

# BILL C-75: AN OPPORTUNITY TO IMPLEMENT CASE CONFERENCES FOR OFFENDERS WITH FETAL ALCOHOL SPECTRUM DISORDER

Calgary Indigenous Support Network: Indigenous Justice Circle FASD Working Group

## **Introduction**

Fetal Alcohol Spectrum Disorder (FASD) is a systemic problem in Canada that affects adults and youth alike. The FASD Working Group of the Indigenous Justice Circle<sup>1</sup> proposes an amendment to Bill C-75 that will increase the power of courts to ensure offenders with FASD are effectively and appropriately identified, supported, and sentenced in the criminal justice system.

The *Criminal Code of Canada (Criminal Code)*<sup>2</sup> should have a procedural mechanism that allows courts to convene groups of persons to give advice about offenders with FASD (FASD Conferences). A court-ordered conference model has been successfully used in the youth criminal justice context for over a decade through case conferences mandated under section 19 of the *Youth Criminal Justice Act*<sup>3</sup> (Section 19 Conferences). Experience with Alberta-based programming for youth offenders shows that Section 19 Conferences successfully reduce recidivism and effectively support offenders with FASD in the youth criminal justice system.

The FASD Working Group contends that expanding this proven mechanism into the adult criminal justice system on a narrow basis – making it available to adult offenders with FASD – is appropriate, cost effective, and timely.

An adult offender has no less need for a court to respond appropriately his or her permanent brain injury than a minor offender. In turn, courts that try adults have no less need than youth courts for recognizing and reacting to the reality of FASD in the criminal justice system.

## **Recommendation**

Amend Bill C-75 to provide statutory authority for convening FASD Conferences under the *Criminal Code*.

## **Discussion**

There is a recognized need for reform in the criminal justice system to better address the needs of offenders with FASD. If incorporated into the *Criminal Code*, FASD Conferences will:

1. Build on successful practices in the youth context;
2. Extend resources to adults with FASD that are currently unavailable;
3. Improve the court's ability to properly weigh sentencing principles;
4. Supplement currently insufficient pre-sentencing report provisions; and
5. Save long-term costs in the justice system.

### ***Reform to address FASD is urgent and necessary***

FASD is classified as organic brain dysfunction. It is a spectrum of disorders caused when a fetus is exposed to alcohol. The effect of alcohol on fetal development varies from person to person. FASD can lead to problems with learning, memory, attention, language, social skills, motor skills, and controlling behaviour. FASD can also have negative effects on reasoning ability and judgment. It can cause behavior that is impulsive or based on frustration, and

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<sup>1</sup> With thanks for the assistance of Clayton Swan, JD Student at University of Calgary's Public Interest Law Clinic.

<sup>2</sup> RSC, 1985, c. C-46.

<sup>3</sup> SC, 2002, c. 1.

potentially performed with little to no understanding of the consequences. Those with FASD often lack focus or are easily distracted.<sup>4</sup>

FASD is not a disease. It is permanent brain damage that has no cure. While it is a lifelong disability, it can be managed with appropriate supports and services.

The cost of FASD to healthcare, education, social services, and other services in Canada totals \$9.7 Billion every year.<sup>5</sup> An estimated 60% of people diagnosed with FASD have had negative interactions with the law.<sup>6</sup> It should then be no surprise that \$3.9 Billion of the \$9.7 Billion annual cost of FASD in Canada falls upon the Canadian criminal justice system, including costs to police, courts, correctional services, victims, and third-parties.<sup>7</sup> Courts and scholars have called for a restructuring of the Canadian criminal justice system as it relates to offenders with FASD.<sup>8</sup>

We echo that, and add that systemic reform to address FASD, generally, will also improve the lives of Indigenous people specifically. Incarceration rates are ten times higher for Indigenous people than non-Indigenous people, and Indigenous men and women make up 24 and 34 percent of federal prison population, respectively.<sup>9</sup> The potential to improve lives by addressing FASD is so powerful that Truth and Reconciliation Commission of Canada issued a specific Call to Action with respect to it:

*We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of FASD offenders including:*

- i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.*
- ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders with FASD.*
- iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.*

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<sup>4</sup> Government of Canada, “Signs and symptoms of fetal alcohol spectrum disorder,” online: <https://www.canada.ca/en/public-health/services/diseases/fetal-alcohol-spectrum-disorder/symptoms.html>.

