The Revolving Door: Are We Sentencing People with FASD to a Life Trapped in the Criminal Justice System?

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Fetal Alcohol Spectrum Disorder (FASD) is a blanket term referring to a range of prenatal alcohol-induced mental impairments. Individuals with FASD are significantly overrepresented in the criminal justice system (CJS). This article proposes that this overrepresentation is caused by the CJS' current treatment of offenders with FASD, which traps these offenders in a "revolving door". This circularity not only causes long-term harm for offenders with FASD but also increases their reoffending, thereby inflicting further damage to the community. This article identifies numerous issues that arise for offenders with FASD at various different stages of the CJS. It discusses police questioning, fitness to stand trial, sentencing and repeat offending. This discussion illustrates how the CJS disproportionately punishes offenders with FASD, instead of deterring their offending or aiding in their rehabilitation. Finally, this article analyses and critique options for reform, both within the CJS and broader society.

I INTRODUCTION

Retired Canadian judge Anthony P Wartnik explained:[1]

> There are people in your courts who deserve special attention. Some have committed crimes they didn't understand and some have been convicted of crimes for which they are not fully capable and both are doomed to getting caught in the juvenile and or adult criminal justice revolving door unless we recommend and or do things differently.

Wartnik is referring to people who have a permanent brain impairment called fetal alcohol spectrum disorder (FASD). FASD is a blanket term for a range of prenatal alcohol-induced mental impairments.[2] Individuals with

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1 Anthony P Wartnik "Stopping the Revolving Door of the Justice System: Ten Principles for Sentencing of People with FASD" (21 April 2011) NASJE <www.nasje.org>.

2 Stephanie King and Heather Carmichael Olsen "Fetal Alcohol Spectrum Disorders" in Keith Cheng and Kathleen M Myers (eds) *Child and Adolescent Psychiatry: The Essentials* (2nd ed, Lippincott Williams & Wilkins, Philadelphia, 2011) 340 at 340.

FASD often struggle with day-to-day functioning, displaying significant deficits in their social, communication and comprehension skills.[3] Consequently, they struggle with linking cause and effect and emotional regulation and are highly suggestible.[4] These factors, alongside other difficult life outcomes and high levels of co-morbidity with mental health issues, contribute to individuals with FASD being significantly overrepresented in the criminal justice system (CJS).[5]

This article proposes that this overrepresentation is in part caused by the current approach to the treatment of offenders with mental disorders such as FASD. This approach not only causes long-term harm for offenders with FASD but also increases reoffending, thereby inflicting further damage to the community. This article argues that offenders with FASD should not be held fully responsible for their actions. Due to their brain impairment, individuals with FASD are not wholly autonomous, intellectually competent adults. However, because FASD is a spectrum disorder, the majority of people with FASD will not reach the high standard for insanity or mental incapacity.

This article identifies numerous issues that arise for individuals with FASD at different stages in the CJS. It discusses police questioning, fitness to stand trial, sentencing and repeat offending. This broad coverage illustrates how the CJS disproportionately punishes offenders with FASD. The CJS perpetuates repeat offending for people with FASD, rather than deterring their offending or aiding their rehabilitation.

This article will focus on the charge and conviction of individuals with FASD. It will not discuss how individuals with FASD are also disproportionately victimised by crime. While other important issues arise in the context of individuals with FASD, they will not be discussed in depth due to space constraints.

II WHAT IS FASD?

FASD is a non-diagnostic blanket term encompassing various mental impairments associated with prenatal exposure to alcohol (PAE).[6] PAE causes permanent brain damage.[7] FASD has been recognised globally as the most common form of preventable, non-genetic, mental impairment.[8]

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3 Karina Royer Gagnier, Timothy E Moore and Melyvn Green "A Need for Closer Examination of FASD by the Criminal Justice System: Has the Call Been Answered?" (2011) 18 J Popul Ther Clin Pharmacol 426 at 427.

4 At 427.

5 At 428.

6 King and Olsen, above n 2, at 340.

7 Susan J Astley "Diagnosing Fetal Alcohol Spectrum Disorders (FASD)" in Susan A Adubato and Deborah E Cohen (eds) *Prenatal Alcohol Use and Fetal Alcohol Spectrum Disorders: Diagnosis,*

FASD encompasses a full spectrum of mental impairment. It is commonly described as "Swiss cheese brain damage", as some processes of the brain remain almost fully intact while others are significantly damaged.[9] Individuals with FASD experience primary and secondary disabilities.[10] Primary disabilities occur as a result of brain damage caused by PAE.[11] Secondary disabilities can manifest through primary disabilities interacting with a stressful external environment.[12] While primary disabilities can never be *fixed*, appropriate interventions, ideally early in the individual's life, can reduce secondary disabilities.[13]

Primary Disabilities

PAE impairs various domains of functioning, namely: emotional regulation, memory, visio-spatial functioning, learning, executive functioning and language.[14] Research shows that individuals with FASD perform worse on all cognitive measures compared to control groups but perform the worst on verbal IQ, working memory, conceptual ability and adaptive functioning.[15] Despite these impairments, only a small proportion of individuals with FASD are classed as intellectually disabled — that is, having an IQ below 70.[16]

Executive functioning allows individuals to plan, think through possible consequences and understand the potential effects of their actions.[17] The ability for individuals with FASD to plan, organise their thoughts and act in a goal-directed fashion is therefore significantly impaired.[18] Adaptive functioning is the ability of individuals to care for themselves, interact socially and function in the community.[19] As a consequence of deficits in executive functioning and language, individuals with FASD have significantly impaired adaptive functioning. Their adaptive functioning ability is lower than would be expected for their IQ levels or compared to

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Assessment and New Directions in Research and Multimodal Treatment (Bentham Science Publishers, United Arab Emirates, 2011) 3 at 3.

8 At 3.

9 *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 [*Pora* (PC)] at [37].

10 Ann Streissguth and others "Primary and Secondary Disabilities in Fetal Alcohol Syndrome" in Ann Streissguth and Jonathan Kanter (eds) *The Challenge of Fetal Alcohol Syndrome: Overcoming Secondary Disabilities* (University of Washington Press, Seattle, 1997) 25 at 26.

11 At 26.

12 At 26.

13 Alcohol Healthwatch *Towards Multidisciplinary Diagnostic Services for Fetal Alcohol Spectrum Disorder* (2010) [Alcohol Healthwatch (2010)] at 11–12.

14 Giovanna Coriale and others "Fetal Alcohol Spectrum Disorder (FASD): neurobehavioral profile, indications for diagnosis and treatment" (2013) 48 Riv Psichiatr 359 at 360–362.

15 At 863.

16 Gagnier, Moore and Green, above n 3, at 427.

17 Andi Crawford "Fetal Alcohol Spectrum Disorder, Adaptive Behaviour and Children's Development" (18 May 2013) Alcohol Healthwatch <www.ahw.org.nz>.

