

**Legislation, Existing Protocols and Best Practices Training
for Service Providers and Caregivers of People with
Developmental Disabilities in the Criminal Justice System**

Final Report

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EXECUTIVE SUMMARY

There are large gaps in our knowledge concerning people with developmental disabilities who are involved in the Criminal Justice System. Not only can this lack of education, information, and training lead to inappropriate practice and victimization, but it also has implications for service providers and caregivers who are expected to support decisions made for that person when involved in the system. Service providers and caregivers are not always aware of legal rights and the justice process, and struggle with how to best support the client; acting in an uninformed manner can have long-term negative consequences for the client.

The purpose of this project was two-fold. The first goal was to identify gaps in legislation and practice that can lead to victimization of people with developmental disabilities within the Criminal Justice System, in order to inform recommendations for change. The second goal was to provide education, information, and training to services providers and caregivers. If service providers and caregivers are informed and educated, they are in a better position to support people with developmental disabilities through the justice process. This will ensure the accommodation of people with developmental disabilities and prevent possible victimization by the system.

In order to gain a greater understanding of legal rights and the justice system process, as it relates to people with developmental disabilities, the project consisted of four components: 1) a legal analysis; 2) key informant interviews with personnel from the Criminal Justice System; 3) focus groups and individual interviews with people with developmental disabilities, service providers, caregivers, and family members; and 4) information and education workshops for service providers and caregivers.

Highlights of the Findings

The experiences of people with developmental disabilities, support staff, and caregivers in the CJS highlighted in this study have not been positive. While support staff and clients expressed the belief that some progress has been made in terms of educating police officers about disabilities, they agreed that much remains to be done. Lack of knowledge and understanding surrounding specific developmental disabilities often leads to inadequate responses to clients' behaviour. This, coupled with the lack of clients' understanding of the legal process highlights the importance for some form of advocacy for people with developmental disabilities. While support staff agree that part of their role is to advocate for clients, they are quick to point out that the sole responsibility is not theirs. Support staff suggested the need for a response that is specific to persons with developmental disabilities.

The legislative review, combined with interviews with justice officials, has revealed the lack of consideration given to the unique needs of people with developmental disabilities within the CJS. In most cases, the lack of legislation and protocols that specifically address people with developmental disabilities and guide the process is what hinders justice officials from effectively dealing with this population.

Identification, communication, and understanding were also highlighted as challenges in this area.

A lack of alternative programs and community supports, specific to people with developmental disabilities, complicates the issue further. Respondents discussed utilizing programs for other vulnerable populations, or proceeding through the justice system as is, because alternative options are unavailable. While there are times when diversion is not appropriate, there are other times when it is, but diversion requires appropriate and effective initiatives outside of the system.

Recommendations for Change

The following recommendations are based on the information revealed in this study. These are suggested to better accommodate people with developmental disabilities within the CJS and should be kept in mind when considering an effective response to the issue:

- Acknowledge the issue. People with developmental disabilities are involved in the CJS. As is, the system is not equipped to effectively deal with this population. Recognizing people with developmental disabilities and their unique needs is a first step in addressing the issue.
- Identify early. Develop assessment tools or checklists to identify developmental disabilities early on in the justice process, and train justice officials in how to use them. This will assist in a more appropriate response when dealing with people in the system. While labelling is a concern, having such information should lead to fairer treatment by justice officials, and the exercise of legal rights. Identification must happen before available resources can be accessed.
- Share information, among all facets of the CJS. Police, legal representatives, and correctional staff echoed the same concern: identification is the biggest problem when working with people with developmental disabilities. Identifying the disability and sharing that knowledge, along with any other relevant information about the individual, the situation, and possible treatment will only help in finding an effective response.
- Consider specialized or alternative program models. Some initiatives have been identified in this study. Because there are no existing programs in Calgary specific to people with developmental disabilities, it is important to learn from what does exist, even if programs are designed for different populations or places. Models can be adapted and modified to meet the needs of this population and this community.
- Increase awareness. It is important to provide training and education at all levels of the CJS, so officials are more aware of the possible issues they may be dealing with. As well, it is important to educate the system on what resources

are out there. Policing, legal representation, and corrections encompass many responsibilities and often, it is not feasible for officials to respond outside the structure of the justice system. Knowing what is available and who to call can make it easier and more likely that effective and appropriate treatment will happen.

- Implement protocols within the CJS. It is important to have procedures in place to guide practice involving people with developmental disabilities. Considering examples, such as the New South Wales proposed Code of Practice, could be a first step in developing protocols in our own agencies.

This project took a small step in effectively accommodating people with developmental disabilities in the CJS by educating support workers and caregivers on practices, options, and adaptations that can be made. Information on the current legislation and practices in this area provided a solid basis to identify strengths and weaknesses in the system. Findings from the interviews and focus groups provided the connection between the formal legislation and lived experiences of people. An overview of alternative models and tips for best supporting a person with a developmental disability through the CJS provided practical information, in addition to a base of knowledge. A discussion about “Next Steps” provided a window for the future.

There is still a lot of work that needs to happen before people with developmental disabilities will be fully accommodated within the Criminal Justice System. Increasing awareness, education, and developing new initiatives will lead to effective and appropriate treatment. Acknowledging this population in the CJS is key; an appropriate response needs to follow. Support staff and caregivers have an important role to play in this process.

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1.0 INTRODUCTION

A population that is often overlooked in discussions of crime is people with developmental disabilities. From living on their own, with family, or in some form of residential care, to participating in community life and activities, people with developmental disabilities are increasingly becoming more involved in the community and are subsequently more likely to become involved in the Criminal Justice System (CJS).¹ There are large gaps in our knowledge concerning people with developmental disabilities who are involved in the justice system; this lack of education, information, and training can lead to inappropriate practice and victimization.

The Community Rehabilitation Service Provider Council of Calgary identified the need for resource development and training for service providers on legal rights and responsibilities of people with developmental disabilities. Service providers and caregivers for people with developmental disabilities are not always aware of legal rights and often struggle with how to best support the individual through the process; this is usually not a role support workers are trained to fill. Service providers and caregivers are expected to support decisions made for that person when involved in the justice system and acting in an uninformed manner can have long-term negative consequences for the individual.

The Vocational and Rehabilitation Research Institute (VRRI) responded to this need by developing a Resource Handbook, which provides a comprehensive list of counselling and legal services available in the Calgary area. However, a gap still existed between the book of resources and practical knowledge around legislation, existing protocols, and the best ways to support individuals through the justice system. The Canadian Research Institute for Law and the Family (CRILF) then partnered with the VRRI to conduct the study, *Legislation, Existing Protocols and Best Practices Training for Service Providers and Caregivers of People with Developmental Disabilities in the Criminal Justice System*.²

1.1 Purpose of the Project

The purpose of this project was two-fold. The first goal was to identify gaps in legislation and practice that can lead to victimization of people with developmental disabilities within the Criminal Justice System, in order to inform recommendations for change.

The second goal was to provide education, information, and training to service providers and caregivers. If service providers and caregivers are informed and

¹ Kebbell, M.R., & Davies, D.G. (2003). People with intellectual disabilities in the investigation and prosecution of crime. *Legal and Criminological Psychology*, 8 (2), 219-222.

² Funding for this project is provided by the Persons with Developmental Disabilities Alberta Provincial Board and Alberta Community Development. The Coordinator of Alberta-based Research Projects at CRILF is funded by a grant from the Alberta Law Foundation.

educated, they will be in a better position to support people with developmental disabilities through the justice system process. This will help ensure the accommodation of people with developmental disabilities and prevent possible victimization by the system.

1.2 Objectives of the Project

The following objectives were addressed in this study:

- 1) To gain a comprehensive understanding of the legislation and practices in the Criminal Justice System, as they currently exist, in relation to people with developmental disabilities.
- 2) To gain an understanding of the experiences of people with developmental disabilities, service providers, and caregivers in the Criminal Justice System.
- 3) To provide service providers and caregivers with information around practices, options, and adaptations that can be made to best support and accommodate people with developmental disabilities through the justice system process.

2.0 METHODOLOGY

The project began on May 1, 2005 and was completed May 31, 2006. An advisory committee was formed at the outset of the project, which consisted of professionals in the field of developmental disabilities, as well as professionals within the Criminal Justice System (CJS). The advisory committee acted as a check and balance system, ensuring that the most effective and appropriate activities were being conducted throughout the research process. Members were also used as resources for information and networking.

Project co-director, Monica Pauls, joined a practice community entitled *Disability and the Law*, of the Public Legal Education Network of Alberta (PLENA). PLENA's practice communities provide the opportunity for professionals in the field to come together, dialogue, and collaborate on matters of common interest. Ms Pauls used the practice community to network with individuals in the legal system who have experience and interest in working with people with developmental disabilities.

2.1 Research Design

The study consisted of four components:

- 1) A review of existing legislation in Alberta, as it relates to people with developmental disabilities in the CJS;
- 2) Key informant interviews with personnel from three streams of the CJS: a) Policing; b) Legal Representation and the Courts; and c) Corrections;
- 3) Focus groups and individual interviews with people with developmental disabilities, service providers, caregivers, and family members who have experienced the CJS in some capacity; and
- 4) Information and education workshops for service providers and caregivers on best practices for accommodating people with developmental disabilities in the CJS.

2.1.1 Research Questions

The following research questions were addressed:

- 1) How does current legislation address the needs of people with developmental disabilities who come into contact with the justice system?
- 2) What are the existing protocols for dealing with individuals with developmental disabilities in the CJS? What accessible resources are available?

- 3) What are the experiences of individuals with developmental disabilities who have been involved in the justice system? What gaps exist between current protocols and lived experiences?
- 4) What recommendations can be made regarding provincial legislation, protocols, and practices to increase awareness and understanding for justice professionals who come into contact with people with developmental disabilities?
- 5) What are the best practices for service providers and caregivers to accommodate people with developmental disabilities in the CJS?

2.1.2 Procedures

The partnership between CRILF and the VRRRI allowed for the project co-directors to focus on their areas of strength. CRILF was responsible for the justice component of the project, and the VRRRI was responsible for the disability component of the project. The co-directors merged the two components together to develop the workshop for service providers and caregivers. The co-directors worked collaboratively to develop all project materials, such as the interview schedules and focus group protocol, and to make all decisions around the research activities.

The legislative review was contracted out to Ms Sheryl Pearson, Legal Consultant. Ms Pearson worked with the co-directors to establish an outline of analysis, and then completed the review for use in the workshops. The review was organized similar to the justice component of the project, which divided the CJS into three streams: 1) Policing; 2) Legal Representation and the Courts; and 3) Corrections. The primary purpose of the review was to highlight the law and identify its limitations as it applies to people with developmental disabilities in the CJS (see Section 3.0 Legal Analysis).

Eleven “client-related” interviews were conducted, which included: three individual interviews with people with developmental disabilities; one focus group with four people with developmental disabilities; one interview with a family member; and three individual interviews with support staff (see Section 4.0 Key Responses from Clients and Support Staff). Twelve individual interviews were conducted with personnel from the CJS, by phone or in person (see Section 5.0 Key Informant Interviews: Criminal Justice System).

The project co-directors worked with a Trainer from the VRRRI to develop a format for the workshops. Project co-director, Monetta Bailey, also attended a workshop hosted by the Elizabeth Fry Society of Calgary, which provides training for their Adult Court and Youth Court Programs. Volunteers in these programs educate people appearing in court for the first time on legal rights and the Criminal Justice System. The possibility existed to use some of the information from the Elizabeth Fry workshop in this project, but time constraints made it impossible to incorporate the material.

After conducting a pilot of the workshop at the VRRRI, four additional workshops were held at various locations in Calgary. A workshop brochure was created and distributed to related agencies, the advisory group, and the PLENA practice community. Workshop participants were asked to provide feedback at the end of each workshop in an effort to evaluate content and format (Section 7.0 Information and Education Workshops for Support Staff and Caregivers).

2.2 Sampling Strategy

Respondents from the CJS were identified through a networking process that started with the project advisory committee and the PLENA practice community. Initial contacts with justice officials and professionals in the disability field resulted in referrals to other individuals with experience in this area.

Another aspect of the project was to explore alternative models that exist within the justice system; whether outside of Alberta or programs designed for other vulnerable populations. This work demanded exploratory research on programs and initiatives and the project co-director made numerous contacts in this area. Many of those contacts led to possible interview respondents for the project.

Clients and support staff were recruited by advertising at various agencies that provide services to persons with developmental disabilities in Calgary (see Appendix A for request for client participation). A call for participants was sent out with the request that those who were interested contact the researcher. This was followed up by phone calls to agencies where individuals expressed an interest in the project. Both clients and support staff were told of the requirement of experience in the justice system, in order to participate in the study.

2.3 Data Analysis Strategy

Presentation of the findings is organized around the specific research objectives discussed in Section 1.2. Outcomes of the project include:

- 1) A legal analysis of relevant legislation in Alberta, as it relates to people with developmental disabilities in the CJS;
- 2) Information on existing protocols and practices in the CJS for working with people with developmental disabilities;
- 3) A greater understanding of the personal experiences and perspectives on the issue from people with developmental disabilities, service providers, caregivers, and family members;
- 4) Identification of needs, gaps, issues, successes, and resources in this area; and

- 5) Recommended practices for service providers and caregivers to best support people with developmental disabilities in the CJS.

Analyses of the focus groups and interviews were done with the following question in mind: “How can these discussions assist in gaining a greater understanding of the Criminal Justice System, as it relates to people with developmental disabilities?” Research questions were used to guide the organization, reading and interpretation of the data. The notes taken during the focus groups and interviews were organized to highlight common and recurring themes, which were based on their relevance to the study and the research questions.

2.4 Limitations to the Study

The following limitations should be recognized in this study:

- 1) The legislative review attempts to survey the most significant phases and components of the CJS. However, limits on the scope were necessary to ensure a focused discussion. For instance, the focus is limited to persons accused of committing crimes and does not include a discussion of the issues specific to victims of crime who have developmental disabilities. In addition, the lack of existing legislation addressing this issue resulted in a modification of the *review* to, more specifically, a legal *analysis*.
- 2) Client-related interviews focused on those who were accused of criminal activities rather than those who were victims and/or witnesses. Therefore, the focus of the project shifted away from providing support for those involved in the justice system overall, to focusing on assisting individuals who are accused of criminal activities.
- 3) A lack of existing protocols and resources for people with developmental disabilities in the Criminal Justice System led to consideration of alternative supports and programs in the mental health field (these are relevant models, and are often applied to people with developmental disabilities).

3.0 LEGAL ANALYSIS

3.1 Introduction

3.1.1 Statement of Purpose

The Importance of Legal Rights

A criminal justice system in a democratic society should ensure the fair treatment of all people who are subject to prosecution by the state. What does “fair treatment” mean? At a minimum, it means that principles of fundamental justice must be adhered to without exception and all individuals must benefit from the protection of legal rights afforded by the *Charter of Rights and Freedoms*. However, neither a fair process nor legal rights alone will ensure the fair treatment of all individuals. For many individuals, the mere availability of legal rights does not mean the protection of legal rights. This review will look at the legal vulnerability of persons with developmental disabilities in the criminal justice system and the reality that equal treatment before the law does not translate into equality under the law.

Because of the disadvantages and vulnerability to exploitation experienced by people with developmental disabilities, important and complicated questions arise that must be considered if the criminal justice system is to attain genuine integrity. For instance, did the suspect make an informed choice about whether or not to speak with the police in the course of the investigation or upon being detained or arrested? Was the suspect advised of his right to counsel in a manner that enabled him to fully appreciate the significance of exercising or waiving this right? Did the accused make a statement or confession? If so, was it a voluntary and reliable confession? To what degree should developmentally impaired individuals be diverted from the formal criminal justice process? Is a developmentally disabled defendant fit to stand trial? How should this be determined? Can the defendant provide a meaningful explanation of the circumstances surrounding the alleged offence to his lawyer? Can he/she make appropriate decisions about his defence based on the advice of his lawyer? Is the defendant competent to testify? If the individual committed the criminal act, did he/she understand the nature and consequences of the act? Did the individual have the capacity to intentionally commit the act? To what degree should the cognitive impairment of a convicted offender be taken into consideration in the sentencing process? These issues are further complicated by the reality that wide variations exist in the abilities of developmentally disabled persons to understand and control their actions, to communicate, and to participate in education and training programs.

Based on these concerns, the principles of justice may require that additional procedures be adopted in the criminal justice system to ensure the equal and uniform application of legal principles. In addition, police, lawyers, and other personnel involved in the criminal justice system may need special training and techniques in order to fulfil

their legal responsibilities and to ensure that people with an intellectual disability are treated fairly.

The Importance of Responsibility

The need for recognition of equal rights does not negate the importance of the responsibility to obey the law. Indeed, the law should also encourage responsibility of all persons for their actions. That being said, the obvious danger of requiring equal treatment and responsibility before the law is the subjection to a process and imposition of a punishment which is meaningless to the person. While alternatives such as automatic diversion from the criminal justice system may not give adequate recognition to the importance of responsibility, it is doubtful whether equal responsibilities are really appropriate for some people with developmental disabilities, particularly those with more severe disabilities. Clearly, special consideration is required in order to ensure a balanced response of the law — one that ensures protection of rights while encouraging appropriate levels of responsibility.

