and 21 per cent via conferences.

3. Survey of Queensland Legal Practitioners⁷

3.1 Method

During September and October 2011 we surveyed lawyers (both barristers and solicitors) about their knowledge of FASD and how they deal with FASD in practice. The survey used in this study was based on a survey used in a Canadian study undertaken in New Brunswick, Canada in 2007.⁸ A copy of the survey instrument is appended to this report (appendix 2). As in the Canadian study, the Queensland study included questions about individual background, awareness of FASD, impact of FASD on practice and training and information needs. The research was approved by the University of Queensland Human Ethics Committee.

A range of strategies were used to disseminate the survey to lawyers. The Director of the Aboriginal and Torres Strait Islander Legal Service (ATSILS) emailed ATSILS lawyers throughout Queensland, and encouraged them to complete the online survey or to download the survey and return via post to the researchers.⁹ With the support of lawyers from Legal Aid Queensland (LAQ) the survey was also posted on the LAQ website with a request that it should be completed by lawyers.¹⁰ Members of the research team also attended criminal law conferences and seminars hosted by the Queensland Bar Association and the Queensland Law Society where they distributed hard-copies of the surveys. Completed surveys collected at these meetings were later uploaded into a database.¹¹ Ultimately, 39

⁷ This part of the research has been published as: Douglas, H; Hammill, J; Russell, EA; Hall, W 'The Importance of Foetal Alcohol Spectrum Disorder for Criminal Law in Practice: Views of Queensland Lawyers' (2012) 32 *Queensland Lawyer* 153-164. Douglas, H was invited to present this part of the research as: 'Emerging issues in sentencing - Fetal Alcohol Spectrum disorder in criminal justice' Brisbane CPD conference 23 March 2012.

⁸ Cox L, Clairmont D and Cox S, "Knowledge and Attitudes of Criminal Justice Professionals in Relation to Fetal Alcohol Spectrum Disorder" (2008) 15(2) *CJCP* 306-313.

⁹ Our thanks to Mr Greg Shadbolt, principal legal officer of ATSILS, for supporting and disseminating our survey

¹⁰ Our thanks to Dorothy Adams and David Thompson (LAQ) for facilitating this process

¹¹ Our thanks to Helene Breen and Dan O'Connor for facilitating distribution of the surveys at the Effective Sentencing Submissions seminar hosted by the Queensland Bar Association in Brisbane on 27 September 2011 (60 delegates attended). Our thanks also to Anso Schabot for facilitating distribution of the surveys at the Criminal Law Conference, hosted by the Queensland Law Society in Brisbane on 28 October 2011 (73 delegates attended).

lawyers completed the survey. The overall response rate was unfortunately low, so the statements reported about current knowledge and practice among lawyers in Queensland should not be considered necessarily representative.¹² The Queensland Law Society notes that it represents 8,500 lawyers in Queensland. The Queensland Law Society lists 19 lawyers as specially accredited criminal lawyers but there are many more Queensland lawyers who would conduct criminal work. The high workloads of criminal lawyers¹³ may explain the low response rates.

3.2 Demographics

Of the 39 lawyers that responded, slightly more were men (54 per cent) and less than half were women (46 per cent). Nearly half of the respondents (41 per cent) were aged between 40-49 years. A number of respondents (33 per cent) were aged between 20-39 years and 26 per cent of respondents were aged between 50-69 years. Interestingly a considerable proportion of respondents (44 per cent) had been admitted to practice between 2000 and 2009. Over one quarter (28 per cent) of lawyers were admitted between 1970 and 1989. Survey responses were received from lawyers working throughout Queensland. Lawyers were asked to identify the location (by postcode) of the court in which they most commonly instructed or appeared in matters. In order to maintain the confidentiality of participants, responses have been coded to districts in Table 3.1 below.

TABLE 3.1 Most common location of court in which respondents appear/instruct

| Most common location of court presided in | Percentage | Most common location of court in which appear/instruct | Percentage |
|--|-------------------|---|-------------------|
| Brisbane | 66 per cent | North Queensland | 11 per cent |
| Gold Coast area | 8 per cent | Other areas | 15 per cent |

Over 80 per cent of respondents answered that they practice criminal law, although only 58 per cent identified criminal law as their “usual” area of practice. Around one quarter stated that they had a mixed practice which included criminal law cases. About two thirds (64 per cent) identified their role as “solicitor” while the remainder (36 per cent) identified their role as “barrister”.