18 At 1–2.

19 At 1.

others with comparative learning disabilities.[20] The combined effect of these primary disabilities means that individuals with FASD are significantly impaired socially and emotionally, and often function cognitively at a level much younger than their biological age.[21] While most individuals with FASD are not intellectually disabled, they are "functionally disabled in their everyday life".[22]

Secondary Disabilities

Secondary disabilities arise through primary disabilities interacting with difficult environments.[23] These disabilities can be mitigated if the individual's condition is properly understood and appropriate interventions occur.[24] Secondary disabilities include a high level of psychiatric problems (over 90 per cent of individuals with FASD have at least one other mental health diagnosis), reduced self-esteem, increased levels of school drop-outs, unemployment, poverty, drug and alcohol use, inappropriate sexual activity, criminal activity and imprisonment.[25] Factors shown to mitigate secondary disabilities include living in a stable environment, diagnosis before adulthood, not experiencing violence or trauma and receiving disability services.[26]

FASD Prevalence

To date, no prevalence study has been conducted on FASD in New Zealand.[27] The lack of awareness of the scale of the issue has not gone unnoticed: SJ O'Driscoll described the disorder as an "iceberg", as "sufferers of the disorder are frequently unrecognised and undiagnosed".[28]

The Ministry of Health indicates that the generally accepted international prevalence rate of 3 per cent could apply in New Zealand.[29] Meanwhile, Alcohol Healthwatch suggests that rates of FASD in New

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20 Shannon E Whaley, Mary J O'Connor and Brent Gunderson "Comparison of the Adaptive Functioning of Children Prenatally Exposed to Alcohol to a Nonexposed Clinical Sample" (2001) 25 Alcohol Clin Exp Res 1018 at 1018.

21 At 1018.

22 *Pora* (PC), above n 9, at [37].

23 Ann P Streissguth and others "The Long-Term Neurocognitive Consequences of Prenatal Alcohol Exposure: A 14-Year Study" (1999) 10 Psychological Science 186 at 186.

24 Ann P Streissguth and others "Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects" (2004) 25 JDBP 228 at 231.

25 Natalie Novick Brown, Kieran O'Malley and Ann P Streissguth "FASD: Diagnostic Dilemmas and Challenges for a Modern Transgenerational Management Approach" in Susan A Adubato and Deborah E Cohen (eds) *Prenatal Alcohol Use and Fetal Alcohol Spectrum Disorders: Diagnosis, Assessment and New Directions in Research and Multimodal Treatment* (Bentham Science Publishers, United Arab Emirates, 2011) 43 at 45.

26 Streissguth and others, above n 24, at 235.

27 Ministry of Health "Fetal alcohol spectrum disorder" (29 August 2018) <www.health.govt.nz>.

28 SJ O'Driscoll "Fetal Alcohol Spectrum Disorder" [2011] NZLJ 119 at 119.

29 Ministry of Health "Fetal alcohol spectrum disorder" (10 September 2018) <www.health.govt.nz>.

Zealand may be higher due to high rates of binge-drinking and unplanned pregnancies.[30] This data indicates that "New Zealand has a significant and preventable public health problem that needs urgent attention".[31] Moreover, Māori are known to be disproportionately harmed by alcohol.[32] However, because there is no data on the prevalence of FASD in New Zealand, it is impossible to determine if certain populations are disproportionately affected by FASD.

FASD Diagnosis

There are currently no diagnostic criteria for FASD in New Zealand. Furthermore, there are no systematic screening, identification or follow-up programmes in place.[33] Being diagnosed, especially early on, is a vital factor in helping reduce the overrepresentation of individuals with FASD in the CJS and in creating more positive life outcomes for these people.[34] Alcohol Healthwatch identified effective diagnosis of FASD in New Zealand as "[a] key circuit-breaker … thereby lifting [FASD] out of obscurity".[35]

III FASD IN THE CONTEXT OF THE CJS

The offending of individuals with FASD challenges the underlying assumptions and principles of the adult CJS. This challenge manifests in the overrepresentation of individuals with FASD in the CJS.

Principles of the CJS

In its treatment of offenders, the New Zealand CJS has taken a fairly punitive approach.[36] The system appears, therefore, to be based on classical theories of criminology whereby all individuals are assumed to be autonomous beings who can self-regulate and are fully responsible for their actions.[37] Correspondingly, individuals should be punished when they act in ways that breach the social contract.[38]

30 Alcohol Healthwatch (2010), above n 13, at 18–19.
31 At 19.
32 Alcohol Healthwatch *FASD in New Zealand: A Time to Act* (Call to Action Consensus Statement, Auckland, September 2014) [Alcohol Healthwatch (2014)] at 3.
33 Alcohol Healthwatch (2010), above n 13, at 21.
34 At 16.
35 At 22.
36 Ian Taylor, Paul Walton and Jock Young *The New Criminology: For a social theory of deviance* (2nd ed, Routledge, London, 2013) at 2.
37 At 2–3.
38 At 2–3. The "social contract" is the concept that people come together freely to create a civil society and that there is a consensus of certain rules to maintain peace and protect private property

These underlying assumptions and principles fundamentally conflict with how individuals with FASD think and behave. Individuals with FASD are not fully autonomous people who can regulate all their behaviours. Furthermore, individuals with FASD often struggle to link cause and effect. Punishment as a method of deterrence is often futile. The Canadian Bar Association has recognised this futility:[39]

> … the criminal justice system is based on normative assumptions that a person acts in a voluntary manner, makes informed choices with respect to the decision to commit crimes, and learns from their own behavior and the behavior of others … these normative assumptions and the sentencing principles such as specific and general deterrence are not valid for those with FASD …

The CJS does not treat all people equally. The CJS disproportionately punishes individuals with FASD for having a permanent and incurable brain impairment. This overarching issue with the CJS is demonstrated in an alarming overrepresentation of individuals with FASD.

FASD Overrepresentation in the CJS

For many reasons, individuals with FASD "are at [a] high risk for becoming involved in the legal system, either as offenders or as victims".[40] Trouble with the law is a secondary disability of FASD.[41] This disability is exacerbated by other secondary disabilities, such as difficulty in school and drug and alcohol abuse.[42]

Rates of FASD in the CJS vary and are difficult to accurately ascertain. However, a review of international studies suggests that the proportion of individuals within the CJS that have FASD is, on average, 10 per cent.[43] However, one study has recorded figures as high as 27 per cent among Aboriginal youth in Australia.[44] Some studies propose that up to 60 per cent of individuals with FASD will at some point offend and become involved in either the youth or adult CJS.[45] Moreover, individuals with FASD are thought to be 19 times more at risk of incarceration compared to individuals without FASD.[46] Svetlana Popova and others note that often

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and personal welfare. People therefore enter into a contract with each other and the state to preserve the peace within society's terms or rules: see Taylor, Walton and Young, above n 36, at 2.

39 Canadian Bar Association *Fetal Alcohol Spectrum Disorder in the Criminal Justice System* (Resolution 10-02-A, 15 August 2010).

40 Svetlana Popova and others "Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review" (2011) 102 Can J Public Health 336 at 336.

41 Streissguth and others, above n 24, at 231.

42 At 231.

43 Popova and others, above n 40, at 338.

44 At 338.

45 O'Driscoll, above n 28, at 119.

46 Popova and others, above n 40, at 339.

those with FASD go undiagnosed and these rates may, in reality, be even higher.[47] Furthermore, internationally there is a lack of widely used screening and diagnostic tools to identify FASD in the CJS.[48] Correspondingly, incidences of FASD in the New Zealand CJS could be far more pervasive.

This overrepresentation can be partially explained by behavioural deficits caused by FASD, which causes behaviour that society treats as criminal. This article proposes that another explanation for overrepresentation is that the way the CJS reacts to individuals with FASD perpetuates their offending, instead of deterring or dealing with their behaviour appropriately.