<sup>5</sup> David Milward, “Special Issue: Law on the Edge: The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways”, (2014) 47 UBC L Rev 1025, at para 2. [Milward]

<sup>6</sup> Public Health Agency of Canada (PHAC). (2011). *Assessment and diagnosis of FASD among adults: A national and international systematic review*. Ottawa, ON: PHAC. Retrieved from: <https://www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/hp-ps/dca-dea/prog-ini/fasd-etcaf/publications/ad-ed/pdf/fasd-etcaf-eng.pdf>, at page 44; Streissguth, Ann P, et. Al. (2004) “Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects,” *Developmental and Behavioral Pediatrics*, Vol 25 No. 4, 228-238, at page 233.

<sup>7</sup> Thanh NX, & Jonsoon E. (2015) “Cost of Fetal Alcohol Spectrum Disorder in the Canadian Criminal Justice System,” *Journal of Population Therapeutics and Clinical Pharmacology*, 22(1), 125-131, at page e125.

<sup>8</sup> Milward, *supra*, note 5.

<sup>9</sup> Government of Canada Department of Justice, *JustFacts: Indigenous overrepresentation in the criminal justice system*. January 2017. online: <http://www.justice.gc.ca/eng/rp-pr/jrf-pf/2017/jan02.html>.

*iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.*<sup>10</sup>

For these reasons, introducing FASD Conferences into the adult criminal justice system is worth your consideration and support.

### ***How FASD Conferences will function***

In Appendix A, below, we provide a draft amendment to Bill C-75. That amendment introduces a provision in the *Criminal Code* for convening FASD Conferences. An FASD Conference, like a Section 19 Conference, will bring together the offender's personal and professional supports to review the offender's medical assessments, identify the supports required to assist the offender, and make recommendations on what will aid the offender in successfully completing his or her disposition.

The findings and recommendations that a FASD Conference generates would be submitted to the court to aid it in making any decision regarding the offender under the *Criminal Code*.

To be most effective, an FASD Conference should be available as needed and at any time in the proceedings. An FASD Conference should also be available through a court's own initiative or by application of the parties or other justice system participants involved with the offender.

Finally, to ensure the effectiveness of an FASD Conference, a court should have direct statutory authority to order the participation of a variety of relevant people.

### ***Experience and research in Alberta demonstrate conferences are effective***

FASD affects 9-12 in 1000 Albertans.<sup>11</sup> Recently, Alberta Justice and Solicitor General commissioned independent researchers to evaluate the efficacy of Section 19 Conferences. Their research showed that Section 19 Conferences reduce recidivism in justice-involved youth with FASD, and generate effective opportunities to provide those youth with greater support.<sup>12</sup>

Section 19 Conferences empower multiple parties to convene a conference, with court ordered attendance, for the purpose of aiding in the making of decisions under the *Youth Criminal Justice Act*. Those who may be required to attend at the conferences include parents or guardians, probation officers, child welfare representatives, and FASD assessors. Section 19 Conferences consider a young person's current supports, and what supports would assist the young person to successfully complete his or her disposition, improve his or her life course, avoid future criminal involvement.<sup>13</sup>

Section 19 Conference reports provide the court with a complete record of the resources available to the young offender in their communities. They are similar to *Gladue* reports, but are

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<sup>10</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, Winnipeg, Manitoba: 2012, at page 4.

<sup>11</sup> Thanh, N. et al. (2014), "Incidence and prevalence of Fetal Alcohol Spectrum Disorder by sex and age group in Alberta, Canada," *J Pop Ther Clin Pharmacol*, 21 (23), e395-404, at page e395.

<sup>12</sup> Merrill Cooper and Lindsay Guyn, "Evaluation of an Intervention to Prevent Recidivism Among Young Offenders with FASD: Alberta's FASD Justice Project," Guyn Cooper Research Associates Ltd: Calgary AB, at page i. [Cooper and Guyn]

<sup>13</sup> *Ibid.* at page i.

not limited to use in sentencing only. Alberta's research ultimately found that, when Section 19 Conferences provide youth with FASD and their guardians with the support and guidance they required to reduce criminogenic risk factors, the youth's risk of offending fell. At the end of the day, "conferences are effective in preventing crime and reducing recidivism and... should be widely replicated."<sup>14</sup>

### ***What we know about the youth context is applicable to adults with FASD***

FASD does not go away with age. Youth with FASD become adults with FASD, and many adults with FASD operate at the mental level of children. By extending one procedural mechanism available to young offenders with FASD to adult offenders with FASD, the JUST Committee will remove the arbitrary cut off faced by offenders with FASD as they turn 18.