¹²See <http://www.qls.com.au/content/ss/accredited-specialists?location-match=contains&location=&specialist-accreditation=CL&name-match=contains&surname=&given-name=&language=&other-admission=&commissioner> viewed 3 December 2011.

¹³ Freiberg A, “Non-adversarial Approaches to Criminal Justice” (2007) 16 JJA 205 at 22

3.3 Results

3.3.1 Legal Practitioners and Knowledge about FASD

Nineteen per cent of respondents had never heard of FASD. Among the 81 per cent who reported that they had,¹⁴ the largest group (45 per cent) had heard about of FASD through the media, 21 per cent from a client or a party to a proceeding, 14 per cent at a conference, 10 per cent from another legal practitioner and 7 per cent had heard about FASD as part of non-law studies at university. None of the respondents had heard about FASD at university as part of their undergraduate law studies. A few respondents said they knew about FASD because of a previous medical or health-related career. One respondent reported that they knew about FASD because they had an affected relative.

Most (81 per cent) of the respondents who had heard of FASD provided a definition that demonstrated a clear understanding that the disorder arose from the maternal ingestion of alcohol during pregnancy. Around one third of respondents (35 per cent) believed that FASD resulted from the mother's "excessive" alcohol consumption during pregnancy. One respondent linked FASD to the mother's binge-drinking during pregnancy. Half (50 per cent) of the respondents observed that "cognitive impairment" or "mental disability" was associated with FASD but as many descriptions (48 per cent) did not identify specific impairments associated with FASD; these descriptions referred generally to "disorders", "disabilities", "conditions" or "defects" associated with FASD. Respondents who were aware of FASD were asked to rate four statements: see Table 3.1.

TABLE 3.1 Rated statements

| Statement | Agree | Neither agree nor disagree | Disagree | Don't know |
|---|---------------------|----------------------------|--------------------|--------------------|
| FASD is an identifiable syndrome | 57 per cent n 22 | 12 per cent n 5 | 12 per cent n 5 | 19 per cent n 7 |
| FASD is relevant to my work as a legal professional | 85 per cent n 33 | 11 per cent n 4 | 0 per cent | 4 per cent n 2 |
| FASD is really only an issue for youth | 0 per cent | 12 per cent n 5 | 80 per cent | 8 per cent n 3 |
| FASD assessment would lead to more appropriate consequences for behaviour | 81 per cent n 32 | 8 per cent n 3 | 0 per cent | 11 per cent n 4 |

¹⁴ At this point in the survey those respondents who answered "no" were directed to another part of the survey focussed on training and information needs.

3.3.2 Legal Practitioners and FASD in practice.

Respondents who had heard of FASD were asked about how often they had acted for a person or questioned a witness who they “knew” had such a diagnosis. Nearly two-thirds (65 per cent) said that they had “never” seen such a case; 15 per cent answered “2-5 times”; 8 per cent answered “6-10 times” and 12 per cent answered “11 or more times”. In most cases respondents who “knew” a party or witness had FASD were aware that they had a positive diagnosis (89 per cent) or had been so advised by the person (33 per cent). Two respondents gleaned the information directly from medical reports. Interestingly one respondent knew the family history of the person and assumed the person had FASD because of this. Another lawyer stated they conducted a “Q and A” with the person to determine the issue.

Those respondents who reported they had known a person with FASD (n=11) were also asked whether they used a trained support worker to help them communicate with the person. Most (n=7) had not because in four cases “no such service” existed. Similarly four said that “such services were difficult to access because of location”. One respondent answered simply that they were “ignorant” about the availability of such a service.

Most respondents (77 per cent) who knew a person had FASD modified their practice in some way. Most often (90 per cent) this involved changing the way that instructions were taken and sentencing submissions were made. Seventy per cent modified their approach to questioning the person’s fitness to plead. Half the respondents modified their approach to bail and their approach to presenting evidence and 40 per cent changed their approach to arguments about the applicability of various defences.

One respondent commented:

The juvenile justice system copes reasonably well with FASD. A jailed FASD client was deprived of TV rights ... because of low level behavioural issues (which he had trouble managing) and reduced mingling in prison because of the threat of being bullied – spent time in cell doing push-ups. Fortunately he was rescued by a prison visitor who got him higher up the queue for a kitchen hand job.

