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Via email: natasha.phillips@gov.yk.ca; Joanna.Wells@justice.gc.ca

Natasha Phillips
Territorial Co-chair
CCSO Steering Committee on FASD

Joanna Wells
Federal Co-chair
CCSO Steering Committee on FASD

Dear Ms. Phillips and Ms. Wells:

I write on behalf of the National Criminal Justice Section of the Canadian Bar Association (CBA) in response to your letter dated August 8 2014, sent to CBA Past President, Fred Headon. Thank you for your continued efforts to ensure that the criminal justice system responds more appropriately to people with Fetal Alcohol Spectrum Disorder (FASD).

In my response, I follow the order of the questions in your letter.

Definition of FASD

CBA Resolution 13-12-A calls for a legislated or legal definition of FASD in the *Criminal Code* that, with the exception of requiring proof of maternal consumption of alcohol, would be aligned with generally accepted medical guidelines and protocols. All medical evidence provided would ultimately be assessed by a judge to determine if the presence of FASD had been legally established.

We have not addressed the question of better defining other disorders or mental illnesses. FASD is a class of brain injury that has been identified in a significant number of people involved with the criminal justice system. FASD is a root cause of many other secondary problems, including forms of mental illness. The volume of people impacted alone warrants particular consideration. We expect that recognition of the prevalence of FASD was also an important factor in the decision of Federal/Provincial/Territorial (FPT) Ministers to create your committee, identify FASD as a priority issue, and engage in a dialogue with CBA to find solutions.

Maternal Alcohol Consumption

While evidence of maternal alcohol consumption is an important factor in an FASD medical diagnosis, this evidence will not always be available. An abandoned child, for example, may have no means to establish maternal consumption of alcohol during pregnancy. Even when the mother is available, she may not be forthcoming about, or recall her drinking habits during pregnancy, particularly some time later when the child is in conflict with the law. Depending on the situation, external evidence may or may not exist to establish FASD, even though all symptoms are present.

The CBA has not formally consulted either the judiciary or diagnostic experts on this issue but relied on the expertise and experience of practicing lawyers and judges. The challenge of establishing maternal alcohol consumption is not new in the assessment of FASD. When the only obstacle to a diagnosis of FASD is an absence of proof of maternal alcohol consumption, but significant factors in an assessment point to FASD, an expert may be able to offer an opinion about the existence of the condition. If the degree of certainty in a medical diagnosis is affected by the inability to prove maternal alcohol consumption, it should not be a legal bar to the court's determination that FASD is a factor. Ultimately, determining if an individual is affected by FASD rests with the judge. As with "not criminally responsible" determinations, legal and medical definitions can and do vary.

FASD Assessments and Diagnosis

As noted, the CBA has relied on the expertise of its membership in developing our policy positions on the optimal type of assessment. We do agree that the additional research and consultation you suggest would be useful, and an important first step in implementing the recommended amendments.

The *Criminal Code* would need to address the issue of the threshold evidence required before an assessment was ordered. You ask for clarification as to whether we recommend diagnostic or functional assessments, but these are often overlapping. Diagnostic assessments generally include a functional component.

We also note that a hypothetical offender being referred for an assessment has already been found fit to stand trial and instruct counsel. FASD is a spectrum disorder and the presence of FASD is not automatically a bar to having capacity to consent. As with applications under section 672, this issue of assessment might be raised by Crown or the court. However, we expect that in most instances, a request for an assessment would come from the accused, nullifying concerns regarding the issue of consent.

The reality is that for the justice system to properly identify and respond to individuals with FASD, time and resources must be expended. Obviously some delays would be occasioned by FASD assessments, but no more than for the preparation of other court assessments and *Gladue* reports. The volume of requests from such assessments would vary from court to court but the prevalence in some parts of Canada speaks only to the need for improving processes for identifying and responding to people with FASD, rather than the need to avoid seeking improvements because of the time or cost involved.

We note that when a person is assessed once, there would unlikely be need for further assessments if the individual returns to court on other matters. It is not like a section 672 assessment, which must be conducted for each offence.

FASD as a Mitigating Factor

The CBA has recommended that FASD be considered a mitigating factor in sentencing. FASD has been found to be a mitigating factor, but courts have also held it to be an aggravating factor in sentencing. In our view, treating FASD as aggravating is inconsistent with sentencing principles in the *Criminal Code*, particularly in regard to proportionality, requiring that moral blameworthiness of the individual be considered.

External Support Orders

While it is true that an order could not be imposed on an offender after sentence expiration, a court could order an “external support plan” be developed and put in place during the period of probation. Governments could decide to make resources available for such plans to continue to be offered to offenders with FASD after a sentence expires, with the goal of saving resources over time by preventing future contact with the system.

Proposed Corrections and Conditional Release Act Amendments

As mentioned in your letter, the existing wording in the CCRA allows for accommodation for mental health issues, though the degree to which such accommodation is currently available is brought into question by tragic cases such as that of 19 year old Ashley Smith.

Further, FASD is a brain injury or disability, not a mental illness, so could be interpreted as not falling within the existing wording in the CCRA. CBA members who practice in this area report the problems and abuse experienced by offenders with FASD while incarcerated. We understand that Corrections Service Canada is currently moving toward group based cognitive work for offenders, which is particularly inappropriate for those with FASD.

Again, more research and data on the prevalence of such problems and how they are currently accommodated would be illuminating. We believe that more could and should be done to both provide alternatives to incarceration for people with this disability, and to accommodate their needs if they are to be held in custody.

I trust that this additional information will assist you in your work. As always, the CBA, and in particular the National Criminal Justice Section, would be happy to be consulted further as opportunities arise.

Yours truly,

(original signed by Gaylene Schellenberg for Eric V. Gottardi)

Eric V. Gottardi
Chair, Criminal Justice Section