IV PRE-TRIAL ISSUES

There are processes both before and at the start of the CJS that raise significant issues for people with FASD. The processes that lead to individuals with FASD being drawn into the CJS raise significant issues. These include a lack of awareness, methods of police questioning, the risk of false confessions and fitness to stand trial.

Lack of Awareness

New Zealand lacks a general awareness of the issues raised by individuals with FASD. While the government announced it would be working on an "action plan" to address FASD in the CJS in 2015, the products of this plan have yet to be released.[49] Awareness is the main factor underlying all of the legal issues discussed in this article. This factor encompasses awareness about FASD as a condition, its prevalence in the CJS and its link to offending. Such awareness is vital if the system is to treat offenders with FASD fairly.

Awareness is a complicated factor. The hallmark signs of someone with undiagnosed FASD are often the same indicators judges, police officers, and others who work in the CJS attribute to lifelong criminals who are inherently "bad" and cannot be rehabilitated.[50] Individuals with FASD are often serial offenders — people who struggle to display remorse for their actions, and who have not learnt from traditional court or prison programmes.[51] However, the real reason for their offending is a brain

47 At 339.
48 At 337.
49 Ministry of Health "Fetal alcohol spectrum disorder (FASD) action plan activities" (14 September 2018) <www.health.govt.nz>.
50 O'Driscoll, above n 28, at 120.
51 At 120.

impairment that influences their ability to learn and function in the "normal" way.

Awareness of the hallmark characteristics of FASD is vital in recognising the true nature and cause of an individual's offending. This awareness is particularly important because FASD is largely undiagnosed in New Zealand.[52] Individuals with FASD have likely not had access to any social services for their mental impairment.[53] If someone working in the CJS — whether an advocate, judge, police officer or lawyer — recognised that a person may have FASD and called for an assessment, that could allow that person to receive the help they require.

Police Questioning and False Confessions

The risk of false confessions is significantly increased for individuals with FASD. This increased risk can be linked to the brain impairment of these individuals.[54] First, individuals with FASD display many characteristics that are known to increase their vulnerability to falsely confessing.[55] Secondly, individuals with FASD are known to have a higher level of interrogative suggestibility. That is, the individual is more likely to change his or her account of events as a consequence of pressure during questioning.[56] Thirdly, individuals with FASD are known to confabulate and tell a person what they think he or she wants to hear.[57]

Combining these factors with deficits in executive functioning, memory and language, individuals with FASD are markedly more likely either to make a false confession or unknowingly disclose self-incriminating information.[58] These tendencies must be distinguished from lying. Individuals with FASD do not intentionally confabulate. They are, instead, easily confused and have issues ensuring that what they say is checked against objective evidence.[59] Furthermore, individuals with FASD have been known to be coaxed into confessing by others. They are known to confess to crimes to "impress others" without grasping the consequences of such statements.[60] Consequently, considerable care must be taken when

52 Alcohol Healthwatch "Fetal Alcohol Spectrum Disorder: The effect of alcohol on early development" (2006) <www.ahw.org.nz> at 4.
53 Alcohol Healthwatch (2010), above n 13, at 21.
54 Gagnier, Moore and Green, above n 3, at 430.
55 At 430.
56 At 430.
57 Kathryn A Kelly "Fetal Alcohol Spectrum Disorders and the Law" in Susan A Adubato and Deborah E Cohen (eds) *Prenatal Alcohol Use and Fetal Alcohol Spectrum Disorders: Diagnosis, Assessment and New Directions in Research and Multimodal Treatment* (Bentham Science Publishers, United Arab Emirates, 2011) 148 at 155.
58 At 155.
59 Valerie McGinn "Fetal Alcohol Spectrum Disorder and Confabulation" (May 2013) Alcohol Healthwatch <www.ahw.org.nz>.
60 McGinn, above n 59.

interrogating individuals with FASD. A confession made by a compliant individual under pressure is likely to have little validity.[61]

The case of Teina Pora epitomises the potentially damaging effect of a lack of awareness about FASD during police questioning.[62] Pora, only 17 years old, was questioned for hours without a lawyer or support person and often appeared confused. He finally falsely confessed to rape and murder. In 2015, after he had spent 20 years in prison, the Privy Council quashed his conviction.[63] Valerie McGinn, a New Zealand expert on FASD, gave evidence that was substantially helpful in the finding of a false confession.[64] McGinn diagnosed Pora with FASD and found that due to his brain impairment at the time of confessing, Pora had the cognitive capacity of a child of around eight to 10 years old.[65] McGinn explained the increased risk of false confessions and confabulations in individuals with FASD.[66] McGinn also proposed that individuals with FASD cannot be considered "reliable informant[s]".[67]

A lack of awareness of an individual's FASD can lead to a fundamental miscarriage of justice. Furthermore, false confessions and wrongful convictions are not just damaging for the individual with FASD, but also for the victims. False confessions prevent the state from apprehending the real offender. This elongates a traumatic process for the victim and is potentially harmful to the community. Such errors are also costly for the state. Greater awareness and different tactics for police questioning of individuals with FASD are necessary for fair trials.

Fitness to Stand Trial

The brain impairment of an alleged offender with FASD raises the question of whether they are fit to stand trial. However, there are issues with fitting a diagnosis of FASD into the strict classifications for unfitness to stand trial.

An individual is considered unfit to stand trial if they "are unable, due to a mental impairment, to conduct a defence or instruct counsel to do so".[68] The presence of a "mental impairment" is generally seen as a precondition for an unfitness finding under the Criminal Procedure (Mentally Impaired Persons) Act 2003.[69] The Act does not define the term "mental impairment". Determining whether the individual has a "mental impairment" is a matter for the judge. The judge must consider whether the

61 Gagnier, Moore and Green, above n 3, at 430.
62 *Pora* (PC), above n 9.
63 *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683 at 683.
64 *Pora* (PC), above n 9, at [35]–[43].
65 At [37].
66 At [37].
67 At [37]. This observation also raises considerable evidential issues that, while important, are not discussed in detail in this article.
68 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4(1).
69 *New Zealand Police v AZ* [2018] NZYC 368 at [5].

defendant has a condition that impacts mental functioning in a way that seriously impairs their ability to understand the charges, consider various options, make a plea and present a defence.[70] However, such a finding is often premised on the diagnosis of either a mental disorder under the Mental Health (Compulsory Assessment Treatment) Act 1992 (MH(CAT)) or meeting the diagnostic criteria for an intellectual disability under s 7 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR). FASD is not a mental disorder but a permanent brain impairment. It is therefore not covered by the MH(CAT).

Additionally, to fall within s 7 of the IDCCR, the individual must have a very low IQ score. This criterion is problematic for individuals with FASD, who often function adaptively much more poorly than their peers with a similar IQ level.[71]

There are various cases in the Youth Court where an individual with FASD has been found unfit to stand trial. However, in these cases, the individual fell clearly within s 7 of the IDCCR.[72] Meanwhile, in a case where an individual with diagnosed FASD did not have the requisite IQ level for intellectual disability, the individual was found fit to stand trial.[73]

Canadian academics have recognised this problem.[74] Mark Luimes argues that the cognitive capacity test for individuals with FASD should be reconsidered. The test should account for the specific difficulties that individuals with FASD have with understanding the consequences of criminal proceedings.[75] Luimes contends that in light of what is known about the deficits caused by FASD, current cognitive capacity tests are "not adequate to protect the rights of [an] intellectually disabled accused".[76] This issue is relevant in the New Zealand context — definitions of mental impairment need to be changed in recognition of diagnoses such as FASD.