Respondents who had heard of FASD were also asked about how often they “suspected” that parties or witnesses who appeared before them had FASD. Almost half (42 per cent) had “never” suspected this; 7 per cent had “once”; 11 per cent “2-5 times”; 15 per cent “6-10 times” and 23 per cent “11 or more times”. Respondents were provided with a list of factors drawn from the literature

about FASD¹⁵ and asked to select those that made them suspect that the person had FASD (see Table 4). The factors most commonly identified were “know the mother is an alcoholic” (87 per cent) “obvious low IQ” (80 per cent), and “memory problems” (73 per cent). One respondent suspected FASD because the defendant had an “inability to manage time and appointments; lowest down in pecking order in street group but gets into the most trouble, easily overwhelmed”. Another respondent suspected FASD because the defendant had “slow speech and instructions were childish imagination at times”. Another respondent suspected FASD because they worked in “an alcohol-based community” while a further respondent suspected FASD because of “their experience working in remote Indigenous communities”.

TABLE 3.2 What factors made you suspect a witness or party has a FASD

| Factor | Responses | Factor | Responses |
|--|-------------|---------------------------------|-------------|
| Physical appearance | 47 per cent | Does not show empathy | 20 per cent |
| Obvious low IQ | 80 per cent | Has memory problems | 73 per cent |
| Inability to learn from mistakes | 33 per cent | Poor attention span | 67 per cent |
| Repeat offender | 47 per cent | Know the mother is an alcoholic | 87 per cent |
| Unable to follow court instructions | 40 per cent | No fixed abode | 13 per cent |
| Illiterate | 40 per cent | Other | 40 per cent |
| Unable to cope with bail/court/parole orders | 33 per cent | | |

In nearly half (47 per cent) of cases where FASD was suspected, respondents had not recommended or sent the person for diagnosis or an assessment of a FASD, most commonly because the lawyer “did not know where to refer the person” (43 per cent) or believed that “an assessment would not change the outcome of the case” (43 per cent). One respondent thought ‘it would be pointless because it may result in a longer period of incarceration’ and another commented:

I had a client in custody who lacked capacity to instruct due to undiagnosed disabilities which may include FASD. The prison health service, forensic mental health and disability services all refused to conduct any assessment of my client. The client was never assessed.

Another respondent claimed that, as a prosecutor, it wasn’t his role to refer for diagnosis or assessment.

¹⁵ Roach K and Bailey A, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law: From Investigation to Sentencing” (2009) 42 *UBC Law Review* 1.

Around 50 per cent of those who suspected a person had a FASD had modified their approach to dealing with the person in some way. All of these respondents had modified their approach to taking instructions, one commenting “it takes five times longer in dealing with these cases”. A significant number of respondents (61 per cent) had modified their approach to bail and sentencing submissions while 77 per cent of respondents adjusted their approach to fitness to plead issues. One respondent noted that she refused to enter a plea until the person was assessed for FASD. A third (31 per cent) adjusted their approach to evidence and 23 per cent their approach to defences.

3.3.3 Legal Practitioners and information needs

Most (75 per cent) respondents said they would like more information about FASD. Of these, most (82 per cent) wanted guidelines on how to deal with FASD, 70 per cent wanted a list of qualified specialists or information about where to refer individuals for diagnosis and treatment.¹⁶ Half (52 per cent) wanted more research information. Respondents preferred information to be delivered by email (37 per cent) or through a continuing professional development event (37 per cent).

4. Interviews with Judicial officers and criminal lawyers

As part of the surveys with judicial officers and lawyers participants were asked if they would be prepared to be interviewed. As a result of this process nine interviews took place, five with judicial officers and four with legal practitioners. The interviewees were given the chance to enlarge upon their responses to the surveys and were asked about their understanding of FASD and their experience in dealing with this in the criminal justice context. The interviews largely served to emphasise the issues raised in the surveys and underline the need for improved and continuing education about FASD and its relevance to the criminal justice sector and the need for appropriate services to diagnose FASD. Some of the responses are discussed below.

¹⁶ Russell E, *Queensland Medical Professionals with an Interest in FASD*, <http://www.elizabethrussell.com.au/russell-family-fetal-alcohol-disorders-foundation> viewed 17 November 2011.

