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Chair

Mr. Mike Wallace

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● (1605)

[*English*]

The Chair (Mr. Mike Wallace (Burlington, CPC)): Okay, ladies and gentlemen, thank you for joining us. I'm sorry for the delay in the beginning of the meeting. This is the Standing Committee on Justice and Human Rights. This is meeting number 66 and we're dealing with the order of reference of Wednesday, November 26. The subject matter is Bill C-583, an act to amend the Criminal Code, regarding fetal alcohol syndrome disorder. We have a number of witnesses, and we're going to get right to them because we only have a short period of time. The goal is to hear all the witnesses. If we have time we'll have a question period, but if not, we'll start.

As per the orders of the day, please introduce yourself when you're speaking. From the Aboriginal Legal Services of Toronto, Mr. Rudin, the floor is yours.

Mr. Jonathan Rudin (Program Director, Aboriginal Legal Services of Toronto): Thank you. I understand I have 10 minutes for the presentation.

The Chair: You have 10 minutes maximum.

Mr. Jonathan Rudin: That's fine. Please tell me if I go over. I have one of the fancy watches that's not very specific, but it's very stylish.

Thank you very much for the invitation. My name is Jonathan Rudin. I'm the program director at Aboriginal Legal Services of Toronto. At Aboriginal Legal Services we work with many clients who are affected with FASD. We also have a project funded by the Law Foundation of Ontario. It's a research project that provides diagnoses for aboriginal inmates who are on remand and awaiting sentence. That's a research project to see what the impact of an FASD diagnosis is on sentencing. When judges know something about the individual does that change the sentence?

The other reason I think I'm here is that I'm also the chair of the FASD Justice Committee. The FASD Justice Committee is responsible for a website: FASDJustice.ca. It is the major site in Canada for information about FASD and justice. It is also used by people around the world. We've had 1,710,650 visitors to the site since we began about 10 years ago. The site is designed for justice professionals. It contains a list of reported cases on FASD across the country, along with specific information that's useful for judges, and crown and defence counsels, in terms of working with people who are affected with FASD.

To begin my presentation let me emphasize that, although I work with Aboriginal Legal Services, FASD is not an aboriginal issue. We do not know—and I know Ms. Popova will be speaking about this—the prevalence rates of FASD in the general population in Canada. It's impossible to assume or to guess that those rates are higher in the aboriginal population. We have no way of knowing that. What we do know is that aboriginal people are overrepresented in the criminal justice system. We also know that people with FASD are overrepresented in the criminal justice system. It stands to reason that among those people who are found to have FASD in the criminal justice system a large percentage will be aboriginal. Contributing to that is the fact that, when you look at our case law on our website, awareness of FASD is greater in western Canada than it is in eastern Canada. In terms of a sort of bias, because aboriginal people make up a significant proportion of those before the courts in the west, you see a preponderance of people with FASD who are aboriginal in reported cases. I caution against making any other assumptions. It's also fair to say that the aboriginal community has been at the forefront of working toward prevention and coming up with strategies to work with people with FASD.

Our understanding—and that means our understanding as legal professionals and also in the medical field—about FASD has changed over time. The original notion of people with FASD as those people who had particular physical characteristics we now know is not the bulk of people who are affected with FASD. The majority of people with FASD have no discernible physical characteristics that would single them out as opposed to anyone else. The difficulty and the challenge for the justice system is that in court the FASD-affected individual looks like anybody else. In our daily lives, and certainly in the courts, we work on a couple of presumptions.

One is that, unless we are told differently, the people who come before us are fully capable and competent, and have the same level of cognitive development that we do. We look at someone and we say, “You look like you're 22, you sound like you're 22 because you can speak, you seem articulate, and I'm going to assume you're 22.” The criminal justice system works so quickly that we often don't have any stop signs. There's nothing to say to people, “Wait, take a look at this person.” If you walk into court with a cane and dark glasses, we know you're blind and we take that into account. FASD is largely an invisible disability and that is why it's so important that we find ways of addressing it in criminal justice. Failing to do so means that we miss these individuals and we don't sentence them properly.

There is even now, when you look at the case law, a lot of misinformation about FASD. It is not unusual to hear judges or crown attorneys arguing that because someone has FASD they should be put in jail. The assumption is that their behaviour can't be dealt with in the community.

Some people—mistakenly, I think—will say, “If you have FASD, you have difficulty. You need structure in your life. Where can we give you structure? I know where we can give you structure: jail. There's structure in jail.” But what's missing in that analysis is that people with FASD are often heavily exploited when they're in jail because of their social limitations. They try to make friends and they are very easily exploited.