### ***FASD Conferences can ensure effective sentencing***

The sentencing provisions of the *Criminal Code* require a court to consider certain principles when sentencing an offender, such as denunciation and deterrence, protection of society, rehabilitation of the offender, reparations for harm done, and a promotion of a sense of responsibility in the offender.<sup>15</sup> Sentences must be proportionate to the gravity of the offense and the degree of responsibility, or moral blameworthiness, of the offender. FASD is a relevant factor for a court when a) weighing the moral culpability of the individual, b) judging whether a sentence would have any deterrent effect on an individual, and c) deciding whether imprisoning the individual is necessary for the protection of the public.

FASD can be a mitigating or aggravating factor in sentencing an individual. An FASD offender's inability to connect actions to their consequences is central to effective sentencing, because it lowers the offender's moral culpability.<sup>16</sup> FASD can also reduce the effectiveness of incarceration as a deterrent, and blunt any meaning a sentence itself may otherwise have for denouncing an offender or engaging that offender's sense of responsibility.<sup>17</sup> And, in some cases, courts have held cognitive defects caused by FASD resulted in a greater danger to the public that can only be mitigated by increased incarceration.<sup>18</sup> Everything depends on the court's ability to obtain information about the extent of the effect of FASD on an individual.

Emphasis on sentencing principles of deterrence and denunciation for offenders with FASD can be inappropriate.<sup>19</sup> It can be incorrect for a court to rely upon denunciation and deterrence in sentencing, because increased cognitive defect in an individual can correspond to a decrease in

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<sup>14</sup> Cooper and Guyn, *supra*, note 12 at page ii.

<sup>15</sup> *Criminal Code* s.718-718.2.

<sup>16</sup> *Ibid.*; *R v Ramsay*, 2012 ABCA 257, 536 AR 174 at paras 18-19. [Ramsay]

<sup>17</sup> *Ramsay*, *ibid*, at para 21.

<sup>18</sup> *R v Obed, John Julius*, 2006 NLTD 155 (CanLII) at paras 66-71; *R v Manyshots*, 2018 ABPC 17, at para 69; *Ramsay*, *supra* at note 10, at para 21.

<sup>19</sup> *R v Quash*, 2009 YKTC 54 (CanLII), [2009] YJ No 72 (QL) at para 70; *Ramsay*, *supra*, note 16 at paras 22, 23; *R v Virani*, 2012 ABCA 155, 524 AR 328 at para 68.

his or her degree of responsibility.<sup>20</sup> Courts have also signaled that any mental illness, regardless of whether it was the direct cause of an offence, could be a mitigating factor in sentencing.<sup>21</sup>

FASD Conferences can prevent sentences that breach an offender's rights under the *Charter of Rights and Freedoms (Charter)*.<sup>22</sup> As the Supreme Court of Canada has recently affirmed, failure to properly balance sentencing principles can result in a "grossly disproportionate" sentence that breaches an offender's rights under section 12 of the *Charter*.<sup>23</sup> Because some offenders with FASD cannot understand cause and effect, have the cognitive equivalence to that of a child, or are unable to act within the expected social norms, a court's over-reliance upon the sentencing principles of deterrence or denunciation could result in a grossly disproportionate sentence.<sup>24</sup> As the Yukon Trial Court has vividly found, "it is simply obscene to suggest that a court can properly warn other potential offenders by inflicting a form of punishment upon a handicapped person."<sup>25</sup>

In order to properly balance sentencing principles and avoid infringing *Charter*-protected rights, courts must have a tool that provides a rich profile of information containing the full circumstances of an offender with FASD, including the extent of that individual's disability and the availability of community supports. FASD Conferences are that tool.

### ***FASD Conferences can achieve what current pre-sentence provisions cannot***

FASD Conferences are required to supplement current pre-sentence report provisions. Currently, under section 721(1) of the *Criminal Code*, a court may order a probation officer, and a probation officer only, to prepare a pre-sentence report. That report can only be used to aid in imposing a sentence or granting a discharge. The court is not currently empowered to order attendance or participation by those who may otherwise be reluctant or have no incentive to talk to the reporting probation officer.

This should change for two reasons. First, because FASD Conferences can occur at any time in the criminal justice process, the court benefits from better information throughout the proceedings. Second, the ability to make attendance at FASD Conferences mandatory is essential, because it provides the court with a greater breadth and depth of information. FASD Conferences would provide the court with a more holistic approach to rehabilitation, would ensure that all the necessary information is collected, and would allow for an earlier understanding of the particular and unique characteristics and needs of that individual.