A recurring theme in the interviews was the lack of knowledge about FASD held by those working throughout the criminal justice sphere; not only lawyers and prosecutors but also psychologists and psychiatrists who may be called upon to undertake assessments:

I don't think, honestly, that either the Prosecution Corps or the Aboriginal and Torres Strait Islander Legal Services are very well acquainted with FASD.¹⁷

The non-responsivity of defendants to opportunities that were offered to them was no doubt related ... to the disorder. It was never, ever identified. It was never, ever suggested. When I say this I don't mean the solicitors were considering it. I firmly believe that they – that it's not on the radar.¹⁸

What probably needs to be done as much as anything, is just make sure that people who – psychiatrists and psychologists who work in the forensic field are actually aware of it. Now, it maybe something that they are aware of, I don't know. It's just I've never discussed it with forensic psychologists or psychiatrists.¹⁹

One lawyer reflected on the suggestion that checklists could be introduced to ensure that the issue of FASD was considered. This lawyer observed that there were risks in this approach:

But we decided at this stage anyway that might not be advisable. It might be just one of those matters where you just go, you're in a rush, you're a duty lawyer and before the court the magistrate wants to get the thing done, check, check, check, no, you're right, let's go. It could cause - maybe it might lead to people being overlooked and not enough attention being paid to each individual.²⁰

A particular concern was the lack of access to services and professionals who could provide the required psychological and psychiatric tests. These problems related to lack of funds to pay for such reports but also the delays involved in obtaining a report:

Well, if the lawyer organised it, it would be paid for by Legal Aid, or if I ordered it, and I've only been asked to do it a few times, the Justice Department would pay for it. Then all hell would break loose because there's nothing in the budget for that, but I'd still order it and then we'd have to worry about it after that.²¹

The problem always with our work is that unless something is quite serious, in terms of an offence or offending, it's hard to get those types of reports.²²

They would then wait some significant time in custody before they were diagnosed. There are issues you know, even though you might decide to get a proper diagnosis, it's just not practical.²³

¹⁷ Interview 1 Magistrate.

¹⁸ Interview 9 Magistrate.

¹⁹ Interview 6 Legal Practitioner.

²⁰ Interview 7, Legal Practitioner.

²¹ Interview 5 Magistrate.

²² Interview 8 Legal Practitioner.

²³ Interview 1 Magistrate.

In circumstances where judicial officers were aware or were advised that FASD was a concern, they agreed their approach to sentencing and appropriate orders would change:

So maybe if I was more appropriately advised as to the diagnosis the less likely inclined to place somebody on a community-based order if the prospect was that really he's doing is adding to his criminal history. I might be more inclined to impose a fine and allow them to pay it off or - I don't know. It's one of the things that there'd be a lot of considerations if somebody got up and said this man suffers from FASD. I think I'd have different sentencing considerations.²⁴

The more appropriate interventions the better. Because sometimes kids with difficulties like that don't respond positively to supervision where they're required to report in or anything like that, and then they're breached, and then that puts them back in the system. We'd do everything we could to find something that might work for them. It's very hard and the system isn't really taking - because we're law and order more than anything, we don't have a lot of systems that will cater with serious disabilities.²⁵

One lawyer emphasised the importance of clearly identifying the particular disability:

I think it's important as any - with any kind of disability to find out as best you can just what the cause is. Apart from anything else, as I understand it, really the situation is that with fetal alcohol syndrome the client's pretty much stuck in terms of any real improvement. That's different from a lot of things. For example some brain injuries and so forth where there can be improvement.²⁶

5. Engagement with Queensland Police Service

As part of this project the research team planned to survey Queensland Police Service (QPS) employees about their knowledge of FASD. We prepared a survey and sought ethical approval through QPS Ethical Standards. We were advised that: 'Unfortunately, at this point in time, this particular research topic is not a priority for QPS.'²⁷ We were advised however that we should meet to discuss the issues with the Mental Health Co-ordinator at QPS.

Following the advice received, a meeting was scheduled between a Senior Sergeant (and the research team), Mental Health Intervention Co-ordinator, Operations Support Command, at the offices of Queensland Police on 3 November 2011. At this meeting the team presented information about FASD and discussed possible future involvement with, and assistance with, developing police policies in relation FASD. From this meeting the Senior Sergeant intended to raise FASD at National Police Workshop in late 2012. Subsequent to this meeting with Senior Sergeant Mitchell and prior to National Police Workshop, one of our team members, Dr Janet Hammill, was invited to talk further

²⁴ Interview 1 Magistrate.