The other difficulty with jail is that most of the programming in jail is not in fact designed for people with FASD. The trend in corrections now is to move towards group work and programs that are based on cognitive behavioural therapy, where you think about what you did, talk about what you did, talk about why it didn't work, and those types of things. Those do not work well with people who have FASD. People with FASD often don't work well in groups because they don't pick up on the social cues and they don't do well with cognitive behavioural work. This is not to say that people with FASD cannot learn, because they certainly can. The problem is not with them; the problem is the way we deal with people with FASD.

I also want to draw the attention of this committee to a recent decision by the Judicial Committee of the Privy Council in the U.K. We don't talk much of the Judicial Committee of the Privy Council, because in Canada we have not relied on it since before World War II, but they've just issued a very interesting decision in a New Zealand case called Pora v. the Queen. The decision was delivered on March 3, 2015. The case is significant because it's about an individual who was convicted of a murder in New Zealand and who on appeal, while he was in custody, was diagnosed with FASD. The significance of that diagnosis for the Privy Council was that it threw his confession into question. He confessed to an offence, and the jury obviously believed that confession, but the judicial committee said that could not be relied upon because the effects of FASD on an individual make their confessions totally unreliable.

I don't have time here, obviously, because I don't want to take time from anyone else, but it's a very significant decision. There's a discussion of specifically the FASD analysis, the FASD evidence, on pages 11 to 17 of the decision. What's important here is that absent the diagnosis, which was only obtained when Mr. Pora was in custody subsequent to having been convicted—it was in the process of the appeal that he was assessed—only then did the evidence come before the judicial committee.

The judicial committee, having heard and read the evidence of the two experts who diagnosed the individual with FASD, concluded the following, which is at paragraph 55:

> The evidence of Dr McGinn and Dr Immelman unquestionably establishes the risk of a miscarriage of justice. It provides an explanation as to why Pora’s confessions may have been false. This is of central and critical importance to one’s approach to the question whether his convictions can be regarded as safe.

I really commend this decision to you, because it is the latest, and we have not had a significant decision on FASD like that in Canada at this point.

I have one last point before I turn it over. I do want to stress that what is very important in the context of FASD is a diagnosis, not the fact that the person has been assessed. If I'm defence counsel, and I stand up and say, “Your Honour, my client has been diagnosed as being affected with FASD”, without actually having that diagnosis, without knowing how that manifests itself in the client, the diagnosis is not particularly helpful.

● (1610)

It's very important that if we get diagnoses they're provided to the court, because it's only then that the court can truly take into account the circumstances of the individual.

Thank you. *Meegwetch*.

The Chair: Thank you for that presentation, sir.

Before we go to our next presenter from the Centre for Addiction and Mental Health, members, there's a budget in front of you that will pay our witnesses. Can anybody move that for me?

An hon. member: So moved.

(Motion agreed to)

The Chair: Thank you very much.

Professor, for the Centre for Addiction and Mental Health, the floor is yours.

● (1615)

Dr. Svetlana Popova (Assistant Professor, University of Toronto, and Senior Scientist, Social and Epidemiological Research, Centre for Addiction and Mental Health): Good afternoon, everyone. Thank you very much for this invitation.

I am an epidemiologist. I am a senior scientist from the Centre for Addiction and Mental Health. I am also an assistant professor at the University of Toronto in the Dalla Lana School of Public Health in the Faculty of Social Work.

I prepared a PowerPoint presentation today, but unfortunately we cannot use it. At the same time, I have handouts for all members and I would greatly appreciate it if these handouts can be distributed amongst—

The Chair: We don't have them right now, but we will on Monday. They need to be bilingual.

Dr. Svetlana Popova: It will be hard for you to follow.

I know we are short of time so my first slides are dedicated to FAS and FASD in general, but I will skip them and go into the prevalence of FAS and FASD in Canada. Actually, because I am an epidemiologist, I prepared data on the prevalence, co-morbidity burden, and cost associated with FASD.

The prevalence in northern communities, in which of course the majority of people are aboriginals, ranges from approximately 4% to 12%, which is substantially higher compared to the general population, which we believe is 0.1% to 0.7%. However, the prevalence of FASD, which is the umbrella term and includes several medical alcohol-related diagnoses, is also higher in northern communities, ranging from 2.5% to 19% as compared to the prevalence in the general population, which we believe is about only 1%.

However, it is true that these studies suffered from many methodological limitations, and they are outdated. That's why we need better prevalence studies in Canada. Most likely the prevalence is much higher in both northern communities and the general population.