3.1.2 The Problem

Little attention has been given to directly address the issues faced by persons with developmental disabilities in the criminal justice system. By and large there are relatively few formal mechanisms and procedures in place, legislated or otherwise, to effectively respond to the needs of intellectually and functionally impaired individuals who are accused of crimes.

The review will canvass the specific issues faced by persons with developmental disabilities and identify the constraints of the law in responding to them. The primary purpose of this review is to highlight the law and identify its limitations as it applies to persons with developmental disabilities in the criminal justice system.

3.1.3 Scope of Review

This review will explore the experiences of persons with developmental disabilities in the criminal justice system through an examination of the phases of the criminal justice system. Section 3.2 will canvass a host of preliminary matters, including definitions of developmental disability, the functional and legal distinctions between developmental disabilities and mental illness, and the problem of over-representation of persons with developmental disabilities in the criminal justice system. In a nutshell, Section 3.2 will survey some of the issues that are necessary in order to contextualize the analysis of the criminal justice system vis-à-vis persons with developmental disabilities.

Section 3.3 of the review will consider the police investigation procedures and the legal mechanisms in place to protect the interests of individuals facing prosecution by the state. In particular, the constitutionally guaranteed rights and their effectiveness will be considered as they apply to the specific concerns of persons with developmental

disabilities. Section 3.3 will also review the function, if any, of adult guardianship legislation in the context of police investigations.

Section 3.4 focuses on the dispositions available under the *Criminal Code of Canada*.¹ Dispositions include the range of possible outcomes that may ensue once an individual has been charged with an offence. Under the *Criminal Code*, an individual may be found guilty or innocent through the fact finding process of a trial. Alternatively, an individual may be found not criminally responsible by reason of mental disorder or may be found unfit to stand trial altogether before or during the trial procedure. Section 3.4 will examine the means of determining whether an individual is fit to stand trial, the defence of mental disorder, and the elements of an offence that must be proved in order to establish guilt. In addition, Section 3.4 will also explore the process by which a person may be diverted from the prosecutorial process through formal and informal alternative measures.

Although some evidence issues will be explored in Section 3.3 under police investigations, other evidence issues, including the privilege against self incrimination, competence, and compellability of witnesses will be briefly considered in Section 3.5.

Section 3.6 will explore the sentencing regime under the *Criminal Code*, including the purpose and principles of sentencing, the sentencing options available, and the relevance of this regime to persons with developmental disabilities.

Section 3.6 will conclude by identifying some of the key deficiencies and gaps in the criminal justice system, law, and procedure as it relates to persons with developmental disabilities.

3.1.4 Limitations of the Review

While this review attempted to comprehensively survey the most significant phases and components of the criminal justice system, limits were necessarily adopted to ensure a focused discussion. This review will not undertake an empirical inquiry to establish or substantiate the over-representation of persons with developmental disabilities in the criminal justice system. It will not discuss the challenges associated with assessing the degree of impairment of inmates, nor will it attempt to determine the most critical points in the criminal justice system where the risk for increased involvement occurs (committal of crimes, contact with police, appearance at court, sentencing, unsuccessful application of defences). That being said, the issue of over-representation and some possible explanations will be canvassed as a preliminary matter in Section 3.2.

The focus of the review is limited to persons with developmental disabilities who are accused of committing crimes and it will not include a discussion of the issues specific to victims of crime who have developmental disabilities.

¹ R.S. 1985, c. C-46 [hereinafter *Criminal Code*].

Lastly, the review will not include an examination of the law and procedures for judicial interim release (bail). Nor will it consider the law and procedures in the *Corrections and Conditional Release Act*² related to parole. Finally, the discussion of the law of evidence will be limited primarily to a discussion of the *Charter* requirements that must be met in order to ensure that evidence is constitutionally obtained, and will not focus on the rules of evidence generally or the tests for determining whether unconstitutionally obtained evidence should be excluded.

3.2 Preliminary Matters

3.2.1 The Meaning of Developmental Disability

There are several terms used synonymously with the term “developmental disability.” They include intellectual disability, mental impairment, and mental retardation. For reasons of consistency, the term developmental disability will be used throughout this review. Other jurisdictions, in the course of this same discussion have opted to use different terminology, although the meaning of the terms is substantially the same.³

In its review of the issues facing people with intellectual disabilities in the criminal justice system, the New South Wales Law Reform Commission recommended the adoption of the following definition of intellectual disability.

“Intellectual disability” means a significantly below average intellectual functioning existing with two or more deficits in adaptive behaviour.⁴

In the course of arriving at this statutory definition, the NSW Report considered the broad meaning of intellectual disability. It noted that intellectual disability does not simply mean that a person will perform poorly in academic areas such as IQ tests. The existence of an intellectual disability also results in adaptive deficits, meaning that the disability affects the person’s level of communication, social skills, and ability to live independently.⁵

² 1992, c. 20.

³ See for instance, New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) [hereinafter NSW Report]; R.W. Conley, R. Luckasson & G.N. Bouthilet, eds., *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Baltimore, Maryland: Paul H. Brookes Publishing Co., 1992) [hereinafter *The Criminal Justice System and Mental Retardation*].

⁴ NSW Report, *ibid.* at 64. The Commission specified that the proposed definition should be restricted to legislation used in the criminal justice system and not extended to legislation designed for other purposes, such as service provision and education. Although the Commission recognized the benefits of a uniform definition where possible, it also recognized the inherently different aims of the criminal justice system, which requires that definitions be as unambiguous as possible due to the punitive consequences of that system, as compared to a service provision context which will generally favour a broader definition so as not to deny people services.

⁵ *Ibid.* at 54.

The NSW Report distinguished “intellectual disability” from “developmental disability” on the following bases: first, developmental disability is generally considered to be a broader term because it can include “other disabilities which arise during the developmental period but which may be of a physical, rather than intellectual, nature”⁶; and second “some developmental disabilities may not be permanent, but may be resolved with or without treatment or management,” while “intellectual disability is *not* a mental or physical illness which can be “cured,” although people with an intellectual disability can benefit from appropriate educational programs.”⁷

Similarly, *The Criminal Justice System and Mental Retardation*, citing the American Association on Mental Deficiency, defines “mental retardation” as follows:

“significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behaviour and manifested during the developmental period.” “[S]ignificantly sub average... intellectual functioning” is usually defined as an IQ below 70, although clinicians may occasionally regard individuals with even higher IQ’s as having mental retardation. “[D]evelopmental period” is defined as the period of time before age 18. And “deficits in adaptive behaviour” are defined as “significant limitations in an individual’s effectiveness in meeting the standards of maturations, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group...”⁸

The NSW Report raises a concern about the classification of intellectual disabilities based on severity because these classifications can sometimes be misleading. For instance, because the majority of persons with intellectual disabilities are classified as having a “mild” level of disability, there is necessarily a wide range of abilities within this category. Further, although disabilities may be identified as borderline, mild, moderate, severe or profound based upon IQ ranges, there may be little practical difference in the understanding and ability of persons between categories. Indeed, the broad ranges within categories and arbitrary distinctions between categories can be problematic from a law and policy perspective where a “cut-off” point is necessary in order to determine who’s in and who’s out.⁹

For the purpose of this review, the reference to persons with developmental disabilities will be limited to persons who experience impaired intellectual functioning and deficits in adaptive behaviour. The review will also focus only on persons with *permanent intellectual* disabilities, in contrast to persons who have a physical disability

⁶ *Ibid.* at 55.

⁷ *Ibid.*

⁸ J. H. Noble, Jr. & R.W. Conley, “Toward an Epidemiology of Relevant Attributes,” citing the American Association on Mental Deficiency, 1983 at 1 in *The Criminal Justice System and Mental Retardation*, *supra* note 3 at 20 [hereinafter Noble & Conley].

⁹ NSW Report, *supra* note 3 at 55-56.

which may be treatable.¹⁰ Lastly, it should be noted that the review will pertain only to adults with developmental disabilities, although much of the discussion will be relevant to youth in the criminal justice system as well.

On the basis of these criteria, most persons diagnosed with a mental illness will be excluded from the analysis in this review. This distinction is deliberate and the exclusion intentional. For reasons that will be addressed below, the intention of this review is to highlight the response of the criminal justice system specifically to persons with developmental disabilities, in contrast to persons with a mental illness.

Conversely, the analysis in this review may be applicable to some people with brain injury or dementia. Provided those persons exhibit impaired intellectual functioning, deficits in adaptive behaviour, and their injury is permanent or non-treatable, the timing of the onset of the disability (i.e., outside of the developmental period) is irrelevant for the purpose of this discussion. For clarity, the target population in this review also encompasses persons diagnosed with fetal alcohol spectrum disorder. Fetal alcohol spectrum disorder is presumed to constitute a developmental disability on the basis that the intellectual impairment suffered is not simply a matter of developmental delay, but is also indicative of permanent brain damage suffered by the fetus in utero.¹¹

Because the establishment of concrete recommendations is not the primary purpose of this review, it is not necessary to establish a “cut-off” point for identifying persons with developmental disabilities. However, if the establishment of a statutory definition is contemplated, a threshold definition of developmental disability would be necessary.

3.2.2 Developmental Disability Compared with Mental Illness

Functional Comparison

Although persons with mental illness and persons with developmental disabilities may experience a common response from the criminal justice system, these two groups are nonetheless functionally distinct. One source of reason for this distinction is that the existence of a mental illness does not preclude normal or above average intellectual functioning. As a result, a person who is mentally ill will not necessarily experience intellectual impairment or adaptive deficits.¹² Indeed, persons who have a mental illness may be intellectually functional or capable of adaptive behaviour or both, with the

¹⁰ This is not to suggest that persons with developmental disabilities will not benefit from appropriate education programs. However, education, which is different from treatment and rehabilitation, will not result in the disability being “cured,” although it may ameliorate the adaptive deficits of the disability.

¹¹ *R. v. J.(T.)* [1999] Y.J. No. 57 at para 10 [hereinafter *R. v. J.(T.)*].

¹² That being said, it is noteworthy that people with an intellectual disability are more likely than non-disabled people to experience mental illness thereby increasing the likelihood of a dual diagnosis (see Human Rights and Equal Opportunity Commission Human Rights and Mental Illness: *Report of the National Inquiry into the Human Rights of People with Mental Illness* (AGPS, 1993) (the “Burdekin Report”), Ch. 21 cited in NSW Report, *supra* note 3 at 39.

effects of their impairment confined to delusions or psychotic episodes. Thus, although mentally ill persons may be incompetent for a host of other reasons, they do not, as a matter of course, lack the intellectual capacity to understand their rights, the court process, or to instruct counsel.¹³

Beyond the differences in the intellectual capacity of these two groups to understand and experience the police investigation procedure and the trial procedure, their understanding and awareness of criminal activity may also be different based on their capacity to form intention and their awareness of the possible consequences of their actions. The impaired decision-making associated with developmental disabilities arises from an intellectual inability to exercise proper judgment. In contrast, the impaired decision-making associated with a mental illness is more likely to arise from the incapacity of an individual to recognize reality. In spite of these idiosyncratic experiences, the response of the law is to blur the cognitive realities and to see them as degrees of capacity on the same continuum. However, until the functional reality of persons with developmental disabilities is independently recognized, the criminal justice system cannot hope to respond effectively to the needs of this group in order to ensure fair and equitable treatment.

Finally, developmental disabilities and mental illness must be seen as functionally distinct on the basis that most mental illness is physical or biochemical in nature and therefore treatable, while developmental disabilities are an intellectual deficiency in which the development of the brain has been arrested or permanently damaged. While the treatable/non-treatable distinction is not particularly relevant for the purpose of determining capacity, there are legal implications of this distinction related to the outcomes of fitness hearings and verdicts of not criminally responsible by reason of mental disorder.¹⁴

Legal Comparison

The response of the *Criminal Code* to persons who are developmentally disabled is largely indistinguishable from its response to persons who are mentally ill. The uniformity of the *Criminal Code*'s application will become apparent in the forthcoming analyses dealing with the fitness to stand trial provisions and the mental disorder defence provisions.¹⁵ In spite of their technical applicability, however, these *Criminal Code* provisions are not abundantly suited to the specific circumstances of developmentally disabled persons and the failure of the provisions (and the courts) to distinguish between the realities of these two groups results in a bit of a round hole-square peg problem.

¹³ See discussion in Section 3.3.2, below, on Constitutionally Guaranteed Rights, and Section 3.4.3 on Fitness to Stand Trial.

¹⁴ These implications will be discussed under Section 3.4, below.

¹⁵ See discussion under Section 3.4, below, dealing with Dispositions.

The distinct legal circumstances of these groups will become obvious through an examination of the *Mental Health Act*.¹⁶ While the MHA is clearly applicable and relevant to the psychiatric concerns of mentally ill persons in a criminal context, its inapplicability and irrelevance is equally obvious when looking at the reality of most persons with developmental disabilities in the criminal context.

Outside of the *Criminal Code*, there is no specialized legislation or regulatory vehicle available for responding to the circumstances of this group.¹⁷ Conversely, the MHA, which applies circumstances where an individual with a “mental disorder” presents a danger to himself or others, creates a type of statutory framework for responding to the circumstances of mentally ill persons accused of criminal activity. For instance, if a mentally ill person directly threatens the safety of another person or behaves recklessly and thereby endangers the safety of another person, that individual could be apprehended and detained pursuant to the MHA. In contrast, a person with a developmental disability whose conduct threatens the safety of another person runs a greater risk of arrest and detention due to the inapplicability of the MHA.

Although a detailed analysis of the MHA is not warranted for the purpose of this review, the provisions that are germane to the criminal context will be discussed in order to emphasize the need for distinct legal responses to mentally ill persons and developmentally disabled persons who commit crimes.

Application of the *Mental Health Act*

The MHA provides legal mechanisms for apprehending, detaining, and treating persons who are suffering from a mental disorder. It is used to admit persons, involuntarily, to a mental health facility for the purpose of ensuring their safety, the safety of others and providing treatment, if necessary.

The criteria for admitting an involuntary person require that the person:

- 1) is suffering from a mental disorder;
- 2) is in a condition presenting or likely to present a danger to the person or others; and
- 3) is unsuitable for admission to another facility other than an as an informal patient.¹⁸

Under the MHA, mental disorder is defined as a “substantial disorder of thought, mood, perception, orientation or memory that grossly impairs: (i) judgment, (ii)

¹⁶ R.S.A. 2000, c. M-13 [hereinafter MHA].

¹⁷ With the exception of the *Dependant Adult Act*, *infra* note 93, which may be used to obtain guardianship or physical care over incompetent persons in most emergent situations. The DAA will be discussed in Section 3.3.3.

¹⁸ MHA, *supra* note 16 at s. 2.

behaviour, (iii) capacity to recognize reality, or (iv) ability to meet the ordinary demands of life.”¹⁹ The definition of mental disorder is limited to “substantial disorders” that result in a “gross impairment.” This severity requirement excludes from treatment persons with a mild mental handicap²⁰ and therefore limits the MHA from being applied to persons with mild or even moderate developmental disabilities. It is even doubtful whether the existence of a severe developmental disability satisfies the definition of mental disorder under the MHA. Although “mental retardation” may provide grounds for compulsory admission under mental health legislation in provinces where the definition of mental disorder embraces any “disease or disability of the mind,”²¹ this is not the case with the definition of mental disorder in the Alberta MHA. For this reason, developmental disabilities, regardless of how severe, may fall outside of the purview of the MHA.

In addition to the involuntary admission provisions, the MHA also provides authority for the treatment of patients, with or without their consent.²² Of course, this authority presumes the treatability of the patient’s condition. Indeed, the most common mental illnesses that justify invoking the MHA are schizophrenia, bipolar mood disorder and major depression. These conditions are considered brain diseases and the symptoms of these illnesses usually respond to treatments that act on the brain.²³ Again, the treatability requirement limits the application of the MHA in the context of developmental disabilities which, as noted earlier, are not generally amenable to treatment.

On the basis of the mental disorder definition and treatment criteria under the MHA, it is clear that the application of this legislation is directed towards persons suffering from mental illness. While the MHA is clearly not intended to be a formal substitute for the application of the *Criminal Code* and the prosecution of criminal activity, it is likely that the police and courts rely on the apprehension and treatment provisions under the MHA, where applicable, as an alternative to arresting and detaining a mentally ill person.

Conversely, there is no comparable statutory alternative available for dealing with persons with developmental disabilities. Although it is conceivable that the police will rely on the provisions of the MHA (albeit unjustifiably) to apprehend persons who suffer from severe developmental disabilities, the same cannot be said of persons suffering from mild or moderate disabilities who endanger themselves or others — nor should it. If alternative legislation is warranted in order to respond to the circumstances of persons with developmental disabilities who engage in criminal activity, the MHA is probably not the appropriate model for this legislation. Arguably, because the intellectual impairment

¹⁹ *Ibid.* at s. 1(g).

²⁰ J.E. Gray & R.L. O’Reilly, “Clinically Significant Differences Among Canadian Mental Health Acts” (2001) 46(4) *Can. J. Psychiatry* 315 at 316.

²¹ J.E. Gray, M.A. Shone & P.F. Liddle, *Canadian Mental Health Law and Policy* (Toronto and Vancouver: Butterworths Canada Ltd., 2000) at 75-76 [hereinafter Gray, Shone & Liddle].