²⁵ Interview 5 Magistrate.

²⁶ Interview 8 Legal Practitioner.

²⁷ QPS letter dated: 10 October 2011.

about this research to Queensland Police and a full seminar on FASD was given to an in-service meeting of Mental Health Intervention Project Police Officers on 1 June 2012. The Senior Sergeant also said he would investigate the possibility for the same seminar to be delivered across regional Queensland.

The research team have not had further contact with QPS since June 2012. Funding for the Mental Health Unit at Queensland Police was precarious in 2011 and 2012 and this is unlikely to have changed; this may explain the lack of follow-up by QPS.

6. Engagement with Queensland Corrective Services

As part of this project the research team also planned to survey Corrections employees about their knowledge of FASD. We prepared a draft survey and sought ethical approval through Department of Justice and Attorney General. Our application for ethical clearance was neither refused nor approved. The Department sought to have a meeting with the team to discuss the possibility of collaborating on further research. A meeting took place with Corrective Service Department representatives on 21 February 2012.

At this meeting there was a discussion about engaging in research with the Department. The view of Department representatives at the meeting was that research to determine the knowledge of FASD of those working in the Correctional services area was minimal so research into this issue would not be valuable. It was agreed that further discussions should take place to consider how alternative research could proceed. Unfortunately we have been unable to advance these discussions because of the recent change of government and turnover of senior staff. However the meeting with Corrective Service Department representatives led to an invitation for our team to present our research at the Crime Research and Statistics meeting 17 April 2012.

Professor Heather Douglas, Dr Janet Hammill and Ms Elizabeth Russell presented talks to members of the Law and Justice Policy Unit at the Department of the Premier and Cabinet. This group represents all areas of Queensland State employed criminal justice workers including police, correction, Department of Justice Policy workers and court support workers. Janet Hammill presented on the physical, cognitive and secondary disabilities of FASD particularly in relation to policing. She explained that the link between FASD and criminal activities is well known and described a portion of the guidelines under which the Royal Canadian Mounted Police operate when an offender with FASD is identified. Professor Heather Douglas presented the FARE funded research on *The Knowledge and Attitudes of Criminal Justice Personnel on FASD* and it was the results of this

research that Professor Douglas outlined in her presentation. Ms Elizabeth Russell outlined the day to day issues experienced by parents and carers of children with FASD. She explained the role of Facebook in supporting parents of children with FASD.

7. Discussion

Lawyers and members of the judiciary surveyed and interviewed for this study were generally keen to know more about FASD and wanted to be able to understand it better. Significant research has been undertaken in other jurisdictions, most notably in the United States and Canada, to improve identification and understanding of FASD. Based on this research, Table 7.1 sets out a summary of the core values shared by the community and reflected in the criminal justice system, about what constitutes appropriate or expected behaviour. The table then shows the neurobehavioral symptoms associated with FASD and finally accommodations that may be appropriately made by lawyers to respond to the symptoms.

TABLE 7.1 Values, behavioural symptoms of FASD and accommodations²⁸

| Value | Neuro-behavioural Symptom of FASD | Accommodations |
|---|--|---|
| Show emotion/ empathy/ be respectful | Difficulty identifying feelings/ lacks empathy/ seems disrespectful/ incorrigible. May miss social cues. ²⁹ | Help identify feelings – use colour or animals ³⁰ |
| Be responsible/ acting age | Immaturity | Reframe questions at appropriate level |
| Keep appointments/ follow through | Memory problems/ trouble planning/ difficulty organising/ sequencing (e.g. breach bail or sentence conditions) ³¹ | Extra assistance in organising, break tasks into small steps. Opportunities for practice. ³² |
| Accept the consequences | Difficulty forming associations and linking cause and effect (eg between offence and sentence) ³³ | Prevent problems (eg extra supervision) |
| Learn from mistakes/make good decisions | Difficulty integrating, remembering (eg may lead to re-offending) | Accept the need for re-teaching and factor in opportunities |
| Cooperate, be flexible | Rigid. Difficulty transitioning, adapting (eg to new situations such as community-based orders, incarceration). Maybe be seen as “oppositional”. | Adjust workload into separate tasks to achieve closure of tasks. Provide adequate time. |

²⁸ Adapted from Malbin D, *Fetal Alcohol Spectrum Disorders: A Collection of Information for Parents and Professionals* (The Asante Centre for Fetal Alcohol Syndrome, Maple Ridge, 2006) p 55. Diane Malbin, a clinical social worker based in Oregon in the United States, has worked for many years with clients with FASD. She has developed resources to assist people working with clients who have FASD.