Now I would like to present prevalence data of incarceration in the criminal justice system of people with FASD. There are several anecdotal estimates. In one of them there is a belief that about 50% of young offenders in Canada have FASD. One American study found that among 253 people with FASD, about 60% reported being charged, convicted, or in trouble with authorities, and 42% of adults with FASD had been incarcerated for a crime.

We conducted a comprehensive literature search in order to look at the prevalence of people with FASD in Canada and we found only four epidemiological studies. The prevalence of FASD is quite high among incarcerated youth. It ranges from almost 11% to 23%. There is only one study in Manitoba that reported the prevalence among adult correctional populations, which is about 10%.

In order to investigate how many and what type of co-morbidities are associated with FASD, we conducted another literature research and found that more than 400 disease conditions are associated with FASD. This study and article was submitted to *The Lancet*. It's the highest input factor in the medical field. We found that the co-morbid conditions spanned across 18 out of 22 chapters of the international classification of diseases. The most prevalent disease conditions identified that occur among individuals with FASD are congenital malformations. The second-largest group is mental and behavioural disorders.

I have a nice slide that I hope you will review later when you have this handout. You will see that indeed the second-largest group of diseases amongst people with FASD are mental and behavioural disorders, but among other groups of diseases are diseases such as cancer, diseases of the nervous system, circulatory system, genitourinary system, and many other diseases. Of course you can imagine that the cost of health care associated with this population is enormous, and I'm going to report this data in a few minutes.

My next slide presents the conditions within the mental and behavioural disorders. It shows that about 90% of people with FASD have conduct behavioural problems, disruptive behavioural impulsivity. Also, 80% of people have receptive and expressive language deficit, 70% have developmental and cognitive disorders and developmental delays, 55% have alcohol and drug dependence, 50% suffer from attention deficit hyperactivity disorder, and 45% from brief psychotic disorder.

● (1620)

More than 40% have fine and/or gross motor developmental delays and developmental coordination disorder. More than 40% have mental retardation and intellectual impairment. More than 40% have major depressive disorder.

They also compared the prevalence of co-morbid conditions in individuals with FAS among the general population of the United States. They found that the prevalence of a conduct disorder, for example, among individuals with FAS was estimated to be 10 times higher than among the general population of the United States, receptive language disorder was 10 times higher, expressive language disorder was 11 times higher, unspecified disorder of psychological development was 97 times higher, conductive hearing loss was 126 times higher, alcohol and drug dependence was more than four times higher, and disturbance of activity and attention was about eight times higher among people with FASD, as compared with the general population.

Now I would like to present some cost estimates from our recently conducted study on the burden and cost associated with FASD.

You will be able to see from a cost slide that FASD affects virtually all sectors of our society. It includes direct health care costs; direct law enforcement costs, which include the police, courts, and corrections, including probation; and other direct costs, which include children in care, special education, home support services, supportive living, job skills training, social assistance, prevention and research, and many other costs. Costs also include productivity losses of parents, caregivers, and affected individuals. The costs also include intangible costs, which means the cost of pain, suffering, stress, frustration, and guilt of the mothers, which cannot be estimated in terms of money.

The research estimated that the cost associated with FASD is enormous; it ranges from $1.3 billion to $2.3 billion per year. This is a very conservative estimate. The highest contributor to the overall FASD-attributable cost was the indirect cost of productivity losses due to disability and premature mortality of people with FASD. However, the second-highest cost was the cost of corrections, about $378 million, which accounted for 30% of the total cost of FASD.

I would also like to look more closely at the cost of corrections associated with FASD in Canada. As you know, FASD is associated with organic brain damage that has a detrimental impact on abstracting abilities, memory skills, information processing, the comprehension of social rules and expectations, and the ability to connect cause and effect in relationships. Given these factors, if appropriate diagnosis, intervention, and support services are not put in place early in life and maintained throughout the life course, then many people with FASD are at a high risk of becoming involved in the legal system either as offenders or as victims. Individuals with FASD tend to have high rates of recidivism due to their generally lacking the ability to learn from past experiences, along with other mental health problems.

Based on the available epidemiological data and data from the Canadian centre for justice statistics, we were able to calculate that youths with FASD are 19 times more likely to be incarcerated than youths without FASD in any given year.

In summary, the epidemiological and medical data draw attention to three main points.

First, awareness needs to be raised regarding individuals with FASD in terms of their prevalence and their disabilities. Second, intervention efforts need to target individuals with FASD in order to reduce recidivism rates. Finally, screening for FASD needs to be incorporated as early as possible in the criminal justice process.

Thank you very much for your attention.