V ISSUES ARISING WHEN PUTTING AN OFFENDER WITH FASD ON TRIAL

Everyone has the right to a fair trial.[77] However, what is "fair" for one class of individuals may not be fair for others. This is true of individuals with

70 At [5].
71 Whaley, O'Connor and Gunderson, above n 20, at 1018.
72 *New Zealand Police v OR* [2016] NZYC 172 at [24]; *New Zealand Police v ZW* [2017] NZYC 942 at [26]; and *New Zealand Police v UP* (2011) YC Auckland CRI 2010-204-314, 12 April 2011 at [12].
73 *New Zealand Police v AZ*, above n 69, at [32].
74 Mark Luimes "Fitness to Plead Guilty: The Limited Cognitive Capacity Test and Mentally Disordered Accused" (2019) 77 UT Fac L Rev 27.
75 At 34.
76 At 35.
77 New Zealand Bill of Rights Act 1990, s 25.

FASD. Once an individual with FASD enters the court process, several concerns arise. While an individual with FASD may be technically fit to stand trial, the complex court process poses significant problems for people with permanent brain impairment. It is imperative to acknowledge these challenges in investigating alternative measures to aid an individual with FASD throughout the trial process.

Criminal Culpability

Criminal culpability is premised on assumptions of autonomy: individuals who commit "crimes" have some level of mens rea to which we can attach moral culpability.[78] Individuals with FASD challenge these assumptions. These individuals have difficulty understanding normative and socially acceptable standards of behaviour.[79] Consequently, they can be impulsive and fail to comprehend potential ramifications.[80] This poses the question: to what level of culpability or criminal responsibility should individuals with FASD be held?

1 The Defence of Insanity

Section 23 of the Crimes Act 1961 provides that an individual will not be held criminally responsible for their actions who, through "natural imbecility or disease of the mind", is unable to understand the quality and nature of his or her wrongful actions, or that such actions are morally wrong. However, there are issues with how the terminology used in the defence applies to people who have mental disabilities or permanent brain impairments like FASD.[81] The concept of "natural imbecility" is now described as "intellectual disability".[82] As discussed earlier, individuals with FASD often do not meet the statutory requirements to be classed as intellectually disabled. Therefore, it is unlikely that an FASD diagnosis would fit the requirements for the insanity defence.

Additionally, the defence is not designed for individuals with partial impairments. Often, individuals with FASD have some awareness of what is happening and can comprehend, even if only on a basic level, that what they are doing may be wrong. In a recent report, the New Zealand Law Commission recognised these and other issues with the insanity defence and how it applies to individuals with mental impairments.[83] The defence is

78 Zoe Johansen-Hill "Proportionate Justice: An Examination of Fetal Alcohol Spectrum Disorders and the Principles of Sentencing in Saskatchewan" (2019) 82 Sask L Rev 75 at 78.

79 Julie A Millar and others "Educating students with FASD: linking policy, research and practice" (2017) 17 JORSEN 3 at 8.

80 At 152.

81 Law Commission *Mental Impairment Decision-Making and the Insanity Defence* (NZLC R120, 2010) at 25.

82 At 20.

83 At 20.

scarcely used in New Zealand for this reason.[84] Despite this, reform in this area is yet to emerge.

2 Defence of Diminished Capacity

New Zealand, unlike England, does not recognise the defence of diminished capacity.[85] This defence recognises that individuals may not be held fully criminally responsible for their actions where they have a substantial mental impairment contributing to their offending.[86] The existence of FASD could be directly relevant to such a defence, especially where the actions of the individual are clearly impulsive.[87]

3 Objective Mens Rea Issues

In New Zealand, certain offences have only a mens rea requirement of negligence. Negligence is an objective standard of whether a reasonable person would have been aware of the risk or circumstances and, if so, whether he or she would have chosen to run the risk anyway.[88] There are issues with applying such a standard to "abnormal" defendants such as individuals with FASD.

It is not settled in New Zealand what personal circumstances can be considered when determining what a reasonable person would do in the position of the specific offender. AP Simester and WJ Brookbanks suggest that "a defendant's low intelligence and similar incapacities" do not appear relevant to determinations of negligence.[89] This observation indicates that it would be difficult to take cognitive deficits and complex impairment issues into the consideration of such offences in New Zealand.

Canadian jurists have recognised that individuals with FASD present a significant issue to the application of an objective mens rea standard.[90] The "moral dilemma" presented by people with permanent brain impairments is that they, by no fault of their own, have deficits in their ability to assess risk objectively. Despite this, they are still held to the objective standard of a "reasonable person".[91] What may seem to the "reasonable person" to be a significant departure from the norm may be how a person with that brain impairment would usually respond and behave.[92] Terry Skolnik argues that because individuals with FASD struggle to recognise risks and foresee

84 At 51.
85 Brenda Midson "Culpability of young killers" [2013] NZLJ 158 at 159.
86 At 159.
87 Kelly, above n 57, at 154.
88 AP Simester, WJ Brookbanks and Neil Boister *Principles of Criminal Law* (5th ed, Thomson Reuters, Wellington, 2019) at 159.
89 At 167.
90 Terry Skolnik "Objective *Mens Rea* Revisited" (2017) 22 CCLR 307 at 324–325.
91 At 321.
92 At 323–324.

potential consequences, they may be at an increased risk of being convicted for crimes carrying an objective mens rea standard.[93] Skolnik suggests that courts need to be aware of these issues when assessing whether mens rea has been established.[94] Further, they may need to adopt a broader approach to consider how FASD may affect the defendant's ability to recognise and respond to risks.[95]

VI PRINCIPLES OF SENTENCING IN THE CONTEXT OF OFFENDERS WITH FASD

Sentencing individuals with FASD is a complex issue. The Canadian Bar Association recognised that "sentencing options available to courts are often ineffective in changing the behaviour of those with FASD".[96] Hence, a different approach must be adopted.[97] New Zealand courts have only recently begun to acknowledge the issues with sentencing an individual with FASD. They have yet to adopt what this article will argue is a just approach.

Statutory Framework of Sentencing in New Zealand

The statutory context of sentencing in New Zealand presents barriers to crafting an appropriate sentence for individuals with FASD. These barriers are seen in the misapplication of the Sentencing Act 2002's principles and purposes to the offending of individuals with FASD.

1 Purposes and Principles of Sentencing

Many of the statutory purposes and principles of sentencing do not fit well with the mental state of individuals with FASD. Important sentencing purposes include holding the offender accountable for his or her actions, promoting a sense of responsibility for the harm done and deterring the offender from future criminal conduct.[98] These purposes do not wholly apply to an individual who cannot adequately link cause and effect, does not understand his or her own offending and who has memory impairments.

Statutory sentencing principles are also challenging to apply to individuals with FASD, given how their brains function and how this functioning relates to the offending. An important principle is that there

93 At 326.
94 At 340.
95 At 326.
96 Canadian Bar Association, above n 39.
97 Canadian Bar Association, above n 39.
98 Sentencing Act 2002, s 7(a)–(f).

should be consistency in sentencing levels between similar offenders.[99] This principle is problematic in FASD cases. FASD is a spectrum disorder that can have very different cognitive impacts on each individual.[100] There cannot be a "consistent" discount or type of sentence that will be appropriate for every offender with FASD.