²⁹ *R v F (BC)* (2008) SKPC 98.

³⁰ Watson SM and Westby CE, “Strategies for Addressing the Executive Function Impairments of Students Prenatally Exposed to Alcohol and Other Drugs” (2003) 24 *Commun Disord Q* 194 at 194-204.

³¹ Moore T and Green M, “Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System” (2004) 19 *CR* 99 at 99-108.

³² Loomes C, Rasmussen C, Pei J, Manji S and Andrew G, “The Effect of Rehearsal Training on Working Memory Span of Children with Fetal Alcohol Spectrum Disorder” (2008) 29 *Res Dev Disabil* 113.

³³ *R v Harper* (2009) YKTC 18.

| | | |
|---------------------------------|---|---|
| Work fast | Slow cognitive pace, seems to be ignoring you, takes more time (eg answering questions, coping with cognitive behavioural therapy programs) | Give time, slow down, accept slower pace. |
| Behave in a safe way, set goals | Impulsive. May have difficulty thinking in a sufficiently abstract way so can not predict outcomes (even if they seem obvious) (eg risky offending behaviours). ³⁴ | Prevent problems, build on strengths, use visual cues |
| Communicate | Speech and language problems ³⁵ | Avoid metaphor. Speak slowly and use concrete examples. |
| Be truthful, don't lie | Suggestible. Confabulate (may be a defensive response). ³⁶ | Avoid leading questions. |
| Be independent | Require community/ interdependence. ³⁷ | Help to develop links in the community (eg supervised court orders may offer an opportunity to develop links) |

Research also suggests there are a number of approaches that should be avoided by lawyers who are questioning suspects or witnesses who have FASD (either at trial or in taking instructions). These include:

- avoid asking complex multi-step questions;
- avoid questions containing complex wording;
- avoid pronouns – use the names of people to whom you are referring;
- avoid assumptions about the accused's ability to understand and respond appropriately;
- avoid double negatives such as "Did you not see...?"; and
- avoid using abstract terms.³⁸

³⁴ See also Rasmussen C and Wyper K, "Decision Making, Executive Functioning and Risky Behaviours in Adolescents with Pre-Natal Alcohol Exposure" (2008) 6 Int J Disabil Hum Dev 369.

³⁵ *R v TJJ* (2011) BCPC 155.

³⁶ Andrew G, Loomes C, Rasmussen C and Talwar V, "Brief Report: Lie-telling in Children with Fetal Alcohol Spectrum Disorder" (2008) 33(2) J Psychiatr Psychol 220 at 220-225.

³⁷ In a 1996 study involving 415 people with FASD the researchers found that 83% of adults (21 years and older) were not able to live independently. See Streissguth A, Barr H, Kogan J and Bookstein FL, *Understanding the Occurrence of Secondary Disabilities in Clients with Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Effects (FAE)* (University of Washington School of Medicine, Seattle, 1996).

³⁸ Boulding D, *What Legal Professionals Need to Know About Fetal Alcohol Spectrum Disorder and the Law* (2007), <http://davidboulding.com/pdfs/17.pdf> viewed 3 December 2011.

'Benchbooks' have been developed by many courts in recent years. These are publicly available resources that provide judges and magistrates with guidance in treating those who come before the courts equally in consideration of their circumstances.³⁹ Currently FASD is not mentioned in the Queensland Equal Treatment Benchbook, although Chapter 11 is dedicated to a discussion of disability. Chapter 11 also includes an appendix which sets out recommended ways to refer to disability and suggests that the particular disability should be specified.⁴⁰ Chapter 4 of the Western Australian Equality before the law benchbook dedicates Chapter 4 to a discussion of disability.⁴¹ It lists and describes the 'main disabilities' and includes a brief overview of each listed disability including FASD. Specific parts of this chapter are devoted to more detailed discussions of how language, information and advice maybe differently used or presented in circumstances where FASD is identified or suspected. This text provides a good model that should be duplicated in other states. We recommend that information about FASD should be included in the Benchbooks used by the courts to assist them in managing court processes.