● (1625)

The Chair: Thank you, Professor, for that presentation from the Centre for Addiction and Mental Health.

Now we're going to our first video conference delegation. From the Fetal Alcohol Syndrome Society of Yukon we have Ms. Bradley, who I think is the executive director. Hopefully, she is with us.

The floor is yours.

Ms. Wenda Bradley (Executive Director, Fetal Alcohol Syndrome Society of Yukon): Hello. Thank you.

Chair, honourable members, ladies and gentlemen, on behalf of the Fetal Alcohol Syndrome Society of Yukon I would like to thank the committee for inviting us to present. I would also like to thank our member of Parliament, Ryan Leef, for bringing this very important bill forward.

My name is Wenda Bradley. I am currently the executive director of the Fetal Alcohol Syndrome Society of Yukon, also known as FASSY. I am a registered nurse with more than 35 years' experience, mainly in health centres in rural community settings in the Yukon. During the last 15 years, my career has evolved to focus on the issues related to FASD, through involvement with clients, families, and communities. I have also been a foster parent to children and youth who have or may have had FASD. They have been my teachers about what it means to live with a disability on a daily basis.

FASSY started as a grassroots non-profit society run by a board comprised primarily of parents, plus a few committed community advocates. It began as a subcommittee of the Yukon Association for Community Living in 1986 and became a stand-alone society in 1996. There was no funding and little awareness of FASD in the Yukon at that time.

Over the course of the last 19 years, FASSY has provided direct service to adults with FASD and has evolved to coordinate adult diagnostic services and to provide prevention and education services to the communities in the Yukon. However, our primary focus is on direct support of adults with FASD, which has brought us into extensive involvement with the justice system. Currently we have 37 active clients; 76% have past involvement with the justice system and 36% are actively involved with the justice system now.

There is a high incidence of people with FASD in the justice system throughout Canada, as we are hearing. It is significant that in 2014 the Yukon government launched a prevalence study to investigate the incidence of FASD within the Yukon correctional system, and we look forward to the results of that study. FASSY feels strongly about the need for special consideration for people with FASD who are involved in the justice system as victims, witnesses, and offenders, and sometimes in more than one role at a time. They could be a victim in one case and an offender in another.

Prenatal exposure to alcohol is a major cause of preventable birth defects and developmental delays in North America. It affects individuals in many ways and is unique to each individual, but research conclusively shows that it is the result of permanent, physical brain injury.

The effect on the executive functioning of the brain is the most significant. This is the part of the brain that is responsible for reasoning, planning, impulse control, and understanding cause and effect. This injury manifests in the behaviour of the individual. People who have FASD may have varying abilities for executive functioning. They may talk very well and appear to understand what you are saying but may not comprehend much of what is said. It is hard to understand that within one person there may be the ability to talk as an adult but only understand what a person in grade 4 might comprehend from that conversation. There may be delays in processing the information and also delays in responding to questions.

They often have difficulty functioning appropriately in everyday life and seem to employ poor problem-solving strategies. Some are not likely to learn from their own negative experiences, and most have memory issues. These can be at any level of the memory process. Taking what they know and then being able to apply it in different scenarios, known as adaptive functioning, is also not available for many of the people with FASD.

It is confounding and confusing that a person with FASD may be able to play a challenging game of chess but not be able to understand the consequences of their actions or plan a meal. It is these pockets of ability that distract us as service providers, including workers within the judicial system, from the real issues for people with FASD. We tend to view the individual as resistant rather than as not understanding, saying that they won't instead of that they can't.

Many persons with FASD struggle to understand what is expected of them by society. They experience the world as confusing and contradictory. Many adults with FASD have had interruptions in family, school, or employment and are unable to move forward in their lives without support.

Unfortunately, there are many people within our society who are affected by FASD but who have not been recognized and who keep circling in and out of the justice system as well as many other systems within our society. Right now, the only thing that requires a court to consider FASD as a mitigating factor is that other courts do it. I suggest to you that this is not good enough.

● (1630)

FASD should also not be considered a mitigating factor, but instead an essential factor of consideration for a person before the courts. Respecting persons with FASD, by recognizing the effect this physical disability has on their lives, is critically important. Ensuring that an assessment is available through this amendment for persons before the court would enable an understanding of the functional deficits that underlie real-life problems associated with prenatal alcohol exposure. It is important to recognize that FASD is not a fixable, psychological disorder but is in fact a permanent organic brain disability.

The Chair: Ms. Bradley, I'm going to have to interrupt you briefly.

