Foetal Alcohol Spectrum Disorders (FASD)

Executive Summary

Foetal Alcohol Spectrum Disorders ('**FASD**') is an umbrella term for a range of physical, cognitive, behavioural and neurodevelopmental impairments and secondary disabilities that may be experienced by individuals who were prenatally exposed to alcohol.[1] Many mothers drink alcohol during the first trimester without knowing they are pregnant, and then stop drinking upon becoming aware of the pregnancy.[2]

FASD is a preventable, life-long condition with no cure[3] that remains largely invisible and under-recognised in Australia.[4] The harm done by alcohol may not be evident at birth, but the central nervous system damage with which the child is born is irreversible and permanent.[5]

Neurodevelopmental impairments due to FASD can predispose young people to interactions with the law.[6] FASD is highly prevalent in criminal justice settings, and justice-involved individuals with FASD display significant impairment in a greater number of neurocognitive domains including intellectual capacity, executive function, language, academic achievements, motor skills and adaptive living skills than comparison groups – predominantly individuals in the same criminal justice settings without a diagnosis of FASD.[7] Despite this, evidence shows that knowledge of FASD is poor among health, education and justice sectors,[8] and individuals affected by FASD who interact with the justice system frequently do not have, or are unaware of, that diagnosis.[9]

While each case is unique in presentation,[10] brain damage from prenatal exposure to alcohol can increase involvement in criminal activity due to the following characteristics of FASD:

- lack of impulse control
- trouble identifying future consequences of current behaviour
- difficulty planning and connecting cause and effect
- difficulty empathising with others and taking responsibility for actions
- difficulty delaying gratification or making good judgments
- a tendency towards explosive episodes
- vulnerability to social influences such as peer pressure (high levels of suggestibility).[11]

People with FASD are at increased risk of incarceration due to executive functioning disabilities that impact their ability to understand the criminal justice system, to secure legal representation, provide instructions to lawyers, give evidence to defend themselves and/or comprehend the content, strategy and procedures involved in their case. Poor memory, high suggestibility and eagerness to please may lead individuals [with FASD] to falsely confess or agree to statements, resulting in a miscarriage of justice.[12]

These disabilities mean that incarceration is neither beneficial nor appropriate for people with FASD, as they are unable to learn cause and effect and are more vulnerable to physical, sexual and social victimisation in the prison system.[13]

The potential relevance of evidence of FASD in sentencing proceedings is wide-ranging and includes any assessment of *moral culpability*; moderating the weight to be given to *general deterrence*; and determining the weight to be given to *specific deterrence* and *protection of the community*. There may also be issues relating to the likelihood of hardship in custody, a finding of special circumstances and the shaping of conditions to enhance prospects of rehabilitation.

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[1] Judicial Commission of New South Wales, *Equality Before the Law Bench Book – People With Disabilities* (18 July 2016) [5.3.8] ('*Equality Bench Book*') and Stephen Ralph, 'Fetal Alcohol Spectrum Disorder in Indigenous Adults and the Role of Psychology' (2017) 39(2) InPsych: The Bulletin of the Australian Psychological Society Ltd 14, 14–15.

[2] Evelyne Muggli et al, '"Did You Ever Drink More?" A Detailed Description of Pregnant Women's Drinking Patterns' (2016) 16(683) *BMC Public Health* 2.

[3] Senate Community Affairs References Committee, Parliament of Australia, *Effective Approaches to Prevention, Diagnosis and Support for Fetal Alcohol Spectrum Disorder* (Report, March 2021) [2.10]–[2.11] ('*Effective Approaches* Report').

[4] Ibid [1.7].

[5] [Ibid 1.3].

[6] *Equality Bench Book* (n 1) [5.3.8].

[7] Najat Khalifa et al, 'The Neurocognitive Profiles of Justice Involved People with Foetal Alcohol Spectrum Disorder: A Systematic Review' (2022) 40(1) *Behavioral Sciences & the Law* 87, 87.

[8] Jessica C McCormack, Joanna Ting Wai Chu, Samantha Marsh and Chris Bullen, 'Knowledge, Attitudes, and Practices of Fetal Alcohol Spectrum Disorder in Health, Justice, and Education Professionals: A Systematic Review', *Research in Developmental Disabilities* (2022) 131.

[9] Carol Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia' (2018) 8 *BMJ Open* e019605.

[10] Ralph (n 1) 14–15.

[11] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, June 2013) 36–7 [4.42] ('*Justice Reinvestment* Report').

[12] Select Committee on Action to Prevent Foetal Alcohol Spectrum Disorder, Legislative Assembly of the Northern Territory, *The Preventable Disability* (Report, February 2015) 56 [4.46] ('*Preventable Disability* Report').

[13] Heather Douglas, 'The Sentencing Response to Defendants with Foetal Alcohol Spectrum Disorder' (2010) 34 *Criminal Law Journal* 221.