²² MHA, *supra* note 16 at ss. 27 & 29. The provision for authority to obtain an order to treat mentally competent patients without their consent has been the subject of significant scrutiny.

²³ Gray, Shone & Liddle, *supra* note 21 at 75.

of most persons with developmental disabilities can be characterized as mild, neither the MHA, nor any legislation akin to it, is the appropriate means of responding to the unique concerns of this group.

The Importance of a Legal Distinction

The previous analysis illustrates the point that the social and legislative recognition of the needs of persons with developmental disabilities pales in comparison to the legislative recognition of the needs of mentally ill persons. As will become evident in forthcoming analyses of the *Criminal Code* and case law, the statutory and judicial acknowledgment of the unique circumstances of persons with developmental disabilities is relatively impoverished in comparison to mentally ill persons. This is problematic given the high incidence of developmental disabilities and the over-representation of this group in the criminal justice system.

3.2.3 The Over-Representation of Persons with Developmental Disabilities in the Criminal Justice System

This review presumes the over-representation of persons with developmental disabilities in the criminal justice system.²⁴ Although it is not the objective of this review to establish the incidence or to prove the extent of the problem of over-representation of persons within the criminal justice system in Canada, a scan of the nature of the problem and the hypotheses will contextualize the legal analyses in this review.

Social and Environmental Considerations

The NSW Report examines the relationship between crime and people with intellectual disabilities and observes the common life experiences among people with an intellectual disability. While recognizing the dangers of generalisation, the Commission surmises that “people with an intellectual disability have, in varying degrees, common experiences of vulnerability to abuse, discrimination, and social marginalisation due to their disability.”²⁵ The Commission also speculates that people with an intellectual disability often experience social, recreational and sexual relationship problems, and notes the high frequency of substance abuse problems among this group.²⁶

Similarly, other authors have noted that mental retardation does not exist in isolation and observe that “it is influenced by factors such as racism, poverty, unemployment, underemployment, lack of social support, illiteracy, segregation, social isolation, deinstitutionalization, repeated institutionalization, and poor educational-vocational orientation.”²⁷

²⁴ See NSW Report, *supra* note 3 at 23-33 and *The Criminal Justice System and Mental Retardation*, *supra* note 3.

²⁵ NSW Report, *ibid.* at 22.

²⁶ *Ibid.* at 23.

²⁷ J.J. McGee & F.J. Menolascino: “The Evaluation of Defendants with Mental Retardation in the Criminal Justice System” in *The Criminal Justice System and Mental Retardation*, *supra* note 3 at 60.

Both sources echo the reality that persons with developmental disabilities experience disproportionate social and economic problems relative to the general population. Without suggesting a causal relationship between these life experiences and crime, the NSW Report concludes that the question of crime and people with intellectual disabilities must be considered with a view to this disadvantaged background.²⁸

Challenges of Determining the Extent of Over-representation

The NSW Report identifies a number of difficulties in determining the extent of the problem of over-representation of persons with intellectual disabilities in the criminal justice system. It cites the lack of empirical evidence, the problem of non-identification of persons with intellectual disabilities, the use of different definitions of intellectual disability, and interjurisdictional variations in data collection.²⁹

Other difficulties associated with determining the extent of the problem include definitional ambiguities with the term “offenders with developmental disabilities.” Although the term appears to refer to people with developmental disabilities who violate the law, an alleged offender must first confess to a crime or be found guilty in order to be considered an offender. Conversely, if an accused person is found not guilty or unfit to stand trial, the accused person will not be considered an offender, even though he or she has been deeply enmeshed in the criminal justice system.³⁰ This distinction makes it difficult to target a specific population for consideration.

Explanations for Over-representation

In spite of the problems associated with determining the extent of the problem, the NSW Report concludes that people with intellectual disabilities are indeed over-represented within the criminal justice system³¹ and postulates several explanations for the over-representation. The *susceptibility hypothesis* suggests that people with intellectual disabilities are more likely to engage in delinquent behaviour because of their impaired mental abilities.³² The *different treatment hypothesis* suggests that people with intellectual disabilities are more likely to be found guilty by the courts owing to their vulnerability in criminal justice processes.³³ Lastly, the *psychological and socio-economic disadvantage hypothesis* suggests that people with intellectual disabilities are

²⁸ NSW Report, *supra* note 3 at 23.

²⁹ *Ibid.* at 24.

³⁰ Noble & Conley, *supra* note 8 at 23.

³¹ NSW Report, *supra* note 3 at 24.

³² C.A. Buser, P.A. Leone & M.E. Bannon, “Segregation: Does educating the handicapped stop here?” (1987) 49 *Corrections Today* at 17 cited in NSW Report, *supra* note 3 at 27.

³³ J. Zimmerman, W.D. Rich, I. Keilitz & P.K. Broder, “Some observations on the link between learning disabilities and juvenile delinquency” (1981) 9 *Journal of Criminal Justice* 1 at 10 cited in NSW Report, *supra* note 3 at 27.

more likely to be living in community environments where they can become involved in, or suspected of, committing crimes.³⁴

The NSW Report also speculates that people with intellectual disabilities may be over-represented based on the types of crimes committed. For instance, there is a higher rate of offence among persons with developmental disabilities for crimes involving impulsive or unpremeditated behaviour, such as offences against property (arson, break and enter, car theft), against persons generally (murder, assault), and sexual offences, whereas crimes involving planning or foresight (drug trafficking, robbery, fraud) infrequently occur.³⁵ In addition, it has also been suggested that people with intellectual disabilities are more likely to be charged for “public order” offences, in part, because of the lack of understanding about crime and its consequences.³⁶

Regardless of the reasons for over-representation or the difficulties associated with determining the degree of over-representation, it is clear that persons with developmental disabilities are well represented in the New South Wales criminal justice system and this phenomenon probably extends to the justice system in Canada. This reality demands scrutiny of the application of the law and the unique experiences of this population in order to ensure fair and equitable treatment of persons with developmental disabilities within the criminal justice system.

3.3 Police Investigations

3.3.1 Police and People with Developmental Disabilities

Police practices play a crucial role in how a person will experience the criminal justice system. Both the outcome of a matter and the experience of a person throughout the process may be significantly affected by police procedures. This relationship may be even more pronounced where the accused person is vulnerable in some way. Indeed, for many people with a developmental disability, the police are often the “face” of the criminal justice system.³⁷

Because the police investigative process is generally the first stage of the criminal justice procedure, the means by which the suspect is dealt with may have a significant impact on whether the individual’s rights are adequately protected at the outset and throughout the balance of the procedure. From the ability of the police officer to detect a developmental disability, to the communication/interrogation techniques used during interviews, the skill and care employed by investigating officers will dramatically impact the carriage of justice in relation to the rights of persons with developmental disabilities who are suspected of committing crimes.

³⁴ S.C. Hayes & McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (Sydney, November 1988) at 10 cited in NSW Report, *ibid*.

³⁵ See K. Deane & W. Glaser, *The Characteristics and Prison Experience of Offenders with an Intellectual Disability: An Australian Study* (University of Melbourne, 1994) at 4 cited in NSW Report, *ibid*. 32.

³⁶ *Ibid.* at 35.

³⁷ NSW Report, *ibid.* at 81.

The Existence of Formal Police Procedures

In Alberta, there do not appear to be any formal police procedures in place to guide police conduct in investigations involving persons with developmental disabilities. Although procedures manuals exist for the RCMP, Edmonton Police Service and Calgary Police Service, none of these manuals appears to establish a criteria or a protocol for police in dealing with suspects whom they suspect might have a developmental disability.³⁸ Further, none of the legislation or regulations in Alberta pertaining to police governance and authority gives attention to this area either.³⁹

The absence of specific protocols or procedures relating to police conduct in investigations of persons with developmental disabilities is not, on its own, evidence of the criminal justice system's failure to protect the rights of persons with developmental disabilities. It is, however, indicative of the lack of specific attention given to the needs of this group in the criminal justice process. More specifically, it raises concerns about the preparedness of the police to effectively contend with the issues that arise in the context of investigating persons with developmental disabilities.

Police Issues for Dealing with Persons with Developmental Disabilities

Police screening/recognition of Developmental Disabilities

Policing is a difficult occupation. Police are required to deal with a wide range of challenging and potentially dangerous social problems which require skills beyond their traditional role of law enforcement. Not surprisingly, police may lack the specific knowledge and skills required to identify persons with developmental disabilities. The failure of police to understand and recognize the characteristics of developmental disabilities may result in tendencies among police to see persons with developmental disabilities as difficult, to confuse mental illness and developmental disabilities, or to mistake developmental disabilities for substance abuse.⁴⁰

In the absence of specific training and prescribed procedures, police will be hampered in their ability to accurately identify the existence of a developmental disability. As a result, individuals whose intellectual capacity is impaired but who nonetheless appear "normal" may not be given any special accommodation in comparison to those whose appearance more obviously suggests a disability. Similarly, the rights of persons with developmental disabilities who have a high level of verbal competency but who are skilled at concealing their impairment may not receive any

³⁸ Although the writer did not personally review these manuals, information provided by Constable M. Cull of the Calgary Police Service suggests that these manuals are not tailored in any way to deal with the specific needs of persons with developmental disabilities.

³⁹ See *Police Act*, R.S.A. 2000, c. P-17; Police Service Regulation, Alta. Reg. 356/1990; Exempted Areas Police Service Agreement Regulation, Alta. Reg. 229/2004; Special Constable Regulation, Alta. Reg. 357/1990.

⁴⁰ For example, see R. Perske, "Thoughts on the police interrogation of individuals with mental retardation (1994) 32 *Mental Retardation* 377-380.

special accommodation, while the rights of others who lack verbal skills but who are nonetheless capable of understanding more complex information will be treated with more care. The response of the police to these circumstances is likely to be the exact opposite of what is actually required. Furthermore, the lack of specific training and screening procedures decreases the likelihood of timely identification of developmental disabilities and compromises the ability of the police to respond appropriately or consistently.

Interviewing

The intellectual impairment of persons with developmental disabilities raises necessary concerns regarding the reliability of how they give and receive information in the context of a police investigation. Memory problems, as well as a limited capacity to concentrate for extended periods of time will necessarily impact the quality of the interaction between the individual and the police. Persons with developmental disabilities may also have difficulties with the types of questions asked by police, such as times, dates, and descriptions,⁴¹ thereby further jeopardizing the reliability of the information obtained.

Specific research on fetal alcohol spectrum disorder reveals associated problems with memory, language and social skills.⁴² Although people with FASD may learn to exploit nonverbal cues to maintain conversational flow, their degree of comprehension may be much lower than it appears. For instance, they are unable to understand subtleties of language and idioms or sarcasm are likely to cause confusion.⁴³

These cognitive impairments can easily influence the tone or outcome of a police interview. For one thing, interviews may take a long time owing to problems of understanding. The failure of police to appreciate the limited capacity of the individual to concentrate for extended periods will further threaten the reliability of information obtained over a long period of time. The inability of individuals to accurately recall specific details, such as dates and times, may be perceived as evasiveness or, in cases where the individual “fills in” these details, may take the interview down a number of dead-end paths. This potential glibness or confusion of an accused could easily be mistaken by police as deception or indifference.

In order to increase the reliability of information obtained from developmentally disabled persons in police interviews, police will first have to be aware of the existence of a possible disability and, second, systematically alter the tone of the interview to accommodate the intellectual capacity of the accused. Again, in the absence of specific training and procedures, the likelihood of this outcome is diminished.

⁴¹ NSW Report, *supra* note 3 at 83.

⁴² J. Conry, “Effects of Parental Substance Abuse on Children’s Development,” in S. Harrison & V. Carver, eds., *Alcohol and Drug Problems: A Practical Guide for Counsellors* (2nd ed.) (Toronto: Addiction Research Foundation, 1997).

⁴³ *Ibid.* at 42.

False Confessions

There is no shortage of evidence that even people without any apparent intellectual disabilities are susceptible to suggestion and diverse social pressures. The case law and scientific literature offer a number of examples of both children and adults having been induced to describe non-experienced events.⁴⁴ The tendency among people with developmental disabilities to provide false statements and false confessions should therefore come as no surprise. Indeed, intellectual disability is one factor that increases the likelihood of an individual falsely confessing to a crime he or she did not commit.⁴⁵ One explanation for the increased prevalence of false confession is that persons with developmental disabilities may be over-anxious to please authority figures with the result that they are more susceptible to suggestive questions.⁴⁶

Regardless of the questionable reliability of a statement of admission, the inculpatory value of a confession cannot be overestimated in the case building process. All but the most scrupulous police and prosecutors may be disinclined to look beyond the face validity of an admission of guilt, particularly when it conforms to the police theory of the crime.⁴⁷ Indeed, this phenomenon is evidenced in the recent acquittal of Simon Marshall by the Quebec Court of Appeal after it was discovered that he had been wrongfully convicted of several charges of sexual assault based on false confessions.⁴⁸

Consideration of the Problem by Other Jurisdictions

Other jurisdictions have considered the importance of explicit police practices for dealing with persons with developmental disabilities and have recommended the development of formal police procedures for conducting criminal investigations. For instance, New South Wales in Australia proposed a Code of Practice to replace the existing Police Commissioner's Instructions. The Code of Practice, which would be readily available at all police stations for consultation by police officers, detained persons and other interested persons, would establish explicit procedures for police investigations involving people with an intellectual disability.⁴⁹

Due to its comprehensive nature, it bears repeating here the more relevant aspects of the proposed Code.

⁴⁴ See, for instance, *Kvello v. Miazga*, 2003 SKQB 559 and E.R. Loftus, "Creating False Memories," *Scientific American* 277 (September, 1977), 70-75 cited in T.E. Moore & M. Green, "Fetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System," 19 C.R. (6th) 99 at 102.

⁴⁵ G.H. Gudjonsson, *The Psychology of interrogations and confessions: A Handbook*. (Chichester: Wiley, 2003).

⁴⁶ See R. Perske "Thoughts on the police interrogation of individuals with mental retardation (1994) 32 *Mental Retardation* 377-380.

⁴⁷ T.E. Moore & M. Green, "Foetal Alcohol Spectrum Disorder (FASD): A Need for Closer Examination by the Criminal Justice System," 19 C.R. (6th) 99 at 103 [hereinafter FASD: Moore & Green].

⁴⁸ *Marshal c. R.* 2005 QCCA 852. For further discussion of this case, see articles online at: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1125356026699_57/?hub=Canada;and <http://www.cbc.ca/story/canada/national/2005/08/10/wrongful-conviction-050810.html?print>

⁴⁹ NSW Report, *supra* note 3.

Guidelines for Identifying an Intellectual Disability

The Code would set out the indicators for police to watch for in a suspect's behaviour or circumstances to assist in making a determination of whether a developmental disability exists. The indicators to watch for include:

- difficulty understanding questions and instructions;
- responding inappropriately or inconsistently to questions;
- short attention span;
- receipt of a disability support pension;
- residence at a group home or institution;
- education at a special school or in special education classes; and
- inability to understand the caution.⁵⁰

Guidelines for Questioning a Person with an Intellectual Disability

The Code would also establish factors for police to consider when questioning a person with an intellectual disability. The factors might include:

- the need to use language and concepts that will be understood;
- the need to take extra time in interviewing;
- the risk of the person's susceptibility to authority figures, including a tendency to give answers that the person believes are expected;
- the dangers of leading or repetitive questions;
- the need to allow the person to tell the story in his/her own words;
- the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers;
- the need to ask the person to explain back what was said; and
- the possibility that the person may be taking medication which may affect his or her ability to answer questions.⁵¹

⁵⁰ *Ibid.* at 77-78.

⁵¹ *Ibid.* at 78.

Guidelines for Administering a Police Caution

The Code would establish factors for police to consider while administering the police caution:

- a person may have difficulties comprehending the concept of the right to silence;
- there are possible evidentiary implications that may arise from the failure of a suspect to understand the caution; and
- the suspect may need to be reminded periodically of the caution.⁵²

General Guidelines for the Investigative Procedure

The Code would also establish the following general guidelines for investigation procedures:

- The standard questions relating to the adoption of the interview record should be appropriate to the person with the intellectual disability. While interviews should be electronically recorded where possible, if not electronically recorded, the interview should be read back slowly and the person frequently asked whether it is correct.
- Identification parades should not be used for people with intellectual disabilities where unfairness to the suspect is likely to result due to the unusual manner or appearance of the particular suspect.
- An accused's intellectual disability must be taken into account when setting bail conditions.
- A person with an intellectual disability has the right to a lawyer. Absent exigent circumstances, questioning of a suspect after arrest should only take place if a lawyer representing the person is present.⁵³

Guidelines Related to a Support Person

- Police must ask the person whether they wish to have a third person (support person) present during police questioning. If the person wishes to have a support person, the police must take reasonable steps to arrange one.
- A lawyer should also consider the need for a support person and ask the individual whether they would like a support person present.⁵⁴

⁵² *Ibid.* at 79.

⁵³ *Ibid.* at 79-80.

⁵⁴ *Ibid.* at 80.