The bells are ringing for us, meaning we have to go back and vote again. With the permission of the committee, can we hear the end of Ms. Bradley's presentation? She has about five minutes left. Then with the other two, I will discuss having them back for other committee meetings. That might mean I might add a half an hour onto our Monday meeting when we come back, from 3:30 p.m. until 6 p.m., to make sure we get all our witnesses brought forward.

Some hon. members: Agreed.

Mr. Blaine Calkins (Wetaskiwin, CPC): Just a clarification, Chair, does that include everybody who's here today, even those who have just—

The Chair: I'll invite them if they'd like to come back for questions.

Mr. Blaine Calkins: For questions...thank you.

The Chair: Ms. Bradley, the floor is yours for another five minutes and then we'll have to call it a day.

Ms. Wenda Bradley: Thank you.

When Bill C-583 is approved, requests for appropriate assessments need to be made by the court. An assessment for FASD should be requested and it should follow the Canadian Medical Association diagnostic guidelines. These guidelines suggest that a multidisciplinary team assess all abilities or concerns for the individual with an adaptive functioning focus versus a strictly psychological analysis. A stand-alone, general, psychological assessment is not as useful and may in fact be harmful because it doesn't reflect actual brain damage and impact on functioning.

There is a great deal of co-morbidity with mental health issues, but the mental health issues need to be considered in relation to the underlying permanent brain damage caused by prenatal alcohol exposure. Some of the mental health issues may be occurring because the underlying FASD had not been diagnosed earlier in the life of the person.

An FASD assessment, following the collaborative approach recommended by the CMA, could as well recognize or rule out genetic issues and consider the effect of other traumas an individual may have encountered that may be affecting his or her abilities. If all aspects of the judicial system, from investigation, decision to charge, pre-sentence, court, sentencing, disposition and conditions, incarcerations and reintegration, understand the impact of FASD on a person, effective help and support can be offered. A person may succeed in not being involved in further justice issues, or at least minimize the need of involvement, if appropriate dispositions can be made.

As one of our clients has said about trying to stay out of the justice system, "I know I make a lot of bad choices so I need you to help me not make so many." Having a diagnosis also helps individuals learn where their strengths are and where they need help to keep themselves out of trouble. One young fellow I am aware of who has a history of sexual touching of children, now knows that he cannot be where children are because he struggles to control this impulse, so he intentionally stays away from areas where children will be.

We as a society need to get over our feelings of loss and grief for what the potential of the person could have been and get on with accepting the person for who they are. Dr. Sterling Clarren has frequently said that people with FASD are doing what they were designed to do and we need to adapt our behaviour towards them. Collaboration between FASD-informed services and FASD-aware service providers will be the only way that a person who has this disability can move through life. Interventions must begin with nonjudgmental, unbiased observations.

People with FASD need the understanding, caring, and support from all levels of service providers. A story of a court interaction that I was privy to demonstrates how knowledge of FASD can be used for collaboration of service. There was a judge addressing a client known to the court to have FASD and listing off the requirements of probation for that person, with an appropriate language level and at an appropriate rate of talking. The client was intently listening and nodding his head as the judge talked. The judge finished and then asked the person if he understood. The client, who understood some of his own limitations, said, "Yes, Judge, I understand, but I won't remember." The judge was quick to point out that was why his FASSY worker would go over the probation orders with him daily.

This story, I feel, is significant in that the judge recognized and acknowledged, by his actions, the disability of the offender; the offender recognized as part of his disability that which would make it impossible for him to do what the judge was asking; and both recognized the need for support to continue outside the courtroom.

● (1635)

We're learning that people with FASD, with supports, can live clean, sober, and lawful lives and contribute to their own families, communities and society. By making this important amendment to the Canadian Criminal Code through Bill C-583, Canadians will keep the most vulnerable people of our country from further harm or from causing harm to others, and the judicial system will get to the root of the challenging behaviours that impact victims, families, communities, and our society.

Thank you for your time.

The Chair: Thank you very much.

Committee members, you're free to go.

For our witnesses today, those who we didn't get to, the clerk will be in contact with you about rearranging times. We are continuing this study. We're on a break week next week, but when we get back, there are a number of meetings that we'll be having on this. We'll be contacting you to see what you can do to rearrange things so you can do your presentations.

For those who have already presented today, the clerk will also be in contact with you to see if you wish, by video conference or otherwise, to be here for the question and answer period that we didn't get to today, which we normally love to do.

On behalf of the committee members, we apologize for the interruption today, but the voting takes precedence. We're sorry for that. Thank you very much for your presentations. They were all very good. We look forward to hearing the rest of them in a couple of weeks.

With that, we're adjourned.