2 Statutory Mitigating and Aggravating Factors

Further obstacles arise in applying the accepted aggravating and mitigating factors for sentencing to individuals with FASD.[101]

Under s 9(1)(j) of the Sentencing Act, previous convictions similar to the conviction before the court are a relevant aggravating feature. This section is highly problematic for individuals with FASD, who commonly reoffend in the same pattern.[102] Reoffending is directly related to the ability of individuals with FASD to link cause and effect, understand the impact of their actions and to learn from their actions. This issue represents the circular treatment of individuals with FASD, who get caught in the "revolving door" of the system.[103] They are convicted, not dealt with appropriately or rehabilitated, and their condition is either unknown or ignored. Their reoffending then directly counts against them at sentencing. Essentially, individuals with FASD are punished for behaviour manifesting as a direct consequence of their untreated brain impairment.

Remorse presents another issue for individuals with FASD. Genuine remorse is a mitigating factor at sentencing.[104] Individuals with FASD often do not understand their own offending and therefore fail to comprehend the harm they have caused. This impacts their capacity to feel remorse. The New Zealand Court of Appeal acknowledged this capacity in *Pomare v R*.[105] Moreover, if the individual is undiagnosed, their lack of remorse will almost certainly be interpreted as callousness or cruelty.[106]

New Zealand Approach to Sentencing Offenders with FASD

Diminished intellectual capacity is a mitigating factor at sentencing.[107] The Court of Appeal in *E (CA689/10) v R* first set out the principles relevant to

99 Section 8(e).
100 *Pora* (PC), above n 9, at [37].
101 Sentencing Act, s 9.
102 Johansen-Hill, above n 78, at 83.
103 At 83.
104 Sentencing Act, s 9(2)(f).
105 *Pomare v R* [2017] NZCA 155 at [19].
106 At [11].
107 Sentencing Act, s 9(2)(e).

considering mental functioning at sentencing. The Court decided that capacity is relevant to determining, among other things:[108]

- the moral culpability of the offending, making denunciation as a sentencing objective less likely to be relevant;
- the kind of sentence imposed;
- whether general deterrence considerations are relevant;
- whether specific deterrence considerations are relevant;
- how the sentence will weigh on the individual; and
- whether there may be a serious risk that incarceration will have a material adverse effect on the offender's mental state.

The Court of Appeal was also the first to apply FASD as a factor at sentencing in *Edri v R*.[109] Edri was an individual charged with rape. He was found to have the cognitive age of a 12-year-old due to FASD. The Court determined that the appropriate discount for mental impairment would be in the range of 12–30 per cent.[110] The Court thus considered that a discount for Edri's FASD diagnosis would be around 15–20 per cent.[111]

While it is appropriate that courts consider the mental impairments of diagnosed offenders at sentencing, including FASD, there are various concerns with its application.

FASD as a "Double-Edged Sword" at Sentencing

One concern with considering FASD is that it can be used as both a mitigating and aggravating factor and, consequently, the offender's disability is used against them at sentencing. The High Court in *Dodds v R* gave Dodds a 25 per cent discount for his mental impairment (FASD) and his youth (17 years old at the time of offending).[112] However, Dodds was sentenced to three years and one month's imprisonment for burglary and assault with a weapon. This is a considerable term for a young individual with the mental functioning of a child.

What is most troubling about this decision is that Downs J viewed the presence of FASD as:[113]

> … the very type [of condition] that trouble[s] Courts. On the one hand, it diminishes his culpability because it affects self-regulation and hinders

108 *E (CA689/10) v R* [2010] NZCA 13 at [70] citing *R v Verdins* [2007] VSCA 102, (2007) 16 VR 269 at [32].
109 *Edri v R* [2013] NZCA 264.
110 At [15].
111 At [18].
112 *Dodds v R* [2016] NZHC 3003 at [5] and [15].
113 At [18].

> judgment. But on the other, it heightens the risk of re-offending, in turn giving rise to an issue of public protection.

This comment is indicative of FASD being what has been termed a "double-edged sword" at sentencing — it is simultaneously viewed as both an aggravating and mitigating feature.[114]

The nature of FASD as both an aggravating and mitigating feature has been highlighted as a significant problem in Canada.[115] There, judges have also applied the same logic as Downs J in *Dodds*: FASD, as a permanent disorder that cannot be cured (only managed and ameliorated), bears upon the likelihood of the offender's rehabilitation and reoffending. Where the likelihood of rehabilitation is low, and recidivism high, courts will lean towards imposing a sentence that prioritises public protection.[116]

However, treating FASD as a condition that requires "public protection", rather than recognising it as a significant impairment, punishes offenders for their disability and not their criminal or moral culpability.[117] FASD should not completely excuse criminal liability, but it is ethically problematic to treat FASD as an aggravating factor. Individuals should not be held morally responsible for an impairment they were born with and did not choose to have.[118] While there is a heightened risk of recidivism in individuals with FASD, it has been recognised in the Canadian courts that "lengthy incarceration is not an appropriate or just way for society to address that risk".[119] There is a fine line between the need for public protection and merely punishing offenders for their mental condition.

The Relevance of Deterrence and Denunciation

The general principles of deterrence and denunciation are also problematic in sentencing individuals with FASD. The Court of Appeal in *E (CA689/10) v R* recognised that general deterrence and denunciation may not be relevant or can be removed from consideration when sentencing offenders with a mental impairment.[120] Despite this, in *Pomare v R*, the Court, in sentencing an offender diagnosed with FASD, stressed that "the statutory policy of the Act in terms of accountability, denunciation and protection of the public is fully engaged".[121] The Court also stated that "[t]he objective seriousness of the offending must be considered."[122] The Court, therefore, applied the policy objectives of deterrence, public protection and accountability "fully",

114 Johansen-Hill, above n 78, at 83.
115 At 84.
116 At 84.
117 At 84.
118 At 85.
119 *R v Yatchotay* 2017 ABQB 679 at [45].
120 *E (CA689/10) v R*, above n 108, at [70].
121 *Pomare*, above n 105, at [29].
122 At [28].

seemingly ignoring the underlying nature of the offending being linked to the individual's specific brain impairment. This approach is highly problematic, given individuals with FASD often engage in impulsive behaviour they fail to understand, and do not respond to general deterrence. The statutory principles of deterrence and denunciation should not be engaged fully, if at all, when sentencing an individual with FASD.

VII ISSUES ARISING AFTER SENTENCING

Various issues arise for individuals with FASD once sentenced. These include their vulnerability in prison, breach of probation conditions and repeat offending.

Treatment in Prison

Due to their condition, individuals with FASD are far more likely to be abused and victimised in prison. These experiences can cause further psychological impairment.[123] Consequently, a prison sentence can have a severe impact on individuals with FASD.[124]

In the case of Teina Pora, the Privy Council recognised that:[125]

> … the life course experienced by Mr Pora in his teenage years is all too common in New Zealand where young people with FASD tend to be gullible and readily targeted by gangs and attracted to antisocial activities unless they are closely protected, supervised and provided with pro-social influences.

This factor should be considered when sentencing any individual with FASD to prison.[126] Furthermore, there are no apparent safeguards or programmes in place specifically to protect individuals with FASD in prison.