3.3.2 Constitutionally Guaranteed Rights

The Context

Given that police duties and responsibilities for dealing with persons with developmental disabilities are not explicitly defined in a police procedures manual or a code of practice, the obvious question arises: *what mechanisms, legislative or otherwise, are in place to guide the conduct of police in the investigative procedures and to inform their actions when dealing with persons with developmental disabilities?*

The practices of the police in criminal investigations are largely governed by the *Charter of Rights and Freedoms*⁵⁵ and the accompanying case law. The *Charter* establishes constitutional rights which are the highest order rights in the Canadian legal system. Beyond the *Charter* provisions themselves which articulate the legal rights, the courts are involved in the ongoing development of the constitutionally guaranteed procedural rights through the establishment of guiding principles in the case law. The case law functions to inform police practices by fleshing out the requirements that must be met by police in order to ensure that a breach of a constitutionally guaranteed right does not occur. The *Charter* also establishes remedies for when there has been a breach of a *Charter* right.⁵⁶

The constitutional entrenchment of procedural rights has gone a long way towards guaranteeing due process for individuals involved in the criminal justice system and ensuring the reasonable and principled exercise of authority by the state.

There are a number of benefits associated with this method of safeguarding rights. First, the courts have undertaken thorough and rigorous analyses of these rights and provided significant guidance as to the procedures and practices that must be observed in order to ensure the right is protected. Second, *Charter* jurisprudence generally applies universally across Canada therefore ensuring national consistency in the guarantee of rights. And third, the *Charter* provides for possible exclusion of evidence which has been obtained through the violation of a constitutionally guaranteed right.⁵⁷

On the other hand, there are limitations to relying exclusively on the *Charter* and its interpretation by the judiciary for the purpose of guaranteeing and safeguarding the rights of persons with developmental disabilities.

First, it may be unrealistic to expect or assume that the police will be completely well versed in the scope of constitutionally guaranteed rights, particularly given the continual evolution of these rights in the jurisprudence. As a result, there will be a

⁵⁵ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*].

⁵⁶ This will be discussed briefly in Section 3.5, below, dealing with Evidence.

⁵⁷ *Charter*, *supra* note 55 at s. 24(2).

number of instances where police unwittingly violate constitutionally guaranteed rights. While remedies exist to deal with these violations, these remedies cannot mitigate the experiential harm that a suspect with developmental disabilities may experience. Further, the redress of a constitutional violation is contingent on the lawyer recognizing the violation and bringing it to the court's attention to be dealt with.

Second, constitutional rights are judicially interpreted within a particular context based on the particular factual scenario that gave rise to the litigation. While the courts try to articulate general principles that can be broadly applied, the onus of extrapolating the principles to analogous situations falls to lawyers, governments, law enforcement agencies, administrative bodies, and other government organizations. Sometimes the analogous reasoning is accepted by the court in a subsequent case, while other times it is not. This reasoning by analogy makes the precise statement of rights precarious at best.

The problem with this specific-to-general-to-specific approach is that it may not contemplate the interests of any particular group (except the target group of the initial litigation). Indeed, as already noted, justice may require additional procedural protections to ensure the equal and uniform application of these legal principles to persons with developmental disabilities.⁵⁸ Consequently, this method of guaranteeing rights may be unsuitable or insufficient on its own to ensure that persons with developmental disabilities fully exercise their rights in the criminal justice system.

Lastly, the articulation of constitutionally guaranteed rights by the courts in judgments may not be detailed enough to provide sufficient guidance to police in the course of identifying or interviewing persons with developmental disabilities. In order to ensure these persons are appropriately dealt with by the police, specific guidelines and procedures are necessary to inform police practices.

Overview of the *Charter*

The rights of a person involved in the criminal process are primarily governed by sections 7 through 14 of the *Charter*. Although not limited in application to the criminal justice process, these rights are particularly relevant to the criminal context. Section 7 ensures the protection of life, liberty and security of the person. Section 8 protects the right to be secure against unreasonable search and seizure. Section 9 guards against arbitrary detention. Section 10 deals with the rights of notification of an accused upon arrest or detention. Section 11 deals with procedural requirements in criminal matters such as the right to be tried within a reasonable time and the presumption of innocence. Section 12 guards against cruel and unusual punishment. Section 13 constitutionalizes the right of a witness not to have incriminating testimony used against him in subsequent proceedings. And section 14 gives witnesses in a proceeding the right to an interpreter where the witness does not understand or speak the language of the proceeding.

⁵⁸ See Section 3.2: Preliminary Matters, above.

In addition to their broad application in the criminal context, several of the *Charter* provisions are particularly relevant in the context of police dealings with persons with developmental disabilities. Most notably, these include sections 7 and 10(b). Section 7 protects the pre-trial right to silence, while section 10(b) is largely concerned with the right to counsel and protections related to self-incrimination.

Section 7 of the *Charter* provides that:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 10(b) of the *Charter* provides that:

10. Everyone has the right on arrest or detention

- (b) to retain and instruct counsel without delay and to be informed of that right

While all of the *Charter* rights apply to persons with developmental disabilities, the discussion here will be focused on the rights in sections 7 and 10(b) — rights which are often differentially exercised depending on the functional capacity of the person to understand them.

Self-incrimination and the Presumption of Innocence

Self-incrimination arises in the context where evidence, such as blood, breath, or other bodily substances, has been provided by or taken from the accused. It is also used to describe evidence produced through the participation of the accused in the investigative procedure, such as identification line-ups or an admission statement. Although an accused is not prohibited from providing self-incriminating evidence or participating in self-incriminating procedures, the accused must be fully informed of the risks and must voluntarily agree to do so. As a result, the notion of “voluntariness” is central to the concept of self-incrimination and will be discussed in detail, below.

The presumption of innocence has also been entrenched as a constitutional right in section 11(d) of the *Charter*. Any attempt to “force” a person to respond to an allegation or to participate in an investigation against him is considered an assault on the dignity of the innocent and is therefore inconsistent with the presumption of innocence.⁵⁹ The presumption of innocence requires, as a matter of natural justice, that an accused know the allegations and case against him before being called on to respond. As a result an accused cannot be compelled to answer to charges until the Crown has presented its case to an impartial trier of fact. Any requirement for an accused to furnish evidence against himself or to demonstrate his innocence would

⁵⁹ D. Paciocco & L. Stuesser, *The Law of Evidence* (2nd ed.) (Toronto: Irwin Law, 1999) at 179 [hereinafter Paciocco].

undermine the basic rule that the Crown has the burden of proving guilt⁶⁰ and would fly in the face of the presumption of innocence.

Right to Silence – Section 7 of the *Charter*

Section 7 of the *Charter* confers on the detained person the right to choose whether to speak to the authorities or whether to remain silent.⁶¹ A detained person is a person who has been arrested or who is in the power of the state. Recently, the Supreme Court of Canada confirmed that the right to silence also applies to persons before they have been arrested or detained.⁶² The right to silence is premised on an individual's freedom to choose the extent of his or her cooperation with the police. It is animated by a recognition of the potentially coercive impact of the state's authority and a concern that individuals not be required to incriminate themselves.⁶³

The right to silence is rooted in two common law concepts. The first is the confessions rule and the second is the privilege against self-incrimination. Although related, the privilege against self-incrimination and the pre-trial right to silence are analytically distinct. The privilege against self-incrimination is guaranteed by section 11(c) of the *Charter* and applies during the conduct of formal proceedings, such as bail hearings, preliminary inquiries, and trials. It prevents the Crown from being able to compel an accused to testify as a witness in his own hearing.⁶⁴ In contrast, the pre-trial right to silence, which is conferred by section 7 of the *Charter*, applies in informal settings such as police questioning and requires the police or investigating officer to advise the person of this right.⁶⁵

The existence of a pre-trial right to silence means that an adverse inference cannot be drawn against an accused because of his choice not to speak or volunteer information in the investigative procedure. However, if the accused chooses to make statements to the police, independently or through a lawyer, those statements will likely be admissible in evidence against him. The courts have therefore adopted an approach to pre-trial interrogation which emphasizes the detained person's right to make a *meaningful* choice and which permits the rejection of statements obtained unfairly in circumstances that violate that right of choice.

⁶⁰ *Ibid.*

⁶¹ *R. v. Herbert*, [1990] 2 S.C.R. 151 at para. 108 [hereinafter *Herbert*].

⁶² *R. v. Turcotte* 2005 SCC 50 [hereinafter *Turcotte*].

⁶³ *Ibid.* at para 51.

⁶⁴ The privilege against self-incrimination as it applies to an accused person is distinct from the protection of witnesses against self-incrimination. Witnesses in a formal proceeding cannot refuse to answer questions on the grounds that the answers may be self-incriminating. The *Canada Evidence Act*, *infra* note 224 and provincial evidence acts recently removed the privilege of a witness to refuse to answer questions on the grounds that the answers may be self-incriminating. Instead, these statutes now provide protection to individuals who are forced to reveal in testimony that they have committed offences and they are granted immunity against having the testimony used against them in a subsequent proceeding: section 5. This protection of immunity has also been constitutionalized in the *Charter*, *supra* note 55 at s. 13.

⁶⁵ See *Herbert*, *supra* note 61. The requirement of the police to advise of this right will be discussed in more detail, below, under the section dealing with section 10(b) of the *Charter*, the right to counsel.

Confessions

When a person makes a confession it effectively constitutes a waiver of his/her right to remain silent. There are three main issues that are relevant to the confession rule: 1) whether the confession was made to a person in authority; 2) whether the confession was made voluntarily; and 3) whether the person had the capacity to understand the options available and to make an informed choice — i.e., whether the person had an “operating mind.”

Persons in Authority

A person in authority is normally defined to include “those formally engaged in the arrest, detention, examination or prosecution of the accused” such as police officers and prison guards.⁶⁶ When a person makes a statement to a person in authority, the statement will not be admissible unless the Crown establishes that the statement was made voluntarily. If the receiver of the confession was not a person in authority, the statement is presumed to be voluntary unless the defence establishes otherwise.⁶⁷

Voluntary Statements

Traditionally, the only criterion used to determine whether a statement was voluntary was the absence of coercion by the state. Thus, the original confessions rule required only that the statement must not have been obtained from the accused as a result of fear, prejudice or hope of advantage held out by persons in authority.⁶⁸ Relevant circumstances included the time, place and length of interrogation and the question to be answered was whether those circumstances raised a reasonable doubt that the statement was voluntarily given. To be involuntary on this ground, however, the statement must have resulted from external pressure rather than the subjective fear or timidity of the accused.⁶⁹

Although this common law rule functioned to prevent state authorities from bullying an accused into making a statement, this limited safeguard did not prevent the state from using trickery or deception to obtain a statement or confession from a detained accused.⁷⁰ Under that rule, the concept of choice and awareness of the accused person was therefore irrelevant to the voluntariness of the statement.

Following the enshrinement of the *Charter*, the requirement that confessions be voluntary acquired the broader constitutional protection of section 7. Section 7 accords the detained person a *free choice* on the matter of whether to speak to the authorities or to remain silent. The concept of “free choice” implies that a person must be in a

⁶⁶ *R. v. Hodgson*, [1998] 2 S.C.R. 449.

⁶⁷ *Ibid.*

⁶⁸ *Ibrahim v. R.*, [1914] A.C. 599 at 609 (PC).

⁶⁹ *Hobbins v. R.* (1982), 27 C.R. (3d) 289 SCC [hereinafter *Hobbins*].

⁷⁰ *Rothman v. R.*, [1981] 1 S.C.R. 640.

position to meaningfully decide whether to volunteer information or not. Thus, in order for the accused to be able to choose to make a statement, the accused must have the capacity to do so. For the purpose of determining the capacity of a person to waive his right to silence, the court looks at whether the accused had an “operating mind.”

Operating Mind

Whether an accused is capable of exercising his right to choose is defined objectively rather than subjectively. The right to make an informed choice about whether to speak to the authorities or to remain silent does not necessitate a particular state of knowledge on the suspect’s part over and above the basic requirement that he/she possess an operating mind.⁷¹

In the past there has been some debate over the appropriate test to be used in determining whether an accused has an operating mind for the purpose of making a free choice. Some proponents argued that the confession rules existed primarily to exclude untruthful statements and therefore proposed a low threshold, namely that the accused’s mind need only operate sufficiently to know what he/she was saying.⁷² Others have argued that the focus should be on the integrity of the decision to forgo the right to silence and argued for an “awareness of consequence” test.⁷³ The debate was put to rest in *R. v. Whittle* where the Supreme Court of Canada adopted for determining the existence of an operating mind that minimized the awareness of consequences component and emphasized the ability of the accused to understand what he/she is saying:

The operating mind test... requires that the accused possess a limited degree of cognitive ability to understand what he or she is saying and to comprehend that the evidence may be used in proceedings against the accused. Indeed it would be hard to imagine what an operating mind is if it does not possess this limited amount of cognitive ability. In determining the requisite capacity to make an active choice, the relevant test is: Did the accused possess an operating mind? It goes no further and no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her interest.⁷⁴

The “operating mind” test applies in a number of contexts. It is applied when considering whether the accused has the capacity to waive his pre-trial right to silence, to establishing the voluntariness of confessions, to the determination of whether the accused is adequately advised of his right to counsel under s. 10(b), and to the determination of whether the accused is fit to stand trial under section 2 of the *Criminal*

⁷¹ *Herbert*, *supra* note 61 at para 112.

⁷² *Paciocco*, *supra* note 59 at 198.

⁷³ *Ibid.*

⁷⁴ *R. v. Whittle*, [1994] 2 S.C.R. 914 at para 46 [hereinafter *Whittle*].

Code.⁷⁵ In fact, the Supreme Court of Canada explicitly advocates the harmonization of the operating mind tests both before and during the trial process.⁷⁶

Right to Counsel – Section 10(b) of the *Charter*

Generally

Section 10(b) requires that an accused be advised of his right to consult counsel and permitted to do so without delay. This right is designed to ensure that persons who are arrested or detained are treated fairly in the criminal process.⁷⁷ Even where a confession or statement is found to have been voluntarily made for the purposes of section 7, it may nonetheless be inadmissible as a result of a violation of the right to counsel.

Section 10(b) exists to protect the right against self-incrimination of detainees by giving them the opportunity to become informed of their rights and obligations as well as to receive advice on how to exercise them.⁷⁸ When an individual is detained by state authorities, he or she is put in a position of disadvantage relative to the state. Not only has this person suffered a deprivation of liberty, but this person may also be at risk of incriminating him- or herself. Accordingly, a person who is “detained” within the meaning of s. 10 of the *Charter* is in immediate need of legal advice in order to protect his or her right against self-incrimination and to assist him or her in regaining his or her liberty.⁷⁹

The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to make a statement. Similarly, the *Charter* does not place on the authorities and the courts the task of subjectively gauging whether the suspect appreciates the situation and the alternatives. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he/she will speak to the authorities by giving him the right to counsel.⁸⁰

Informational and Implementational Police Duties

Once it has been established that the accused has an operating mind (i.e., capacity), the focus under the *Charter* shifts to the conduct of the authorities. In assessing the conduct of authorities it is necessary to answer the questions of whether the suspect was accorded the right to consult counsel or whether there was other police

⁷⁵ Operating mind in the context of fitness to stand trial will be discussed in more detail under Section 3.4. Dispositions, below.

⁷⁶ *Whittle, supra* note 74 at para 49.

⁷⁷ *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at 394.

⁷⁸ *R. v. Bartle* (1994), 33 C.R. 4th 1 (SCC) [hereinafter *Bartle*].

⁷⁹ *Herbert, supra* note 61 at pp. 176-77

⁸⁰ *Ibid.* at paras. 110 and 112.

conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not.⁸¹

Section 10(b) places three duties on state authorities:

- 1) the duty to inform detainees of the right to counsel;
- 2) the duty to provide them with a reasonable opportunity to exercise this right; and
- 3) the duty to curtail questioning until that reasonable opportunity has been exercised.⁸²

The first duty comprises the informational component of section 10(b). It requires the detainee to be informed of the right to retain and instruct counsel without delay, as well as the existence of legal aid and the duty counsel system in place in the jurisdiction.⁸³ This information is typically provided to the accused person by way of a prescribed police caution. There is a heavy onus on the police to be very explicit about the existence of these rights because if detainees are not clearly and fully informed of their rights at the outset, they cannot be expected to make informed choices and decisions about whether or not to contact counsel and, in turn, whether to exercise other rights, such as their right to silence.

It is important that the standard caution given to detainees be as instructive and clear as possible because absent *special circumstances* that indicate that a detainee may not understand the s. 10(b) caution, such as language difficulties or a known or obvious mental disability, police are not required to assure themselves that a detainee fully understands the s. 10(b) caution.⁸⁴ In some cases it may be possible to infer from the circumstances that the accused understands what he/she has been told. However, where there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding.⁸⁵

The second and third duties comprise the implementation component of section 10(b). They are triggered only if a detainee expresses the wish to exercise the right to counsel⁸⁶ and they impose an obligation on police to provide a reasonable opportunity to do so, including privacy for that consultation. They also require the police to refrain from eliciting evidence from a detainee until he/she has had a reasonable opportunity to consult with counsel.

⁸¹ *Ibid.* at para 126.

⁸² See *Bartle*, *supra* note 78.

⁸³ *Ibid.*

⁸⁴ *R. v. Baig*, [1987] 2 S.C.R. 537 at 540.

⁸⁵ *R. v. Evans*, [1991] 1 S.C.R. 869.

⁸⁶ *Bartle*, *supra* note 78 at para 17.