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<sup>20</sup> *Ramsay, ibid*, at paras 18-19, 22.

<sup>21</sup> *R v Ayorech*, 2012 ABCA 82, [2012] 522 AR 306, at para 10.

<sup>22</sup> *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

<sup>23</sup> *R v Boutilier*, 2017 SCC 64, [2017] 2 SCR 936.

<sup>24</sup> *R v Harper*, 2009 YKTC 18 at paras 38, 47.

<sup>25</sup> *Ibid* at para 47.

### ***The long-term benefits of FASD Conferences outweigh their short-term cost***

On a case by case basis, FASD Conferences may take additional court time, may increase the time it takes to process offenders with FASD in the court system, and may require additional effort for participants who are required to report or attend. However, FASD Conferences can save resources across the Canadian criminal justice system by engaging alternative measures effectively. For example, it costs about \$24,825 per year to supervise an offender in the community compared with the cost of \$101,666 to keep an offender incarcerated for one year.<sup>26</sup> FASD Conferences aid in crafting more appropriate conditions and sentences, which prevent recidivism and reduce the cost to police, courts, correctional services, victims, and third-parties.

### ***Who we are***

The Indigenous Justice Circle collaborates with partners in Calgary to make the community safe for its Indigenous population and to establish a continuum of supports that keep Indigenous people out of the justice system and living healthy and productive lives. Many stakeholders past and present have sat on working groups like the Indigenous Justice Circle's FASD Working Group. Through a process of research, case development and advocacy, the working group advocates for Indigenous people in conflict with the law in Calgary to bring about needed improvement in service delivery in the areas of mental health, addictions, FASD and behavior therapy.

The Urban Programming for Indigenous Peoples (UPIP) Coalition Community Initiative will engage with the urban Indigenous community and seek their input for the developing a coalition in Calgary. Based on the input they will establish and maintain an Indigenous coalition that will share information, discuss current emerging issues, identify local priorities and needs, continue with community planning and promote collaboration at a local level. The Community Engagement & Partnership program funded through UPIP and lead by Native Counselling Services of Alberta is supporting work that is community driven, for the community, by the community to strengthen the voice of Indigenous peoples, the relationships with key stakeholders, and identify the priority areas to focus on over the next 2-5 years.

Originally called the Justice Domain, the Indigenous Justice Circle was formed through an initiative called Calgary Urban Aboriginal Initiative (CUAI). This community initiative engaged collaborative work amongst the Calgary Indigenous community and sunset in 2015. From this, three existing groups remain: Human Rights, Education and Justice. These circles utilize the Calgary Urban Aboriginal Community Strategic Plan 2015 to implement three priorities: cultural awareness (includes intergenerational trauma), cultural space, and improved referral processes to community. There is “One Heart, One Mind, One Spirit” in a journey of reconciliation with each of us; as individuals, by connecting with ourselves, our families, our land and resources to have the most community influence of our strong urban Indigenous community within Calgary.

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<sup>26</sup> Milward, *supra*, note 6, at para 66.

## **APPENDIX A: Proposed Amendment to Bill C-75**

### **386.1 The Act is amended by adding the following after section 487.03:**

#### **487.031 FASD Conferences**

##### **Interpretation**

- (1) In this section,
  - (a) **conference** means a group of persons who are convened to give advice in accordance with this section, and
  - (b) **FASD** means Fetal Alcohol Spectrum Disorder.

##### **Conferences may be convened**

- (2) On its own motion, or on application by the prosecutor, the accused, or a justice system participant, a court that has reasonable grounds to believe that an accused or offender has FASD may convene or cause to be convened a conference for the purpose of making any decision required to be made under this Act.

##### **Mandate of a Conference**

- (3) The mandate of a conference may be, among other things, to give advice on alternative measures, judicial interim release, or sentencing.

##### **Carrying Forward of Youth Conference**

- (4) Subject to sections 117 to 120 of the *Youth Criminal Justice Act*, SC 2002, c. 1, if a conference report has been prepared in respect of the accused pursuant to the *Youth Criminal Justice Act*, SC 2002, c.1, then the contents of the report may be used in preparing a new report to aid in providing advice pursuant to subsection 3.

##### **Rules for conferences**

- (5) The Attorney General or any other minister designated by the lieutenant governor in council of a province may establish rules for the convening and conducting of conferences other than conferences convened or caused to be convened by a judge, a provincial court judge or a justice of the peace.

##### **Rules to apply**

- (6) In provinces where rules are established under subsection (5), the conferences to which those rules apply must be convened and conducted in accordance with those rules.