Breach of Probation Conditions

Individuals with FASD are known to have substantial trouble with adhering to probation conditions.[127] This difficulty is associated with deficits in executive and adaptive functioning. As a result, individuals with FASD often have issues with time management and remembering appointments. Generally, probation officers will interpret such behaviour as the individual not caring or lacking respect for probation conditions, and therefore

123 Kelly, above n 57, at 152–153.
124 Johansen-Hill, above n 78, at 87.
125 *Pora* (PC), above n 9, at [37].
126 See Sentencing Act, s 8(h).
127 Kelly, above n 57, at 149.

warranting further criminal punishment.[128] However, the failure is generally due to the individual's underlying brain impairment. In other words, what is interpreted by corrections officials as an "attitude problem" is really a symptom of the individual's disability.[129]

Repeat Offending

The prison environment can increase an individual's risk of reoffending. Prison places the vulnerable and highly suggestible offender with FASD into repeated contact with more experienced offenders, who often manipulate that offender into further criminal schemes.[130] Essentially, individuals with the maturity of a pre-adolescent exist in an environment with often dangerous older offenders.[131] Incarcerating individuals with FASD in an adult prison creates a significant risk that the individual will pose a greater danger to society than they would have before incarceration.[132] Therefore, the risk of harm to the community is increased. This risk is illustrated in repeat offending being a hallmark of an offender with FASD.[133]

VIII RECOMMENDATIONS

It is clear from the above analysis that the current legal processes in the CJS are detrimental to individuals with FASD. These processes, especially incarceration, can cause more psychological damage to the offender and create more negative life outcomes.[134] However, individuals with FASD coming into contact with the legal system can be an opportunity. Due to the nature of the current diagnostic and health services for FASD in New Zealand, contact with the CJS may be the only time an individual with FASD comes under the umbrella of government services.[135] If effective alternative avenues are created, the CJS can be used to make meaningful and potentially long-lasting change in the lives of these people and their communities.

128 At 149.
129 At 149.
130 At 156.
131 At 156.
132 At 156.
133 O'Driscoll, above n 28, at 120.
134 Kelly, above n 57, at 153.
135 At 153.

Societal Changes

First, there are crucial measures that the government, and the Ministry of Justice specifically, need to take to ensure better responses to FASD. The Yukon Department of Justice in Canada released a comprehensive report in 2017, which outlined the prevalence of FASD in the Yukon CJS. The report also evaluated numerous screening and diagnostic tools that can be used in the adult CJS.[136] As a general recommendation, this kind of study is what is needed in New Zealand.

1 Prevalence Study

Alcohol Health Watch New Zealand and the Ministry of Health have recognised that a comprehensive prevalence study must be undertaken in New Zealand to understand the true scope of the problem.[137] However, the government is yet to conduct or fund such a study. The prevalence of FASD within New Zealand must be known to effect a meaningful response. Prevalence studies in both the general population and the CJS are desperately needed.

Additionally, in other jurisdictions such as Canada and Western Australia, FASD has been recognised as disproportionately affecting indigenous populations. In Canada, FASD is part of the "social damage inflicted by colonialism" and is, therefore, a "significant contributor" in the over-incarceration of indigenous people.[138] Furthermore, addressing FASD is seen in the Canadian CJS as part of "acknowledging the harms of colonization and seeking reconciliation and healing".[139]

While no such claims in New Zealand can be definitively made without statistics, New Zealand also has a traumatic and violent colonial history.[140] Furthermore, the rates of alcoholic harm on the fetus are greater among Māori.[141] It is, therefore, possible that FASD could be a long-term impact of colonisation in New Zealand, and possibly a contributing factor to the over-incarceration of Māori.[142] A prevalence study is crucial to investigate this possibility and to reorient services towards disproportionately FASD-affected populations.

136 Kaitlyn McLachlan *Fetal Alcohol Spectrum Disorder in Yukon Corrections* (Yukon Department of Justice, 2017) at 70.
137 Alcohol Healthwatch (2014), above n 32, at 2.
138 David Milward "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47 UBC Law Rev 1025 at 1029.
139 Johansen-Hill, above n 78, at 94.
140 Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at ch 7.
141 Alcohol Healthwatch (2014), above n 32, at 3.
142 Department of Corrections *Over-representation of Māori in the criminal justice system: An exploratory report* (September 2007) at 6.

2 Awareness and Education Programmes

Awareness of FASD, at every stage of the CJS and among all involved in the judicial process, is essential to "lifting [FASD] out of obscurity".[143] Awareness is instrumental in many ways. For example, identifying FASD and linking it to the conduct of the offender may allow for more appropriate responses from both the justice system and wider societal services (within the constraints of the current system).

Essentially, all justice professionals should be required to undergo education and training on FASD. Canadian studies have suggested that any staff involved in the management of offenders with FASD need training about the best practices for supporting such offenders.[144] The focus should be on understanding offenders' behaviours and learning how to accommodate these behaviours.[145] The Correctional Service of Canada has developed a "toolbox", used by frontline service staff, to help them adapt their general programmes to match the specific needs of offenders with FASD.[146] This toolbox could be an excellent resource for frontline, general police and corrections staff in New Zealand.

3 Debunking Misconceptions

Part of these educational programmes should focus on debunking common misconceptions about individuals with FASD. Secondary disabilities and negative life outcomes can be mitigated if the individual is supported in the right environment.[147] Brain damage associated with FASD cannot be repaired.[148] However, evidence suggests that if the CJS responds appropriately and the individual is given access to tailored support systems, structure, supervision and learning programmes, these secondary disabilities can be reduced.[149] All members of the justice system must remain positive in their approach to dealing with individuals with FASD. They should not see individuals with FASD as people who only pose a risk to society.

4 Screening Programmes

Screening programmes detect possible cases of FASD, which enables a diagnostic assessment to be made.[150] There are currently no New Zealand screening programmes to alert police or corrections to the possibility of an

143 Alcohol Healthwatch (2010), above n 13, at 22.
144 McLachlan, above n 136, at 70–71.
145 At 70.
146 At 70.
147 Crawford, above n 17, at 4.
148 Astley, above n 7, at 3.
149 Crawford, above n 17, at 4.
150 McLachlan, above n 136, at 32.

offender with undiagnosed FASD. The New Zealand police, justice and corrections systems are where it would be most practical for such programmes to exist. These systems should together investigate options for FASD screening of anyone who enters the CJS. This proposal would be particularly effective in the youth justice system. It would also be instrumental in the adult justice system, where there are likely many adults with undiagnosed FASD.[151]

While there is no universally used FASD screening tool, the Brief Screening Checklist (BSC) is one such tool developed to identify adult offenders in corrections facilities that may be at risk of FASD.[152] The BSC is a useful screening tool because it involves looking at brief measures of behavioural, historical and maternal indicators to determine whether the individual may be at higher risk of FASD.[153] This is one example of a proven method of screening that could work in the New Zealand CJS, provided enough professionals were taught how to use it properly.

5 Disability Services

Diagnostic and disability services are essential in responding to anyone with a disability or impairment. FASD diagnostic services need to be set up across the national health system. Diagnostic services involve having standardised training for health professionals to make FASD diagnoses. The Alcohol Healthwatch Group have been working with clinicians to develop a multidisciplinary diagnostic system in New Zealand based on international guidelines.[154] New Zealand should develop its own FASD diagnostic guidelines in light of internationally proven evidence, although these guidelines should, of course, cater to the New Zealand population.