Waiver of the Right to Counsel

An accused person may waive his right to counsel and his right to be informed of this right (i.e., the informational right). However, where there has been a breach of the informational obligation, a waiver is unlikely to be found to exist because detainees cannot be expected to make informed choices absent full information. As a result, the validity of a waiver of the right to counsel will only be recognized in cases where it is clear that the detainee already fully understands his or her s. 10(b) rights, fully understands the means by which they can be exercised, and adverts to those rights.⁸⁷ In determining whether the accused has the capacity to waive or exercise the right to counsel, the operating mind test applies. The accused must be capable of communicating with counsel to provide instructions, capable of understanding the function of counsel, and capable of understanding that he or she can dispense with counsel even if this is not in his best interests. It is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence.⁸⁸

Charter Considerations in the Context of Persons with Developmental Disabilities

Based on the forgoing analysis, it is arguable that neither section 7 nor section 10(b) of the *Charter* is sufficient to ensure fairness or to protect the rights of persons with developmental disabilities in the police investigation procedure. Given the issues identified in Section 3.3, namely that police may be lacking in any number of skills required to recognize and identify persons with developmental disabilities and that persons with developmental disabilities may be more susceptible to coercion, the absence of any specific mechanisms in the *Charter* or corresponding jurisprudence does little to ensure that the unique circumstances of persons with developmental disabilities are taken into consideration in the police investigation procedure.

Under the old confessions rule, the rights of persons with developmental disabilities were not protected because the unique circumstances of the person, including a tendency to submit to persons in authority or a subjective desire to please, was not relevant for consideration. In order for a statement to be considered involuntary under the old rule, the statement had to have resulted from external pressure rather than the subjective fear or timidity of the accused.

The inclination of persons with disabilities to attempt to disguise their limitations by presenting as cooperative and informed directly opposes the accused's right to silence. With no specific provision made to ensure that these individuals understand the implications of their decision to provide a statement, admission, or to waive counsel, it is difficult to understand how this right can be meaningfully guaranteed for persons with developmental disabilities.

⁸⁷ *Ibid.* at para 41.

⁸⁸ *Whittle, supra* note 74 at para 52.

The heightened informational duty on police under section 10(b) provides little assistance to a person with developmental disabilities who, although capable of understanding the words as spoken, may not understand the implications of their “choice” to waive these rights. The problem lies in the Supreme Court’s characterization of the operating mind test. The expression of the operating mind test in *Whittle* provides no added protection in the police investigation procedure for a person whose intellectual capacity may be impaired such that he or she is incapable of analytical ability. One author expressed his confusion about the Supreme Court’s finding with respect to the operating mind rule: “[s]ince the court in *Whittle* recognizes two bases for the voluntary confession rule, reliability and fairness, one would have expected the court to insist on “awareness of the consequences” as necessary with respect to all three rights. The court did not.”⁸⁹ Given that fairness is a concern underlying the confession rule, it would seem logical to insist on an awareness of the consequences test. Instead, in the course of considering the requisite mental capacity of an individual to waive his right to counsel the Supreme Court notes that “it is not necessary that the accused possess analytical ability. The level of cognitive ability is the same as that required with respect to the confession rule and the right to silence. The accused must have the mental capacity of an operating mind.”⁹⁰

Further, the common operating mind test endorsed by the Supreme Court for procedures before trial and during trial may be somewhat inappropriate.⁹¹ As noted by one author, “at trial, both counsel and judge are interested in protecting the accused person by ensuring a fair trial in an open public place; before trial, the police, in private, are attempting to procure damning evidence out of the mouth of the accused so that a prosecution can be successful. That difference in function calls out for a higher standard of mental competency during the investigative process.”⁹²

The absence of a lack of awareness requirement in the operating mind test, combined with the failure to recognize the position of jeopardy of an accused in the presence of police, suggests that neither the confession rule nor the *Charter* provisions on their own are sufficient to safeguard the rights of persons with developmental disabilities in the police investigation procedure. Further, the complicated nature of the law heightens the risk that law enforcement agents will be unaware of the basic requirements that must be met to ensure constitutional rights are met. Arguably, rules in the form of a code of practice would go a long way to ensure the rights of persons with developmental disabilities.

⁸⁹ R.J. Delisle, “Whittle and Tran: Conflicting Messages on How Much an Accused Must Understand” 32 CR (4th) 29 at 30 [hereinafter Delisle].

⁹⁰ *Whittle*, *supra* note 74 at para 21.

⁹¹ *Ibid.* at para 49.

⁹² Deslile, *supra* note 89 at 32.

3.3.3 Dependant Adults Act

Context

The final piece of legislation to discuss in the context of the police investigation procedure is the *Dependant Adults Act*.⁹³ The question is whether the DAA has any direct or indirect implications for police investigations involving suspects who are under the care or authority of guardians and trustees appointed under the DAA.

Purpose of the DAA

The *Dependant Adults Act* is a form of substitute decision-making legislation that deals with guardianship. Guardianship generally refers to the court-appointment of a person or agency with the power and authority to take charge of the property, financial affairs, and physical person of adults deemed to be mentally incapable and, therefore, unable to make decisions on their own behalf.⁹⁴

Duties and Responsibilities of Guardians

Guardianship is a bundle of rights and the DAA specifies the range of powers that may be granted to guardians. In making an order for guardianship, the court must specify the areas over which a guardian will have decision-making authority. The areas of authority for which a court may appoint a guardian include:

- Where and with whom the dependant adult is to live and consort;
- The nature and type of the adult's social activities;
- Decisions regarding employment and education;
- Licenses and permit applications;
- Consenting to any health care that is in the best interests of the adult;
- Normal day-to-day decisions on behalf of the adult including diet and dress; and
- Any other matters specified by the court and required to protect the best interests of the adult.⁹⁵

Notably, the authority conferred by a guardianship order does not include the authority to admit the adult to a place of care. This is an exceptional authority that must be obtained separately in an application for a compulsory care order (CCO) after

⁹³ R.S.A. 2000, c. D-11 [hereinafter DAA].

⁹⁴ R.M. Gordon & S.N. Verdun-Jones, *Adult Guardianship Law in Canada* (Toronto: Carswell Thomson, 1992 with 1994 and 1995 supplements) at 1-2, 1-3.

⁹⁵ DAA, *supra* note 93 at s. 10(3).

guardianship has been obtained. A CCO provides authority for a person to confine the dependant adult in a place of care, including authority to apprehend and detain the adult while doing so.⁹⁶

Test for Incapacity

The concept of incapacity is not explicitly recognized in the DAA as the threshold for granting guardianship and trusteeship orders. However, the legislation does list the specific factors to be considered when reviewing an application for guardianship or trusteeship and these factors effectively constitute a test for capacity.

In the case of guardianship, the court must be satisfied that the adult is continuously unable to care for himself and make reasonable judgments in respect of matters relating to him.⁹⁷ In the case of trusteeship, the court must be satisfied that the adult is unable to make reasonable judgments in respect of matters relating to any or all of the person's estate.⁹⁸ The capacity test for a compulsory care order is different than for a guardianship order. In this case, the court must be satisfied that the dependant adult is in a condition that presents a danger to himself or others and that the compulsory care order is the proper means of ensuring the protection and treatment of the adult.⁹⁹

Application of the DAA to Police Investigations

Although the scope of authority of the DAA enables guardians and trustees to make personal decisions and enter financial transactions on behalf of dependant adults, the legislation does not extend so far as to make a guardian or trustee responsible for the actions of the dependant adult or to enable them to speak on behalf of or stand in the place of dependant adults in criminal matters. There is nothing in the DAA or the *Criminal Code* that requires a guardian or trustee to be present for interviews or discussions with persons in authority, although logically, one would expect the police to contact the guardian of any person whom they become aware is a dependant adult.

Additionally, the tests for incapacity under the DAA do not directly correspond with the definition of developmental disability as described above. As a result, although there may be some overlap between these target populations, there will likely be many persons with developmental disabilities who neither have nor need a guardian or trustee under the DAA. The reverse is also true and there will logically be persons designated as dependant adults who do not have a developmental disability. Following this

⁹⁶ *Ibid.* at s. 13. A Mental Health Certificate (MHC) may also be issued under the *Mental Health Act*, *supra* note 16, which authorizes a person to be detained against their will in a designated facility. MHCs are distinct from CCOs because they are issued without judicial authorization and they are used for apprehending and detaining a person, whether or not that person is a dependant adult. This remedy will be considered in the section below within the contexts of the test for fitness to stand trial and the defence of mental insanity.

⁹⁷ DAA, *supra* note 93 at s. 7(1).

⁹⁸ *Ibid.* at s. 35(1).

⁹⁹ *Ibid.* at s. 11.

analysis then, the existence of an order under the DAA is non-determinative of whether an operating mind exists for the purpose of understanding the right to silence or waiving his right to counsel. Indeed, the DAA states that a guardianship order or a trusteeship order is not of itself sufficient to establish that a dependent adult does not have legal capacity to make a testamentary disposition¹⁰⁰ so there is no basis for suggesting that it would be sufficient to establish the presence or absence of an operating mind.

Although it may be in the interests of both the suspect and the police for a guardian to be present at any interviews to help ensure the suspect understands his rights and to mitigate the risk of an involuntary confession or admission that might later be excluded, there is clearly no such requirement in the DAA, the *Criminal Code*, or the police procedures manuals. Further, as noted earlier, the *Charter* is limited in the extent to which it applies to specific circumstances. While the interpretation of sections 7 and 10(b) may indirectly support notification of a suspect's guardian, there is no specific requirement to do so.

3.4 Dispositions

3.4.1 Overview of the Post-Investigation Procedure

Following the police investigation, if there is sufficient evidence to suggest a reasonable likelihood of conviction, the suspect will be charged with an offence under the relevant legislation.¹⁰¹ Once an accused has been charged with a crime, he or she must enter a plea — either guilty or not guilty. If the accused enters a plea of not guilty, a series of procedures are triggered. They include:

- the election of a trial by judge and jury or judge alone (for indictable offences);
- a preliminary inquiry – a process whereby the Crown presents the majority of its case to the court and a judge decides whether there is sufficient evidence (i.e., a reasonable likelihood of conviction) to warrant proceeding to trial;
- a trial;
- a verdict; and
- a sentencing hearing if the accused is found guilty.

¹⁰⁰ *Ibid.* at s. 65.

¹⁰¹ Although most offences arise out of breaches of the *Criminal Code*, there are numerous other statutory offences that may result in proceedings taken by the Crown (provincial or federal), for example the *Highway Traffic Act* R.S.A. 2000, c. H-8, the *Child, Youth and Family Enhancement Act* R.S.A. 2000, c. C-12, *Securities Act* R.S.A. 2000, c. S-4, *Controlled Drug and Substances Act* 1996, c. 19. For the purpose of this discussion, however, consideration will be limited to offences committed under the *Criminal Code*.

Conversely, if the accused enters a guilty plea, then there is no election, no preliminary inquiry, and there is no trial. Instead, the accused proceeds directly to the sentencing hearing.

Section 3.4 will focus on the various dispositions available when an accused enters a plea of not guilty and proceeds to trial. It is noteworthy that even if an accused initially pleads not guilty to a charge, he or she may change his plea to a guilty plea at any stage thereafter or, plead guilty to a lesser but included charge in the case of a plea bargain. If and when an accused changes his plea from not guilty to guilty, he/she will bypass the remainder of the trial process and proceed directly to the sentencing hearing.

At the trial stage there are a number of procedural and substantive arguments under the *Criminal Code* and the *Charter* which may be involved to deal with the circumstances of a person with a developmental disability. They include arguments related to the person's fitness to stand trial; the inadmissibility of certain evidence, including evidence allegedly obtained in violation of the accused's rights under the *Charter*; and whether the accused was capable of forming the intent necessary to establish a guilty mind for the purpose of proving the offence(s). Arguments may also include the defence of not criminally responsible by reason of mental disorder,

In addition to the formal dispositions under the *Criminal Code*, there is an intermediate option referred to as "diversion" which effectively diverts the accused person from the formal criminal procedure in favour of community treatment and rehabilitation programs.

The following phases of the criminal procedure will be reviewed in Section 3.4: 1) diversion; 2) pre-trial procedures, including the finding of unfit to stand trial; and 3) trial, including the defence of mental disorder and degrees of intent.

3.4.2 Diversion

Background

The mechanism of diversion may be informal or formal, but it is always discretionary. The process may be used at the police investigation stage (prior to charges being laid), at the stage when the Crown is deciding whether or not to lay charges, or after charges have been laid at or near the time of the plea hearing.

Types of Diversion

Alternative Measures – *Criminal Code* Provisions

The same part of the *Criminal Code* that deals with sentencing also makes provision for alternative measures.¹⁰² It defines alternative measures and sets out the circumstances under which they may be used.

¹⁰² *Criminal Code*, *supra* note 1 at Part XXIII.

Alternative measures are defined as measures other than judicial proceedings to deal with a person (18 years of age or over) alleged to have committed an offence.¹⁰³ The *Criminal Code* has formalized alternative measures as a mechanism for dealing with offenders by establishing parameters for when alternative measures may be utilized. First and foremost, the alternative measure may be used only if it is not inconsistent with the protection of society.¹⁰⁴ Beyond that, the following conditions must also be met:

- the person who is considering whether to use the measures must be satisfied that they would be appropriate, having regard to the needs of the accused person, the interests of society, and of the victim;
- the accused person fully and freely consents to participate in the alternative measures program and accepts responsibility for the offence that he/she is alleged to have committed;
- the accused person was advised of his/her right to be represented by counsel before consenting to participate in the alternative measures;
- the attorney general is of the opinion that there is sufficient evidence to proceed with the prosecution of the offence; and
- the prosecution of the offence is not in any way barred at law.¹⁰⁵

The *Criminal Code* prohibits the use of alternative measures in circumstances where the accused person denies participation or involvement in commission of the offence or wishes to have any charge against him/her dealt with by the court.¹⁰⁶

In essence, alternative measures provide the police and the Crown prosecutors with the discretionary authority to propose an alternative to the formal prosecution system in appropriate circumstances. The parameters of use, most notably the requirements that the accused person must have accepted responsibility for having committed the offence and that the Crown must have sufficient evidence to proceed with the prosecution, help to guard against state coercion. They are intended to help ensure that: a) persons who proclaim their innocence cannot be forced into a program which presumes guilt; and b) the state cannot use less formal measures as an alternative to formal prosecution because of a weak case.

¹⁰³ *Ibid.* at s. 716.

¹⁰⁴ *Ibid.* at s. 717(1).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.* at s. 717(2).

Informal Diversion

In addition to the formal alternative measures provisions in the *Criminal Code*, informal diversion mechanisms are also utilized by the police during the investigation stage and prior to any charges being laid. For example, in the course of investigating an offence, the police may obtain a confession from a cooperative suspect very early on. The police may, in turn, refer the individual to a community service program, a treatment program, or back to the care of a guardian or caregiver. This type of diversion arguably falls outside of “alternative measures” as defined in the *Criminal Code* because police may not limit their use of community resources or services to those specifically authorized by the Attorney General.¹⁰⁷

Issues

The mechanism of diversion seems to bring flexibility to a system that is rigid and constrained in its ability to deal with the unique circumstances of individuals. On the face of it, diversion may be seen as the ideal response of the criminal justice system for dealing with persons with developmental disabilities. While the benefits of diversion are obvious, diversion as a policy must be addressed in a deliberate fashion. Indeed, there are a number of policy questions that must be addressed before diversion can be accepted or rejected as a policy for persons with developmental disabilities accused of crimes.

To What Extent Should People with Developmental Disabilities be Diverted From the Criminal Justice System?

Before assigning any intrinsic value to the use of alternative measures, it is necessary to address a fundamental question: to what extent should people with developmental disabilities be diverted from the criminal justice system? On the one hand, the criminal justice system has the effect of detaching persons from the impact of their crime and its victims due to its formalities and constraints. On the other hand, while rigid and inflexible at times, the criminal justice system serves two very basic functions: 1) the use of a rigorous, evidence-based model of advocacy brings reliability to the establishment of guilt or innocence of persons charged with offences; and 2) it assures due process and protection of rights of persons who are accused of crimes. Thus, although diversion from the formal process may, in many cases, result in more meaningful experiences and outcomes for persons accused of crimes, it does carry with it a greater risk that persons will be deprived of the procedural protection of the formal system.

Some critics of diversion argue that a decision by police to refrain from charging persons with developmental disabilities on the basis that they are responsible for their actions is not in the interest of the person or the community because the person is denied the right to open examination of their guilt or innocence.¹⁰⁸ Others would argue

¹⁰⁷ *Ibid.* at s. 17(1)(a).

¹⁰⁸ NSW Report, *supra* note 3 at 10.

that persons with developmental disabilities should not be subjected to a process or punishment that is meaningless to the person as a result of a limited capacity to understand. The question is not an easy one and is probably best addressed based on the characteristics of the individual rather than as a policy decision.

Problems Related to the Competency to Admit Guilt

The requirement that individuals must accept responsibility for the offence before diversion raises concerns about state coercion and the competency of individuals to admit guilt. Arguably, these risks are exacerbated for persons with developmental disabilities considering the problems related to voluntary confessions and waiver of rights. Further, as noted above, while the defendant must be told of his right to be represented by counsel, there is no requirement of a reasonable opportunity to consult with counsel. The absence of advice from counsel, combined with pressure from the police and/or prosecutor to admit to the crime so the diversion door is opened may significantly influence the decision of a person with a developmental disability. Indeed, the accused will be more inclined to accept responsibility for the offence, regardless of whether the person is actually guilty, in order to please persons in authority and avoid a process that appears daunting and stacked against him.