In 2010 the Canadian Bar Association (CBA) passed a resolution on FASD⁴² which resolved to support federal funding and resourcing of alternative approaches for persons with FASD in the criminal justice system. Specifically, the CBA urged the government "to amend criminal sentencing laws to accommodate the disability of those with FASD".⁴³ Subsequently, meetings between representatives of the CBA and Canadian government have recommended a number of measures including increased training to justice professionals and resources for community alternatives such as diversion programs.⁴⁴ There is scope for Australian barristers' and solicitors' associations to develop similar policies to improve recognition of and legal responses to offenders with this significant disability.⁴⁵ This has been followed in 2012 with a similar resolution of the American Bar

³⁹ Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Foreword, http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf

⁴⁰ Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, chapter 11, http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf

⁴¹ Western Australian Supreme Court, *Equality Before the Law Benchbook*, http://www.supremecourt.wa.gov.au/files/equality_before_the_law_benchbook.pdf, at 4.1.8.

⁴² Resolution 10-02-A: Fetal Alcohol Spectrum Disorder in the Criminal Justice System (Canadian Bar Association, 2010), <http://www.cba.org/cba/resolutions/pdf/10-02-A.pdf> viewed 3 December 2011.

⁴³ Resolution 10-02-A: Fetal Alcohol Spectrum Disorder in the Criminal Justice System (Canadian Bar Association, 2010), <http://www.cba.org/cba/resolutions/pdf/10-02-A.pdf> viewed 3 December 2011.

⁴⁴ Spencer B, "A Different Kind of Justice" (2011) 20 *National* 18 at 28.

⁴⁵ FASD policies could be put in place in the same way that equal opportunity briefing policies have been put in place. See eg *Model Equal Opportunity Briefing Policy for Female Barristers and Advocates* (Bar Association of Queensland, 2004), http://www.qldbar.asn.au/index.php?option=com_content&task=view&id=57 viewed 3 December 2011; *Model Equal Opportunity Briefing Policy* (Queensland Law Society, 2009), <http://www.qls.com.au/content/lwp/wcm/connect/QLS/Your+Legal+Career/Practice+Support/Human+Resources/Model+Equal+Opportunity+Briefing+Policy> viewed 3 December 2011; *Equitable Briefing Policy* (Bar

Association.⁴⁶ Such resolutions help to raise the profile and knowledge around FASD and should be encouraged in Australian jurisdictions.

8. Conclusion and Recommendations

As the first Australian study to canvas the knowledge, views and experience of judicial officers and legal practitioners about FASD, this Queensland-based study has been important in identifying ongoing gaps in knowledge and concerns about service delivery and justice system responses to those who have FASD. One of the benefits of the research is that it has helped to put the issue of FASD 'on the agenda' of the legal profession, judiciary, police and corrective services in Queensland and documented the acknowledged lack of attention to the issue by key professions in the criminal justice sector and desire for further information.

8.1 Further opportunities for education / awareness raising and training materials

There is clearly a need for education and resources, based on research, to be provided to current practitioners. In the interests of reducing cost and delay, this could be done by adapting excellent resources produced in Canada to the Australian criminal justice system. This could include:

- Introduction of material about FASD to the Supreme Court of Queensland Equal Treatment Benchbook.
- Development of a Queensland Bar Association resolution/policy.
- Development of materials for undergraduate law school teaching on FASD.
- Provision of continuing legal education and professional development opportunities for those working in the Criminal Justice System in Queensland.
- A Model of Care for use by Indigenous Community Justice Groups in order for them to better support offenders with FASD.

Association of New South Wales, 2003)

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⁴⁶ American Bar Association, *Resolution on FASD*, 7 August 2012,

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8.2 Further Research

Now that we have completed the Queensland project we are in a position to compare and contrast our Queensland judiciary/lawyer results with those emanating from the Western Australian Project.

Surveys/interviews with judges and lawyers in the Northern Territory (NT) should be undertaken in relation to the knowledge and attitudes to FASD. Professor Heather Douglas previously worked as a legal practitioner in the NT and has good relationships with the profession there. Approximately 30 per cent of the NT population is Indigenous and there are high rates of alcohol abuse and incarceration in this community in the NT. Many of the offenders who come before the courts in the NT may suffer from FASDs.

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