However, diagnostic services cannot exist alone. There must be adequate disability and health services to support individuals once they are diagnosed. Many of the recommendations in this article will lack efficacy if not supported by specific disability services and programmes targeted at individuals with FASD. This issue is much larger than just the CJS, demonstrating the need for the government to invest time and resources into developing such services.

The New Zealand Youth Court Approach

The New Zealand Youth Court has taken steps to consider and assess offenders with FASD. The non-adversarial nature of the Youth Court creates scope to structure tailored sentences that will ensure the offender can comply

151 Alcohol Healthwatch (2010), above n 13, at 10–11.
152 McLachlan, above n 136, at 31.
153 At 31–32.
154 Alcohol Healthwatch (2010), above n 13, at 6.

with the order, instead of effectively setting him or her up to fail.[155] It is, therefore, beneficial to assess how similar processes could be applied to individuals with FASD in the adult CJS.

The presence of FASD in the Youth Court is relevant in two primary ways.[156] First, it is relevant to the culpability of the offender. Secondly, it is relevant in structuring an appropriate sentence for an individual with FASD. Both these factors can be considered through a medical report about the offender. Under s 333 of the Oranga Tamariki Act 1989, a medical assessment of the offender can be ordered to ensure the young person is processed in compliance with the Act. Under the Act, youth offenders must be dealt with in a way that recognises their needs and gives them the chance to develop in positive and socially acceptable ways.[157]

Additionally, the Act requires that any way of dealing with a young person should, where practicable, address underlying causes of his or her offending.[158] FASD is directly relevant to these requirements and can be the subject of a s 333 report. This report can be an important and influential document for the Youth Court judge in making his or her determinations.

The Oranga Tamariki Act 1989 provides the Youth Court with a greater level of discretion in tailoring offences to the individual. For example, Judge Fitzgerald in *New Zealand Police v ED* recognised that a young offender's FASD was directly linked to his lengthy criminal history and constant breach of bail conditions.[159] Despite these arguably being aggravating factors, Judge Fitzgerald noted that instead of imposing a sentence of detention, the offender's FASD must "be catered for better in plans made in [the] future to reduce the risk of E committing further offences".[160] Judge Fitzgerald also stated that "punishment will not change behaviours that are brain-based".[161] Accordingly, his Honour ordered a supervision and mentoring period, instead of incarceration.

While there is much more to be done in the youth justice system concerning the treatment of offenders with FASD, the current systems provide a space for judges to assess and sentence offenders with FASD appropriately. The Youth Court processes and considerations under the Oranga Tamariki Act would also be directly relevant to adult offenders with FASD. Addressing the underlying causes of offending is crucial in making meaningful change to the behaviour of offenders with FASD. While there is no cure, secondary symptoms of FASD, such as criminality, can be mitigated. It would be interesting to investigate how such processes and principles could be incorporated into the adult CJS.

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155 At 39 and 48.
156 O'Driscoll, above n 28, at 120.
157 Section 4(1)(i).
158 Section 208(2)(fa).
159 *New Zealand Police v ED* [2014] NZYC 122.
160 At [8].
161 At [11].

Changes to the Trial Process

Various changes can be made within the CJS itself that may aid effective responses to individuals with FASD. The system has become a revolving door for these people. Current responses do little to reduce offending. Alternative measures will not only benefit offenders but also their communities.

1 A Different Approach to Police Questioning

Police officers and prosecutors, often the first to come into contact with individuals with FASD, need to adjust their usual questioning approach. This adjustment will be easier when there are more FASD diagnoses. As diagnoses become more common, police officers will be able to recognise the disorder and respond appropriately.

Individuals with FASD need to be carefully questioned so that they are not inadvertently coerced into making a statement. In Canada, some individuals with FASD are given cards that outline their diagnosis, how this increases the risk of a false confession or incorrect statement and that, as a result, they require a support person or lawyer to be present during questioning.[162] The efficacy of this measure is not yet known. However, it demonstrates a possible way of mitigating the risk of inappropriate police questioning of individuals with FASD.

Additionally, there are several suggested modifications to ensure appropriate police questioning of individuals with FASD.[163] These include shortened interviews with small amounts of information per session, ensuring any information given orally is also in writing and given to a support person, keeping questions direct, using simple language and avoiding open-ended or "why" questions.[164] These techniques should apply to any situation in which an individual with FASD is interviewed, both in and out of the courtroom. Ideally, there would be a similar resource produced in New Zealand, providing professional guidelines for communicating with offenders with FASD.

2 Adopting a Non-Adversarial Approach

Court processes are adversarial, lengthy and often complicated. The court system is a challenging environment for individuals with FASD, who are easily confused and overwhelmed by large amounts of information. Various

162 Kent Roach and Andrea Bailey "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing" (2009) 42 UBC L Rev 1 at 13–14.

163 Edmonton and Area Fetal Alcohol Network (EFAN) Child and Youth Working Group *FASD: Strategies not Solutions* (20 September 2007) at 29.

164 At 29.

modifications can be made to mitigate this challenging environment. These modifications include taking short breaks wherever possible, using clear and simple language and avoiding legal jargon where possible when addressing the defendant.[165]

However, it may be more effective to adopt a different approach to that taken in the typical court process. An example of such a different approach is that taken in the Youth Court. The Youth Court is less adversarial and allows for easier communication between the judge, defendant, lawyers and other support persons. The Youth Court has seen some success in setting more appropriate sentences for individuals with FASD.[166] It may be that such an approach is better suited to individuals with FASD, who often have the mental age of an adolescent, despite being biological adults.

3 Changing our Conception of Fitness to Stand Trial

The competence of a defendant to stand trial generally depends on the way his or her intellectual disability is assessed for the purposes of the IDCCR. Determining fitness to stand trial is based heavily on IQ level. This poses an issue for individuals with FASD, who may not necessarily have a low IQ, but rather have poor adaptive functioning compared to others with the same IQ.[167] Their poor adaptive functioning means that individuals with FASD tend to struggle in stressful courtroom environments more so than what their IQ level indicates. Determinations of capacity to stand trial and of intellectual disability must therefore focus more on the individual's practical ability to understand the court process and direct counsel.

Statutory reform may be needed to change the way an individual is classed as intellectually disabled. A more holistic view, encompassing not only IQ but also a practical assessment of adaptive functioning, may be more accurate in determining whether an individual with FASD is intellectually disabled. This assessment is important, not only in terms of fitness to stand trial, but also for access to certain disability services.

4 Partial Defence of Diminished Capacity

New Zealand could look at creating a defence of diminished capacity. This defence would recognise, before sentencing, that an individual's mental impairment reduces their moral and criminal culpability. However, the Law Commission has found the concept of diminished capacity difficult to define and problematic to apply. As a result, the defence has never formed part of

165 At 13–14.
166 *New Zealand Police v ED*, above n 159.
167 Kelly, above n 57, at 155.

New Zealand law.[168] Introducing a defence of diminished capacity would significantly change the criminal law.

Furthermore, FASD is a spectrum disorder, impacting people in differing ways and to varying degrees. Therefore, it may be difficult to determine when an individual's condition is sufficiently connected to their offending to fit under some version of the defence. Additionally, FASD-specific rehabilitation programmes would need to supplement any defence of reduced capacity.