A related but separate issue is the competency of the accused person to plead guilty. As noted earlier, the test for competency for all stages of the criminal justice process is the “operating mind” test as set out in *Whittle*.¹⁰⁹ As noted, an accused need not be capable of analytical reasoning to be found to have an operating mind for the purpose of waiving his or her right to remain silent, including the making of admissions. The test for an operating mind has no higher a threshold for an individual who is given the option to proceed through an alternative measures program provided. Again, this raises concerns regarding the capacity of a person to make free choices and to weigh the consequences of those choices.

Misuse of Discretion

Both police and prosecutors have the authority to recommend the use of alternative measures. Given the discretionary nature of these measures, there is a risk of real or perceived forced compliance with a treatment program or participation in a community program when in fact the officer may not even have grounds for arrest. Similarly, there is also a potential for the Crown prosecutors to divert some individuals for whom there is an insufficient basis for conviction. While the *Criminal Code* provisions propose to guard against this, there is no mechanism in place to monitor this discretion. As a result, the potential for misuse of alternative measures is significant. The risk may be even greater within the context of informal diversion by police where there are no real guidelines governing its use.

Although a referral to an alternative measures program will often be catalyzed by the intention to do what is best for the suspect (particularly when the suspect appears to

¹⁰⁹ *Whittle*, *supra* note 74.

have a developmental disability), police and prosecutors must be extremely cautious about exercising this discretion in situations where they might otherwise be required to drop or reduce the charges against an individual due to insufficient evidence. Indeed, there is a risk that a person's legal rights may be compromised in the interests of doing what is best. As such, the discretionary application of these measures needs to be closely scrutinized.

Slippery Slope – Equality Issues

From a slightly different perspective, it is also necessary to consider the potential equality implications of the discretionary use of alternative measures programs when dealing with persons with developmental disabilities. Would a policy decision to increase the discretionary diversion of persons with developmental disabilities create a perception that intellectually impaired persons do not need the same procedural protections and that they should be treated differently than accused persons in the general population? Is this a throwback to the days when persons who were mentally ill and “retarded” were treated paternalistically with little regard for their rights and freedom of choice?

Indeed, there is a clear danger of substituting one form of social control (mental health facilities and treatment programs) for another (jails or probation) without allowing a defendant the procedural safeguards of a trial.¹¹⁰

Inequity Among Provinces

The *Criminal Code* provides that alternative measures may only be used if they are part of a program of alternative measures authorized by the Attorney General.¹¹¹ The requirement is significant for several reasons. First, it is permissive rather than mandatory; while each province has the authority to implement such programs, none is obliged to do so. As a result, disparity in services may result in inequality amongst accused persons. If there is a policy decision to utilize alternative measures for persons with developmental disabilities whenever possible, equality of access will necessarily become an issue when the availability of these programs continues to vary from province to province.

3.4.3 Pre-trial: Fitness to Stand Trial

Background

In the wake of the Supreme Court of Canada's decision in *R. v. Swain*,¹¹² parliament introduced Part XX.1 of the *Criminal Code*. The provisions in Part XX.1 establish a regime for dealing with accused persons who suffer from mental disorders.

¹¹⁰ R. Roesch, “The Response of the Canadian Psychological Association to the Law Reform Commission Report on Mental Disorder in the Criminal Process” 16 C.R. (3d) 21 at 23.

¹¹¹ *Criminal Code*, *supra* note 1 at s. 717(1)(a).

¹¹² *R. v. Swain*, [1991] 1 S.C.R. 933 [hereinafter *Swain*].

The first group covered by the regime is made up of accused that are found “not criminally responsible on account of mental disorder.” The second group constitutes individuals declared unfit to stand trial. The procedures for dealing with both are comparable, although the dispositions are applied in different circumstances.¹¹³

The concept of fitness to stand trial is fairly limited in scope. It does not relate to the determination of guilt or innocence or to the mental state or competency of the accused at the time the alleged offence was committed. Nor does it relate to the ability of the accused to make informed or rational decisions during the course of the trial. Rather, it relates only to the capacity of the accused to understand the proceedings and to instruct counsel for the purpose of the trial. In other words, an accused will be fit to stand trial if he/she has an “operating mind” for the purpose of the trial.

An accused person is presumed fit to stand trial unless otherwise established.¹¹⁴ If fitness is raised as an issue, it is generally, although not necessarily, raised prior to trial. An accused person may be found to be unfit to stand trial before or after the preliminary inquiry, after the trial begins, or during the course of the trial. An accused person may also become unfit throughout the course of the trial.

The Rationale for the Fitness Rule

When an accused has been charged with an offence on the basis that there is a reasonable likelihood of conviction, the question might be asked: why does the defendant’s fitness or competency to stand trial even matter? At a very basic level, the requirement for fitness exists to ensure fairness to the accused. Beyond the importance of fairness, one author has proposed three additional rationales for why competency of the accused to stand trial is important: 1) dignity; 2) reliability; and 3) autonomy.¹¹⁵

Dignity: a person who does not understand the nature and purpose of the proceedings against him is fit for neither prosecution nor punishment. To proceed against such a person offends the moral dignity of the criminal process because it does not treat the defendant as an accountable person, but rather an object of the state’s effort to carry out its promises.¹¹⁶

Reliability: beyond the need to maintain the dignity of the criminal process, if a person is incapable of meaningfully assisting in his defence it will undermine the reliability of the outcome. This is unfair to both the defendant and society’s interest in the integrity of the criminal process.¹¹⁷

¹¹³ See discussion, below, under the defence of mental disorder compared with the disposition of unfit to stand trial.

¹¹⁴ *Criminal Code*, *supra* note 1 at s. 672.22.

¹¹⁵ R.J. Bonnie, “The Competency of defendants with mental retardation to assist in their own defence” in *The Criminal Justice System and Mental Retardation*, *supra* note 3 at 102 [hereinafter Bonnie].

¹¹⁶ *Ibid.* at 102.

¹¹⁷ *Ibid.*

Autonomy: certain decisions related to the defence or disposition of a case must be made by the defendant. Because of this, some level of decisional competency is an inherent feature of any legal structure that prescribes client autonomy. If the criminal justice system did not require a basic level of decisional competency, the result would be a model of criminal adjudication in which guilty pleas could not be permitted and all decisions regarding the conduct and defence of the case would be made by counsel, not the defendant.¹¹⁸

For these reasons, along with the simple reason of fairness, it is imperative that the criminal process demand a minimal level of competency before an individual can be held to account for his actions. The question is whether the minimal level of competency that has been established for the purpose of the fitness rule is sufficient to protect the interests of accused persons with developmental disabilities.

Definitions

Unfit to Stand Trial

The fitness test, which was developed under the common law, is now codified in the *Criminal Code*:

“unfit to stand trial” means unable *on account of mental disorder* to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, *unable on account of mental disorder* to:

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel.¹¹⁹

The fitness test requires only that the accused have limited cognitive capacity to understand the process and to communicate with counsel.¹²⁰ Provided the accused possesses this limited capacity, it is not a prerequisite that he/she is capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his interests.¹²¹

The rationale for the fitness threshold was explained by the Ontario Court of Appeal. That court suggested that the “limited cognitive capacity” test strikes an effective balance between the objectives of the fitness rules and the constitutional right of the accused to choose his own defence and to have a trial within a reasonable

¹¹⁸ *Ibid.*

¹¹⁹ *Criminal Code*, *supra* note 1 at s. 2 (emphasis added).

¹²⁰ *R. v. Taylor* (1993), 77 C.C.C. (3d) 551 (Ont. C.A.) [hereinafter *Taylor*].

¹²¹ *Ibid.*

time.¹²² Although the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way, the principles of fundamental justice also require that a trial come to a final determination without undue delay. The court maintained that the adoption of too high a threshold for fitness will result in an increased number of cases in which the accused will be found unfit to stand trial even though the accused is capable of understanding the process and anxious for it to come to completion.¹²³

Mental Disorder

The concept of “unfitness” is predicated on the existence of a mental disorder. Mental disorder is defined under the *Criminal Code* as a “disease of the mind.”¹²⁴ Disease of the mind has been defined by the Supreme Court of Canada as “any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.”¹²⁵ It has also been defined as including “any medically recognized mental disorder or mental illness that might make a person unable to appreciate the nature and quality of his or her act, but excludes transient mental problems caused by external factors such as violence or drugs.”¹²⁶

The concept of “disease of the mind” has been broadly defined so as to include the impaired cognitive ability or mental retardation suffered by the accused.¹²⁷ As such, mental disorder is not limited to circumstances of mental illness for the purposes of the fitness disposition. Indeed, it has been applied to cases involving accused persons diagnosed with permanent mental disabilities such as Downs Syndrome,¹²⁸ mild mental retardation where the cognitive ability of the accused was inhibited by his IQ which was between 58-68,¹²⁹ and cases involving fetal alcohol syndrome.¹³⁰

It is important to note that a finding of unfitness will not simply be determined by the existence of a mental illness, disability, or a particular I.Q. For the purposes of the *Criminal Code*, “fitness” is a legal concept — not a medical one — and determinations of its existence are guided by the legal test rather than medical assessments (although medical evidence will usually form part of the basis on which the trier of fact must reach his decision).¹³¹ To that end, the court must be satisfied, first, that the accused has a mental disorder and second, that an accused does not meet the legal test for fitness on account of that mental disorder. For instance, in one case where the accused was found unfit to stand trial, the court commented that the accused demonstrated no

¹²² *Ibid.* at 567.

¹²³ *Ibid.* at 561.

¹²⁴ *Criminal Code*, *supra* note 1 at s. 2.

¹²⁵ *Cooper v. R.* (1979), 13 CR (3d) 97, 51 CCC (2d) 129 at 144 (SCC) [hereinafter *Cooper*].

¹²⁶ *R. v. Oakley* (1986), 24 CCC (3d) 351, 13 OAC 141.

¹²⁷ *R. v. M.S.R.* (1996), 112 C.C.C. (3d) 406 (Ont. Gen. Div.) at 408 [hereinafter *R. v. M.S.R.*].

¹²⁸ *R. v. Demers*, [2004] 2 S.C.R. 489.

¹²⁹ *R. v. M.S.R.*, *supra* note 127.

¹³⁰ *R. v. W.A.L.D.*, [2002] S.J. No. 221 (Sask Prov. Ct.) [hereinafter *R. v. W.A.L.D.*]; *R. v. T.J.*, *supra* note

11.

¹³¹ *Cooper*, *supra* note 125 at 140.

understanding of the nature of the proceedings conducted to determine his fitness to stand trial, he did not have the ability to instruct his lawyer and participate in court proceedings with understanding, he had no concept of the roles played by the Crown, defense counsel or the judge, and there was real doubt as to his ability to receive information and communicate his instructions to his counsel on even the most basic level.¹³²

Application of the Fitness Procedure to Persons with Developmental Disabilities

A disposition of unfit to stand trial does not result in an automatic acquittal or a discharge of the accused. As a result, the accused can be tried for the same alleged offence at a later date upon becoming fit.¹³³ However, in an effort to prevent the unjustified detention of unfit individuals, the Crown must adduce sufficient evidence to put the accused on trial every two years until the accused is found either fit to be tried or is acquitted because the Crown cannot establish a *prima facie* case.¹³⁴ These safeguards are designed to ensure that an unfit accused (who has not been tried and is factually innocent) is not subject to detention in the same manner as an accused who has been tried and found to have committed the criminal act but who was found not guilty by reason of mental disorder.¹³⁵

In spite of these periodic requirements on the Crown to establish a *prima facie* case, the liberty of persons found unfit to stand trial was, until recently, significantly constrained because of the inability of the court to grant an absolute discharge in these cases. Although the *Criminal Code* gave authority to a court or review board to grant an absolute discharge of offenders who are found not criminally responsible by reason of mental disorder (provided the accused is not a significant threat to the safety of society),¹³⁶ the same authority did not exist with respect to an accused person found unfit to stand trial. This incongruence resulted in a substantial unfairness for persons with permanent disorders who were not likely to ever become fit to stand trial. In the case of a person with a developmental disability whose condition is usually permanent and not treatable, a finding of unfit to stand trial could be tantamount to a life sentence.

In response to this unfairness, the Supreme Court of Canada recently held that the failure of the *Criminal Code* to provide for the absolute discharge of persons found unfit to stand trial due to a permanent mental disorder was a violation of section 7 of the *Charter*.¹³⁷ As a result, the provision was declared invalid and parliament was given one year to amend the impugned provision so that persons found unfit to stand trial due to a permanent mental disorder could be discharged where they are not a significant

¹³² *R. v. W.A.L.D.*, *supra* note 130 at para 46.

¹³³ Although the burden of proof shifts to the person seeking to establish that the accused is fit: *Criminal Code*, *supra* note 1 at s. 672.32.

¹³⁴ *Ibid.* at s. 672.33.

¹³⁵ K. Roach, *Criminal Law* (Concord, Ontario: Irwin Law, 1996) at 143 [hereinafter Roach]. The disposition of “not guilty by reason of mental disorder” will be discussed in more detail, below.

¹³⁶ *Criminal Code*, *supra* note 1 at s. 672.54.

¹³⁷ *R. v. Demers*, [2004] 2 S.C.R. 489.

threat to the safety of the public.¹³⁸ Of course, in the case of unfit persons who may become fit, there is still a risk of indeterminate detention, but this circumstance is less relevant to accused persons with developmental disabilities because of the permanent nature of their disabilities.

Viewed from the perspective of persons with developmental disabilities, this finding of unconstitutionality by the Supreme Court significantly advances their rights in the criminal process by ensuring that they will not be indefinitely detained or subject to the authority of the state following a finding that they are unfit to stand trial.

Competency to Proceed Versus Decisional Competency

In spite of the recent advancement of the legal rights of persons with developmental disabilities who are found unfit to stand trial, there are still concerns regarding the applicability of this disposition to this group. While developmental disabilities can be legally characterized as a mental disorder for the purpose of the fitness test, only developmental disabilities that are severe in nature are likely to attract this disposition. Indeed, the stringency of the operating mind test arguably delimits the application of the fitness rule to all but the most severe developmental disabilities. As a result, in order for this mechanism to safeguard the rights of persons with developmental disabilities in the criminal process, a lower threshold of competency for meaningful participation in the trial process needs to be acknowledged.

As noted above, the fitness rule does not require that an individual be capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his interests.¹³⁹ This is a low threshold for establishing competency for the purpose of trial — a threshold that many, if not all but the most severely disabled, would meet.

For individuals who are developmentally disabled but who nonetheless meet this threshold, the fairness of adjudication depends largely on the ability and inclination of defence counsel to recognize and compensate for the client's limitations. Unfortunately, the pressures to cut corners in a criminal legal aid case are undeniable. Furthermore, the risks of inadequate representation are magnified, first, because the client is in no position to monitor the lawyer's performance and second, because lawyers are likely to spend less, rather than more, time interviewing clients who are developmentally disabled — the opposite of what is really needed.¹⁴⁰ As a result, important facts may be masked or distorted. Also, as with police investigations, persons with developmental disabilities may act as though they understand something even when they do not and may bias their responses in favour of what they believe the lawyer wants them to say.¹⁴¹

¹³⁸ Section 672.54 of the *Criminal Code*, *supra* note 1 has not yet been amended to reflect this direction.

¹³⁹ *Whittle*, *supra* note 74 at para 33 citing the Ontario Court of Appeal in *Taylor*, *supra* note 120.

¹⁴⁰ *Bonnie*, *supra* note 115 at 99-100.

¹⁴¹ *Ibid.* at 100.

On the basis of these limitations, competency should be seen as a multiple construct that requires different considerations at the various stages of the criminal process. Competency to make admissions of guilt, or other decisions related to the exercise of one's rights, is necessarily conceptually distinct from competency to assist counsel.¹⁴² Currently, however, neither the *Criminal Code* nor the case law recognizes the importance of this distinction. Instead, they reflect an overly simplistic concept of what it means to be competent to instruct counsel and stand trial.

3.4.4 Trial – Determination of Guilt or Innocence

Overview

As outlined thus far, there are a number of procedural and strategic alternatives in the criminal process that may occur early on rendering a trial and a determination of guilt or innocence unnecessary. For instance, an individual may be diverted from the criminal process, an accused may be found unfit to stand trial, or an accused may plead guilty to the charges in which case he/she will bypass the trial procedure and proceed directly to the sentencing hearing.

Where none of these alternatives apply and the accused pleads innocent, the matter will proceed to trial. It is during the trial stage of the procedure that the substantive aspects of the specific criminal offence will be scrutinized, including the specific elements of the offence and any defences to the charges. It is the proof of these elements, or lack thereof, which will determine the guilt or innocence of the defendant. This is also the context where the "all or none" nature of these concepts becomes evident and the shortfalls and biases of the substantive criminal law are exposed.

The following topics will be considered in this section: 1) the defence of mental disorder; 2) the elements of a crime that must be proved in order to establish guilt, including *actus reus* (the prohibited act) and *mens rea* (intent); 3) the differences between the degrees of intent in the *Criminal Code*; and 4) the concept of diminished responsibility. Each of these topics will be examined vis-à-vis their relationship to persons with developmental disabilities. Fetal Alcohol Spectrum Disorder and its related cognitive impairments will also be specifically considered from the perspective of its impact on an individual's capacity for criminal responsibility.

Defence of mental disorder

Generally

In 1992 the insanity defence was renamed the mental disorder defence, and the verdict of not guilty by reason of mental insanity was renamed the verdict of "not criminally responsible by reason of mental disorder" (NCRMD). A successfully argued mental disorder defence creates a special verdict. There are two requirements that

¹⁴² *Ibid.* at 101.

must be met before a verdict of not criminally responsible on account of mental disorder can be rendered. First, it must be established that the defendant committed the act or made the omission that formed the basis of the offence charged. Second, it must be established that the defendant, at the time of the act or omission, suffered from a mental disorder which rendered him incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Criminal Code Provisions

Section 16(1) of the *Criminal Code* provides for mental disorder defence. It states that:

No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

The *Criminal Code* also stipulates that each person is presumed not to suffer from a mental disorder until otherwise proved.¹⁴³ This means that the burden is on the accused person to prove a mental disorder and create a reasonable doubt as to criminal responsibility.

The *Criminal Code* stipulates that a judge or jury may render a verdict of NCRMD after finding that an accused committed the act but was at the time suffering from mental disorder so as to be exempt from criminal responsibility.¹⁴⁴ Once this verdict is entered against an accused, the accused will not be found guilty or convicted of the offence, nor can the accused be charged again with the same offence.¹⁴⁵

Although the special verdict results in a finding of not guilty, the defendant is nonetheless subject to a disposition by the court or by a review board.¹⁴⁶ Possible dispositions include an absolute discharge (where the accused is not a significant threat to public safety), a conditional discharge (i.e., probation order), or detention of the accused in custody in a hospital.¹⁴⁷ Disposition orders cannot include treatment as a condition unless the accused consents to the treatment,¹⁴⁸ although a special application may be made to court for an order directing the treatment and detention of the accused.¹⁴⁹

¹⁴³ *Criminal Code*, *supra* note 1 at s. 16(2).

¹⁴⁴ *Ibid.* at s. 672.34.

¹⁴⁵ *Ibid.* at s. 672.35(a).

¹⁴⁶ *Ibid.* at ss. 672.45 and 672.47. The same provisions and rules apply to a person who has been found unfit to stand trial under s. 672.22.

¹⁴⁷ *Ibid.* at s. 672.54.

¹⁴⁸ *Ibid.* at s. 672.55.

¹⁴⁹ *Ibid.* at s. 672.58.

NCRMD Compared to Unfit to Stand Trial

Although both the mental disorder defence and the plea of unfit to stand trial are contingent on the existence of a “disease of the mind,” the two dispositions are functionally and conceptually distinct.¹⁵⁰

First, while the tests for both are legal in nature and based on a functional assessment of capacity rather than a medical diagnosis, the measures for each are distinct. In order to establish unfitness the accused must be unable to *understand the proceedings and consequences of the proceedings*. In contrast, the mental disorder defence requires that a person be *incapable of appreciating the nature and quality of the criminal act itself or of knowing it was wrong*.

Secondly, the temporal application of capacity is also relevant. While the test for the mental disorder defence pertains to the state of the accused person at the moment in time when the offence was committed, the fitness test pertains to the state of the accused at the time of trial.

Thirdly, the purposes of the tests are substantively different. The fitness test does not speak to culpability vis-à-vis the alleged offence, but instead pertains to the capacity of the accused to exercise his constitutionally guaranteed legal rights at the time of trial. To that end, the plea of unfitness can be raised as an alternative to a plea of guilty or innocent. In contrast, the mental disorder defence is an excuse for guilt. Although the accused committed the act, the defence operates as an exemption from criminal liability and is predicated on an incapacity for criminal intent. The principal issue is whether the accused person had the capacity to know his act or omission was wrong.¹⁵¹ Thus, while the fitness test pertains to procedural fairness, the defence of mental disorder addresses the issue of whether the accused is criminally responsible for the offence committed.

Is it possible for a person who has been found fit to stand trial to successfully raise the defence of mental disorder, or for a person who is criminally responsible for the offence to be found unfit to stand trial? Although these scenarios are theoretically possible, they are more likely to arise where the cause of the disease of the mind is a mental illness where the status of the illness is subject to the ebbs and flow of regression and improvement, as opposed to a disease of the mind that is developmental in origin and therefore more likely to be constant.

The Capacity to “Appreciate the Nature and Quality”

Once it has been established that an accused suffers from a disease of the mind, he or she must still satisfy one of the two branches of the test under section 16(2) before the defence of mental disorder will be available. The first branch of the test, the incapacity to appreciate the nature or quality of an act, involves more than knowledge or

¹⁵⁰ Also see discussion, above, under Pre-trial: Fitness to Stand Trial.

¹⁵¹ *R. v. Chaulk* (1990), 2 CR (4th) 1 SCC at para 106 [hereinafter *Chaulk*].

cognition that the act is being committed. It pertains to the capacity to measure and foresee the consequences of the conduct.¹⁵² The Supreme Court of Canada has considered the meaning of this phrase and has held that it pertains to “an ability to perceive the consequences, impact, and results of a physical act.”¹⁵³ For instance, an accused may be aware of the physical character of his action (i.e., in choking) but may not necessarily have the capacity to appreciate that, in nature and quality, the act will result in death.

Conversely, the defence will not apply to individuals who, because of a mental disorder, are emotionally unable to appreciate the effect of their actions on the victim. The court has held that “[a]ppreciation of the nature and quality of the act does not import a requirement that the act be accompanied by appropriate feeling about the effect of the act on other people.”¹⁵⁴

Capacity to Know the Act is “Wrong”

The second branch of the mental disorder defence is the incapacity to know that the act is wrong. The Supreme Court of Canada has also considered the meaning of this phrase,¹⁵⁵ and has concluded that the concept of “wrong” is intended to be broader than factual knowledge of the law. As such, when considering the capacity of a person to know whether an act is wrong, the inquiry does not end upon the discovery that the accused knew that the act was contrary to the formal law. Although a person may be aware that an act is contrary to law, the person may be incapable, because of a disease of the mind, of knowing that the act is “morally wrong in the circumstances according to the moral standards of society.”¹⁵⁶ Thus, the real test is whether, in the circumstances of a particular case, the accused was rendered incapable, due to a mental disorder, from knowing the act was one that ought not have been done.¹⁵⁷ This would be the case, for example, if a person who suffers from a disease of the mind knows that it is legally wrong to kill but kills in the belief that it is in response to a divine order and therefore not morally wrong.¹⁵⁸

The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice about whether to do it or not. The inability to make a rational choice may result from a variety of mental dysfunctions.¹⁵⁹

¹⁵² Roach, *supra* note 135 at 151.

¹⁵³ Cooper, *supra* note 125 at 147.

¹⁵⁴ *R. v. Simpson* (1977), 35 CCC (2d) 337 (Ont. CA).

¹⁵⁵ Chaulk, *supra* note 151, and *R. v. Oommen*, [1994] 2 S.C.R. 507, 91 C.C.C. (3d) 8 [hereinafter *Oommen*].

¹⁵⁶ Chaulk, *ibid.* at para 107.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.*

¹⁵⁹ *Oommen*, *supra* note 155 at 17.

Application of Mental Disorder Defence to Persons with Developmental Disabilities

As noted earlier, the definition of disease of the mind has been broadly interpreted and applied so as to include developmental disabilities.¹⁶⁰ Given that the same “disease of the mind” definition also applies in the context of the defence of mental disorder, the mental disorder defence is presumably available to those suffering from developmental disabilities who meet the functional test described in section 16(2) of the *Criminal Code*.

In spite of the common definitions, it is difficult to assess the practical availability of the mental disorder defence to persons with developmental disabilities. Indeed, there appears to be a dearth of case law dealing with the application of this defence in the context of developmental disabilities.¹⁶¹

There are several possible explanations for why this defence is not more commonly utilized by persons with developmental disabilities in the trial process. First, there is some suggestion that pleading of this defence is reserved primarily for cases involving defendants with treatable mental disorders.¹⁶² Given that many developmental disabilities are not amenable to treatment, defence counsel, prosecutors and judges may see the mental disorder defence as inapplicable.¹⁶³

Second, the common law interpretation of “wrong”¹⁶⁴ in section 16(1) may create the inference that the mental disorder defence is more applicable in the context of a mental illness where an individual’s perception of right and wrong may be significantly distorted by reason of a delusion or other psychotic condition.

Third, persons with developmental disabilities are inclined to try and mask their limitations. As a result, they may view this defence as stigmatizing and may refuse to give the instructions to enable defence counsel to plead it. Given that the Crown cannot on its own raise this defence (until after the accused has otherwise been found guilty),¹⁶⁵ a refusal by the accused to consent to the use of this defence will preclude its

¹⁶⁰ See discussion under Fitness to Stand Trial, above.

¹⁶¹ Much of the case law dealing with defendants who have fetal alcohol spectrum disorder or another developmental disability is limited to the context of fitness hearings. The abundance of cases pertaining to fitness and the dearth of cases pertaining to the defence of mental disorder may suggest that accused persons with developmental disabilities are more likely to rely on the fitness provision than the mental disorder defence.

¹⁶² See, for instance, the comments of Judge Lilles Terre in *R. v. J.(T.)*, *supra* note 11 at para 3: “I am satisfied that T.J.’s mental disability is permanent and is unlikely to improve with time. His condition, unlike that described in many of the reported cases dealing with accused who have been found ‘not criminally responsible on account of mental disorder’ is not responsive to treatment, by drugs or otherwise.”

¹⁶³ Although, as evident above, this does not appear to be the case in relation to the plea of unfit to stand trial.

¹⁶⁴ See, for instance, *Chaulk*, *supra* note 151.

¹⁶⁵ See *Swain*, *supra* note 112 where the Supreme Court of Canada held that it is a fundamental principle of justice that the accused be able to control his own defence.

application. Notably, this same restriction does not exist in relation to an application for a fitness hearing which can be made by either the accused or the prosecution, or the court on its own motion.¹⁶⁶

Another possible reason for the apparent underutilization of this defence by developmentally disabled persons may be related to the nature of their impairment. The cognitive impairment suffered by persons with developmental disabilities, regardless of the severity, may not be perceived by the court and lawyers as significant enough to undermine the ability of an individual to appreciate the nature of his or her actions. Given the low threshold of cognitive functioning required to establish an operating mind in the context of the right to silence, the right to counsel, and the fitness test, it is probable that a similar minimal level of cognitive ability is required for an individual to be considered capable of appreciating the nature and quality of an act or of knowing that an act was wrong. Indeed, it may be presumed, albeit inaccurately, that cognitive impairment does not impact the ability of one to form a “moral judgment” (as required for the mental disorder defence) as much as it impacts one’s comprehension and ability to communicate (as required for the fitness test). However, this presumption reflects a clear misunderstanding about the nature of these disorders.

Fetal Alcohol Spectrum Disorder and the Defence of Mental Disorder

As noted in the introduction, FASD is a clinically recognized disability and is considered the single most common nonhereditary cause of mental retardation.¹⁶⁷ It is a lifelong disability that one does not “outgrow” and some FASD-related impairments may even intensify over time.¹⁶⁸ While the cognitive deficits generally associated with developmental disorders may compromise an individual’s capacity to appreciate the criminal nature of their actions or to know that an act is wrong, the effects of FASD raise additional concerns in this context.

FASD raises unique implications for almost all phases of the criminal justice process. As noted earlier, there are implications for police investigations and the voluntariness of admissions.¹⁶⁹ There are also concerns related to sentencing of defendants with FASD.¹⁷⁰ Arguably, however, the specific cognitive impairments associated with this disorder are compounded in the process of determining guilt. For this reason, FASD and some of the associated attributes will be highlighted in this discussion.

¹⁶⁶ *Criminal Code*, *supra* note 1 at s. 672.23.

¹⁶⁷ K. Stratton, C. Howe & F. Battaglia (eds.), *Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention and Treatment* (Washington, DC: National Academy press, 1996) cited in FASD: Moore & Green, *supra* note 47 at 99.

¹⁶⁸ *Ibid.* at 100.

¹⁶⁹ See discussion under Section 3.3, Police Investigations, above.

¹⁷⁰ See discussion under Section 3.6, Sentencing, below.

In a case dealing with an FASD affected defendant, the Yukon Territorial Court took the opportunity to summarize some of the forensically significant attributes of FASD. Some of the comments of the court are reproduced below in their entirety:¹⁷¹

The cognitive processes that most people use to regulate their conduct and to adapt to their social environment are located primarily in the anterior frontal lobe of the brain. The effect of alcohol on the fetal brain is such that this region does not develop sufficiently to allow the FAS individual to appropriately control his or her actions. As such, FAS patients tend to be impulsive, uninhibited, and fearless. They often display poor judgment and are easily distracted. Difficulties in perceiving social cues and a lack of sensitivity often cause interpersonal problems.

FAS patients have difficulties linking events with their resulting consequences. These consequences include both the physical, e.g., getting burned by a hot stove, and the punitive, e.g., being sent to jail for committing a crime. Because of this, it is difficult for these individuals to learn from their mistakes. Lacking sufficient cognizance of the threat or fear of consequences, the FAS patient is less likely to control his or her impulsive behaviour. Similarly, FAS individuals have trouble comprehending that their behaviour can affect others. As such, they are unlikely to show true remorse or to take responsibility for their actions. See *The Family Support Working Group of the Committee on Alcohol and Pregnancy and the Fetal Alcohol Support Network of Manitoba, Fetal Alcohol Syndrome/Effects, Booklet 1: Identifying FAS/FAE (1997)*.¹⁷²

The specific cognitive deficits highlighted by the court, namely, displays of poor judgment, lack of sensitivity, difficulties linking events with their resulting consequences, difficulties controlling impulsive behaviour, and difficulties comprehending the effect of their behaviour on others, all raise concerns in regard to the capacity of an individual with FASD to appreciate the nature or wrongfulness of their actions. Also noteworthy is the fact that 94% of FAS patients also exhibit mental health problems. They are prone to depression, panic disorders, hallucinations, and suicidal tendencies – all of which tend to worsen with age.¹⁷³ If an individual has difficulties controlling impulses and does not appreciate the impact their actions will have on other individuals, surely attribution of criminal responsibility becomes difficult, if not impossible to justify.

Based on this information, it would seem that the defence of mental disorder is highly relevant to situations involving persons with FASD. Apart from the general reasons canvassed above for the underutilization of this defence by persons with developmental disabilities, it is difficult to understand why the mental disorder defence is not more commonly relied upon by accused persons suffering from FASD. Perhaps the underutilization in this context implies a lack of understanding or awareness about the

¹⁷¹ *R. v. J.(T.)*, *supra* note 11. Although the application of the law in this case has been called into question, the discussion of FASD is still valid for the purpose of this discussion.

¹⁷² *Ibid.* at paras 11 and 12.

¹⁷³ See A.P. Streissguth and K.D. O'Malley, "Fetal Alcohol Syndrome/Fetal Alcohol Effects: Secondary Disabilities and Mental Health Approaches," weber.u.washington.edu/fadu/Tr.today.97.html and "Alcohol's Legacy: High Crime Rate Seen in FAS/FAE," (1997) 3 *Crime Times* 5. cited in *R. v. T.(J.)*, *supra* note 11 at para 13.

effects of FASD. Or, perhaps it reflects problems with identification of the disorder.¹⁷⁴ Indeed, although FASD was once considered identifiable based on morphological features, research reveals that even severe FASD-related neurological deficits are uncorrelated with facial abnormalities. As a result, an individual without any physical traits may be as functionally impaired as someone who is more readily identifiable based on physical characteristics.¹⁷⁵

Whatever the reasons for the underutilization of this defence by accused persons with FASD, it is clear that the high incidence of FASD, combined with its effects on an individual's capacity for criminal responsibility, warrant giving it significant attention. At a minimum, lawyers, judges, and criminal justice personnel require increased education to improve their identification and understanding of the disorder. Beyond this, it is necessary for government and policy makers to critically examine the means by which criminal responsibility is assessed in order to meaningfully address FASD and maintain the integrity and reliability of the criminal justice process.

Establishing Guilt

Distinction Between *Actus Reus* and *Mens Rea*

As a general rule, there are two elements that must be proved in order to establish liability for a criminal offence: the *actus reus* – the “prohibited act,” and *mens rea* – the mental element or the intention to commit the act.¹⁷⁶ The prohibited act is the physical act as defined in the relevant section of the *Criminal Code*. It is the outward and visible element. For many crimes, the act requirement is self-evident. For instance, stealing requires taking something belonging to someone else and assault is a positive act of applying force.

The mental element is the part of the offence that constitutes the guilty mind. It varies according to the nature of the crime. In reference to theft, for instance, the *mens rea* is an *intention* to deprive the owner of his property permanently, fraudulently and without claim of right. In some cases, intention is only required in relation to the commission of the act itself. In other cases, it may also be required in relation to probable consequences of the act. For this reason, defences such as mistake of fact and intoxication sometimes operate to raise a reasonable doubt as to whether the accused had the requisite mental element in relation to the probable consequences. Conversely, an accused who makes reasonable mistakes about the law, or who does not know about the law, will not have a defence because ignorance of the law is never an excuse for committing that offence.¹⁷⁷

¹⁷⁴ FASD: Moore & Green, *supra* note 47 at 100.