Different Approach to Sentencing

The complex nature of the impairments associated with FASD and their relationship to the principles and purposes of sentencing requires a radical change to the standard approach. The focus needs to move from concepts of punishment and deterrence to rehabilitation and therapeutic outcomes.

1 General Principles in Sentencing Offenders with FASD

Wartnik lays out ten principles for sentencing individuals with FASD.[169] Wartnik stresses that a different approach to sentencing must be sought to prevent such individuals from being "continually caught in the revolving door" of the CJS.[170] The 10 principles are:[171]

(1) considering whether the disability reduces culpability, warranting a less severe sentence;
(2) avoiding lengthy (if any) incarceration, instead promoting longer periods of supervision;
(3) using milder but more targeted sanctions;
(4) using longer terms of supervision;
(5) using the judge's position of authority to communicate with the defendant;
(6) obtaining an advocate for the defendant who has extensive knowledge of the defendant's condition;
(7) using sentencing to create some form of structure in the defendant's life;
(8) writing out, simplifying and repeating the rules and conditions of the sentence;

168 Law Commission *Understanding Family Violence: Reforming the Criminal Law Relating to Homicide* (NZLC R139, 2016) at [10.78].
169 Wartnik, above n 1.
170 Wartnik, above n 1.
171 Wartnik, above n 1.

(9) ensuring the probation officer and other professionals understand FASD and how it influences the defendant's behaviour; and
(10) not overreacting to probation violations.

The current sentencing method means that New Zealand may not yet be able to give effect to all 10 principles fully. However, some principles can be put into practice through better awareness and education of justice professionals. Others may require statutory reform and the creation of social and disability services tailored to FASD.

2 Readdressing FASD as an Aggravating Factor

An important change that can be made is not treating FASD as an aggravating factor at sentencing. New Zealand judges must not fall into a pattern of viewing FASD as both an aggravating and mitigating feature. This should not be the response to the higher risk of recidivism in individuals with FASD. The courts in Canada have specifically warned against punishing the manifestation of a disability through the method of approaching FASD as an aggravating factor.[172] There must be specialist programmes in place to help rehabilitate offenders with FASD and mitigate the secondary disabilities of their condition. If such programmes are in place, both within the CJS and the community, judges may feel they have more options than simply imposing a prison sentence. However, until alternatives and social support structures exist, the "double-edged sword" approach to sentencing individuals with FASD will likely continue.

3 Wording Probation Conditions Differently

Prolonged periods of supervision on probation or parole can benefit individuals with FASD. Probation and parole officers who are aware of the offender's condition can factor this into consideration of release condition breaches.[173] Individuals with FASD will need appointment reminders, conditions made in direct and simple language and a reminder by the probation officer of their expected behaviours.[174] It is also important for the officer to be flexible and reasonably lenient in dealing with potential violations. Awareness of FASD and a change to release conditions can significantly benefit individuals with FASD, ensuring better compliance.

172 Johansen-Hill, above n 78, at 87.
173 Kelly, above n 57, at 157.
174 At 157.

Specialist Court

Finally, New Zealand could develop a specialist therapeutic court for offenders with FASD and analogous brain impairments. This court could function similarly to other problem-solving courts such as the Drug and Alcohol Court and Te Kooti o Timatanga hou ("The Court of New Beginnings").[175]

The Manitoba Justice Department recently announced the opening of a specialist FASD Court. This initiative came in response to research suggesting that up to one quarter of inmates in Manitoba's corrections facilities have FASD.[176] Compared to general courts, the FASD Court involves a smaller, quieter courtroom with visual images and fewer distractions. These solutions help offenders with FASD to understand the court process.[177] The Court is open to both youth and adults diagnosed with FASD. It sits one day per week. Its focus is to provide the accused with a court environment that specifically accounts for the deficits identified in the individual's FASD assessment report, and to link these deficits to the accused's degree of responsibility for the offence.[178]

New Zealand could introduce a similar initiative. The Court of New Beginnings, which takes a problem-solving, non-adversarial approach and works with various governmental and non-governmental agencies, has had some highly positive results in reducing rates of recidivism and increasing positive life outcomes for participants.[179] This approach may also be beneficial in addressing individuals with FASD and reducing their rates of recidivism. While an individual with FASD cannot be cured, the proposed specialist therapeutic court could find appropriate solutions and ensure that the individual receives adequate social support to impact their life positively and create safer communities.

However, without a prevalence study and a lack of acknowledgement of FASD in the adult CJS, a specialist court may be some way off. Furthermore, specialist courts are often only initially set up at single locations. Therefore, only individuals in that geographical area would be eligible for the programme. With speculated rates of FASD in the CJS being high, it may be that change to the general adult court procedure is most effective in responding to offenders with FASD.

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175 The District Court of New Zealand "Alcohol and Other Drug Treatment Court" (December 2019) <www.districtcourts.govt.nz>; and Tony Fitzgerald "New Beginnings Court" (2015) The District Court of New Zealand <www.districtcourts.govt.nz>.

176 Kelly Geraldine Malone "New Manitoba court for people with FASD could be a game changer: experts" (3 February 2019) CBC News <www.cbc.ca>.

177 Malone, above n 176.

178 Margaret Wiebe "Re: FASD Dockets – Adult and Youth" (14 March 2019) Provincial Court of Manitoba (Winnipeg Centre) <www.manitobacourts.mb.ca>.

179 Alex Woodley *A Report on the Progress of Te Kooti o Timatanga Hou – The Court of New Beginnings* (Auckland Homeless Steering Group, 25 September 2012).

IX CONCLUSION

Individuals with FASD are victims of cycles of poverty and addiction.[180] Their condition can never be cured. The quality of life these people have ultimately depends on how society and governmental institutions treat them.[181] The criminal law, as an institution, is vitally important for these individuals. It has been recognised in Canada that what is lacking in social services "must be compensated for in the CJS as a matter of necessity".[182]

This article has discussed the various legal and societal issues that defendants and offenders who have FASD present. Barriers to justice arise for these individuals at every stage of the CJS. Changes must be made to address these issues. However, what is urgently needed is more information about, and studies on, FASD in the New Zealand CJS. The current lack of awareness and New Zealand-based research on FASD is a barrier in itself to adopting better alternatives. This issue can no longer be ignored.

Moreover, there is both a social and a legal imperative in addressing offenders with FASD. Without taking the time to understand the impact of FASD on the brain, how this connects to offending and how to appropriately deal with such offending, the CJS is punishing individuals for being born with a brain impairment. Because of their behavioural deficits, individuals with FASD are more likely to engage in criminal acts. They are also more likely to be unfairly treated by the CJS. However, the CJS is an opportunity for individuals with FASD to receive the help and support they need. How the justice system decides to treat, deal with and ultimately punish individuals with FASD will not only have a significant impact on their lives but on the lives of their potential victims and the community. The CJS should not continue to punish individuals for having FASD, teaching them nothing and allowing them back into the community to likely commit similar offences. Instead, the CJS must respond to such individuals by properly addressing their underlying brain impairment as a significant cause of their offending.

180 Although not the direct subject of this article, pre-natal alcohol exposure is associated with negative environmental factors such as substance abuse and poverty. See Johansen-Hill, above n 78, at 82.

181 Kelly, above n 57, at 148.

182 Johansen-Hill, above n 78, at 77.