¹⁷⁵ *Ibid.* at 100.

¹⁷⁶ This is not the case with strict liability offences (i.e., regulatory offences) which do not have a mental element requirement.

¹⁷⁷ *Criminal Code*, *supra* note 1 at s. 19.

Degrees of *Mens rea*

A variety of degrees of intent are used in criminal offences. Sometimes the intent requirement is specified in the wording of an offence using phrases such as “intentionally,” “knowingly,” “recklessly,” or “negligently.” Each of these descriptions implies varying degrees of wilfulness. For many offences parliament has not comprehensively defined the level of intent required. As a result, the degree of *mens rea* to be proved in each case must still be inferred from the legislative definition of each separate offence.¹⁷⁸ The only means of arriving at a full comprehension of the level of intent is by a detailed examination of the definitions of particular crimes.

A distinction is often drawn between subjective and objective degrees of intent. A subjective mental element depends on what was in the particular accused’s mind at the time the criminal act was committed, while an objective mental element does not depend on the accused’s own state of mind, but on what a reasonable person in the circumstances would have known or done.¹⁷⁹ Subjective intent is often referred to as fault-based intent because the individual himself must act with a certain degree of intention in relation to the prohibited act. Conversely, objective intent is sometimes referred to as negligence because no specific intention is required on the part of the individual. Instead, the action of the accused is measured against the standard of a “reasonable person.” In other words, criminal liability attaches simply because the action of the accused was objectively unreasonable – there was a marked departure from the standard of care that a reasonable person would have observed in the accused’s situation¹⁸⁰ -not because the accused had any subjective foresight of the prohibited result.

The highest level of subjective *mens rea* requires that the accused acted with the intent or purpose to achieve the prohibited result, or wilfully pursued such a result.¹⁸¹ Knowledge is a slightly lower form of *mens rea* that is used for many possession-based offences.¹⁸² For example, in order to possess an illegal substance, a person must have knowledge of the nature of the substance.¹⁸³ Recklessness, which is a lower form of *mens rea* than intent, purpose, wilfulness or knowledge, is still a form of subjective *mens rea*. It is the conduct of one who sees the risk but who nonetheless takes the chance.¹⁸⁴ Recklessness can be distinguished from negligence which requires only that a reasonable person in the accused’s circumstances would have recognized the risk.¹⁸⁵ Recklessness is the *mens rea* required for most crimes where no mental element is mentioned in the definition of the crime.¹⁸⁶

¹⁷⁸ Roach, *supra* note 135 at 88.

¹⁷⁹ *Ibid.* at 9.

¹⁸⁰ *R. v. Creighton* (1993), 83 CCC (3d) 346 (SCC) [hereinafter *Creighton*].

¹⁸¹ Roach, *supra* note 135 at 94.

¹⁸² *Ibid.* at 97.

¹⁸³ *R. v. Beaver* (1957), 118 CCC 129 (SCC).

¹⁸⁴ *R. v. Sansregret* (1985) 18 CCC (3d) 223 at 233 (SCC).

¹⁸⁵ *O’Grady v. Sparling* (1960), 128 CCC 1 at 13 (SCC).

¹⁸⁶ *R. v. Buzzanga* (1979), 49 CCC (2d) 80 at 91 (Ont. C.A.).

Although most crimes require proof of a subjective fault element, there are many that do not. For instance, the offences of unlawfully causing bodily harm,¹⁸⁷ unlawful act manslaughter,¹⁸⁸ and careless use of a firearm¹⁸⁹ require only an objective level of intent. This is a dramatic aspect of the criminal law because although the individual may not have acted with any subjective criminal intention, those convicted of these offences are subject to the potential of a serious penalty.

The Implications of Objective *Mens Rea* for Persons with Developmental Disabilities

The growing acceptance by parliament and the courts of an objective *mens rea* for criminal offences is particularly problematic for persons with developmental disabilities. The central issue related to the mental element can be defined as whether and how to adjust the objective standard so that it does not apply to those individuals who cannot reasonably be held responsible for satisfying that standard, while not collapsing objective standards into subjective ones.¹⁹⁰

While the subjective intent requirement operates to insulate from criminal liability those persons who are not capable of forming the requisite intent to commit the specific crime, the same cannot be said of the objective standard. In contrast, the application of an objective mental element renders those same persons vulnerable to criminal liability, whether they are deserving of punishment or not, because their actions are measured against the actions of a reasonable person in their position. This construction and application of the law is arguably biased against persons with developmental disabilities who may not function or exercise judgement to the standard of the “reasonable person,” but whose actions are nonetheless judged according to that standard.

The concern regarding the constitutionality of the objective *mens rea* has not been lost on the courts. The Supreme Court of Canada has debated this very issue only to ultimately reason in favour of the constitutionality of an objective *mens rea*.¹⁹¹ More specifically, the court has also debated the issue of whether the objective *mens rea* should contemplate the unique characteristics of an accused.¹⁹² On more than one occasion Chief Justice Lamer advocated that the objective standard in any given case must be modified to make a general allowance for factors which are particular to the accused, such as youth, mental development, and education.¹⁹³

While Chief Justice Lamer’s interpretation of the objective *mens rea* would have gone a long way towards recognizing the rights of persons with developmental disabilities in the criminal justice process, his position was conclusively rejected in 1993. The ongoing debate about the nature of the objective *mens rea* was put to rest when

¹⁸⁷ *R. v. DeSousa* (1992), 76 CCC (3d) 124 (SCC) [hereinafter *DeSousa*].

¹⁸⁸ *Creighton*, *supra* note 180.

¹⁸⁹ *R. v. Gosset* (1993), 83 CCC (3d) 494 (SCC).

¹⁹⁰ Roach, *supra* note 135 at 101.

¹⁹¹ *DeSousa*, *supra* note 187.

¹⁹² See, for example, *R. v. Tutton*, [1989] 1 S.C.R. 1392 [hereinafter *Tutton*].

¹⁹³ *Tutton*, *ibid*.

the Supreme Court considered the applicable standard of *mens rea* for the specific offence of unlawful act manslaughter in *R. v. Creighton*.¹⁹⁴ In *Creighton*, the unlawful act involved the trafficking of a narcotic which resulted in the death of the recipient of the narcotic. Although the accused did not have the intention to kill, the majority of the court endorsed a version of objective *mens rea* that is not concerned with what the accused intended or knew. The result of this finding was a conviction of manslaughter. The court reasoned that the fault of objective *mens rea* lies in failure of the accused to direct his mind to a risk which the reasonable person would have appreciated. The court stated that “objective *mens rea* is not concerned with what was actually in the accused’s mind, but with what should have been there, had the accused proceeded reasonably.”¹⁹⁵

The position taken by the majority was not without opposition. The minority of the court in *Creighton* were of the opinion that the “reasonable person” used to determine objective liability should be invested with “any human frailties which might have rendered the accused incapable of having foreseen what the reasonable person would have foreseen.”¹⁹⁶ Human frailties were defined as “personal characteristics habitually affecting an accused’s awareness of the circumstances which create risk.”¹⁹⁷ Unfortunately for the rights of persons with developmental disabilities, the majority of the court rejected this approach on the basis that it “personalizes the objective test to the point where it devolves into a subjective test, thus eroding the minimum standard of care which parliament has laid down by the enactment of offenses [requiring an objective *mens rea*].”¹⁹⁸ The court was not oblivious to the concerns about convicting the morally innocent, but in weighing the policy considerations, favoured the principle of universality and cited another decision where the following statement was made:

The underlying principle here is the universality of rights, that all individuals whose actions are subjected to legal evaluation must be considered equal in standing. Indeed, it may be said that this concept of equal assessment of every actor, regardless of his particular motives or the particular pressures operating upon his will, is so fundamental to the criminal law as rarely to receive explicit articulation. However, the entire premise expressed by such thinkers as Kant and Hegel [...] supports the view that an individualized assessment of offensive conduct is simply not possible. If the obligation to refrain from criminal behaviour is perceived as a reflection of the fundamental duty to be rationally cognizant of the equal freedom of all individuals, then the focus of an analysis of *culpability* must be on the act itself (including its physical and mental elements) and not on the actor. The universality of such obligations precludes the relevance of what Fletcher refers to as “an individualized excusing condition.” [Emphasis in original.]¹⁹⁹

¹⁹⁴ *Creighton*, *supra* note 180.

¹⁹⁵ *Ibid.* at 375.

¹⁹⁶ *Ibid.* at 359-560.

¹⁹⁷ *Ibid.* at 362-363.

¹⁹⁸ *Ibid.* at 381-382.

¹⁹⁹ *Perka v. The Queen*, [1984] 2 S.C.R. 232 at 270-71 cited in *Creighton*, *ibid.*

According to the majority then, the criminal law is based on a presumption of rationality and the human capacity to overcome the impulses of one's own will. Based on this reasoning, the court concludes that the only personal characteristics of the accused that are relevant in offences with an objective *mens rea* are those characteristics that establish the incapacity of the accused to appreciate the nature and quality of the risk or conduct. The court stated:

Mental disabilities short of incapacity generally do not suffice to negative criminal liability for criminal negligence. The explanations for why a person fails to advert to the risk inherent in the activity he or she is undertaking are legion...

Provided the capacity to appreciate the risk is present, lack of education and psychological predispositions serve as no excuse for criminal conduct, although they may be important factors to consider in sentencing.²⁰⁰

Although the law recognizes incapacity once it reaches the threshold necessary to establish the mental disorder defence, it is clear that any unique attributes of an accused which might distinguish him from the "reasonable person" are not relevant for the purpose of establishing whether the accused had the requisite mental element in relation to an objective intent offence.

This status of the law is troubling for several reasons, the most notable of which is that it presumes a level playing field amongst the ability of individuals to exercise reasonable judgments about risky activity. However, this presumption may not be true of persons with developmental disabilities, in particular, those with fetal alcohol spectrum disorder. Nonetheless, where the behaviour of an individual markedly departs from a standard of reasonable care and results in a prohibited act under the *Criminal Code*, the individual will be held criminally responsible. This is so regardless of the existence of any cognitive, psychological, environmental, or social factors that may appear to erode the individual's capacity to make reasoned decisions. Indeed, nothing short of incapacity to appreciate the nature and quality of his actions will mitigate the responsibility of a person in this context. This harsh statement of the law, which is intended to be softened by the availability of the mental disorder defence, is compounded by the fact that persons with developmental disabilities appear less inclined to raise the mental disorder defence in the first place.²⁰¹ As a result, this group of offenders may be disproportionately vulnerable to inequitable treatment in the determination of guilt.

Diminished Responsibility

The concept of diminished responsibility reflects the reality that there are wide variations in the mental and physical capacities of individuals and that this variation is relevant to criminal responsibility for unlawful conduct. While the capacity of some

²⁰⁰ Creighton, *ibid.* at 390-391.

²⁰¹ See discussion under Defence of Mental Disorder, above.

individuals will be wholly unimpaired at the time of unlawful conduct, the capacity of others may be impaired to some degree or completely impaired. The doctrine of diminished responsibility presumes that where an individual is not wholly unimpaired, the individual cannot be wholly responsible for their harmful conduct.²⁰²

Although the defence of diminished responsibility is not formally recognized in the *Criminal Code*, it is nonetheless indirectly relevant to the offence of homicide.²⁰³ For instance, evidence of a mental disorder that falls short of that required to establish a “not criminally responsible” defence may be relevant for the purpose of establishing the seriousness of the homicide offence.²⁰⁴ In a first- or second-degree murder charge the Crown must prove that the accused acted with subjective foresight of death. An individual who does not possess the requisite capacity to purposefully or intentionally cause another’s death cannot be convicted of these offences, but may still be found to have the *mens rea* necessary for manslaughter.

Some authors have argued that the analysis of diminished responsibility should be relevant to any offence requiring specific intent.²⁰⁵ Although the *Criminal Code* does not formally recognize “general” or “specific” intent offences, the common law has recognized distinction between certain types of offences.²⁰⁶ The distinction is relevant because there are certain defences, for instance, intoxication, which only apply to specific intent offences. The reason for the differential application of defences is that specific intent offences require the mind to focus on an objective further to the immediate one at hand, while general intent offences require only a conscious doing of the prohibited act.²⁰⁷ For instance, the offence of breaking and entering with the intent to commit an indictable offence is a specific intent offence because it requires proof of an ulterior intent beyond the immediate prohibited act. Another example is the offence of assault to resist or prevent arrest because it requires the intent to resist arrest. Absent the ulterior intent, the accused would be convicted of assault simpliciter, which is a general intent offence.

Other examples of specific intent offences include murder, theft, robbery, aiding and abetting a crime, and attempted crimes because they require proof of an ulterior objective beyond the immediate act. Examples of general intent offences include manslaughter, assault, sexual assault, assault causing bodily harm, and mischief because they require proof only of intent in relation to the prohibited act. Notably, crimes based on an objective mental element are also generally considered to be general intent offences.²⁰⁸

²⁰² See, for instance, the model proposed by R.C. Topp, “A concept of diminished responsibility for Canadian criminal law” (1975) 33 UoT Fac. L.Rev. 205.

²⁰³ *Criminal Code*, *supra* note 1 at s. 222.

²⁰⁴ N. Harris, “The utility of a diminished responsibility defence: Can an accused be “half responsible” for murder?” (2002) 60 Advocate (BC) 211 at 216.

²⁰⁵ See, for instance, C. Nowlin, “Taking Aboriginal justice beyond Gladue: Canadian criminal law in conflict with human rights” 67 Sask. L.Rev. 59 at 81 [hereinafter Nowlin].

²⁰⁶ See *Director of Public Prosecutions v. Beard* [1920] A.C. 479 (H.L.).

²⁰⁷ *Bernard v. R.* (1988), 44 CCC (3d) 570 (SCC).

²⁰⁸ *Roach*, *supra* note 135 at 127.

It has been argued that the defence of diminished responsibility should be available to all crimes of specific intent.²⁰⁹ If the accused person does not meet the incapacity test for the mental disorder defence, there may nonetheless be sufficient concerns about whether the individual had the capacity to make a reasoned free choice about his actions which could call into question the basis for criminal responsibility. The application of diminished responsibility, while still recognizing the potential effect of developmental disabilities on the ability of individuals to make well informed choices about their actions, could still result in convictions for lesser included offences where available. It is argued that the application of this doctrine will not compromise the safety of society because many persons convicted of general intent offences are not particularly dangerous to society.²¹⁰ Nor will it result in unjustified acquittals because evidence introduced to support diminished responsibility will seldom negate *mens rea* altogether.²¹¹ Lastly, the application of the doctrine in this context will help to ensure important constitutional rights of all defendants without alterations to the law that might otherwise compromise the conviction and incarceration of dangerous offenders.”²¹²

Some proponents of the concept of diminished responsibility have gone further and argued that doctrine should be widely applied to remedy systemic problems associated with the notion of individual responsibility and the artificiality of “all or none” notion of criminal responsibility.²¹³ One author, Nowlin, suggests that the doctrine of diminished responsibility should be used to acknowledge the social causes of crime and to recognize that individuals are not solely responsible for the commission of crimes. He states:

[w]hen addicted or mentally impaired individuals break the law to cope with the hopelessness and pain associated with the vicious cycle of their homelessness, economic destitution, illiteracy, and substance addictions, they are far from being legally irresponsible, in the sense understood by the traditional “insanity defence” analyses, but they are equally far from deserving retribution.²¹⁴

In support of his position, Nowlin points to the inconsistency in the criminal justice process wherein judges routinely recognize social and biological circumstances as “mitigating factors” at the pre-trial (judicial interim release) and post-trial (sentencing) stages of the criminal process, yet the same judges will readily convict an individual or accept a guilty plea where the same factors are in issue.²¹⁵ Nowlin argues that the recognition of these factors for the purpose of assessing blameworthiness at the sentencing stage is irreconcilable with findings of guilt where the same factors are

²⁰⁹ S.J. Morse, “Undiminished confusion in diminished capacity” (1984) 74 J. Crim. L. & Criminology 1 at 14 [hereinafter Morse].

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ Nowlin, *supra* note 205 at 78-79.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.* at 75.

present. He suggests that the doctrine of *mens rea* could become more coherent “if it accustomed itself to the idea that individual behaviour, including criminal behaviour, is not categorically autonomous, rational and free, but is influenced by a number of social, political, economic, emotional and cultural circumstances”²¹⁶ and concludes that the doctrine of diminished responsibility is a realistic vehicle to accomplish this goal.

In spite of the arguments in favour of accepting the doctrine of diminished responsibility into the lexicon of the criminal law - in either a limited or broad sense – neither the courts nor parliament has taken steps to adopt this concept. Although the role of diminished capacity has been expansively canvassed in the United States, it has not been adopted there either. In fact, in the early 1980s, the *Model Developmentally Disabled Offenders Act* (the *Model Act*) was proposed by the American Bar Association’s Commission on the Mentally Disabled.²¹⁷ The *Model Act* would have denied defendants with mental retardation access to the insanity defence, instead leaving them to argue diminished capacity or lack of *mens rea*. This position was advocated on five grounds. First, it was argued that diminished capacity focuses on the legal issues most likely to be affected by the impairments related to developmental disabilities. Second, it avoids many of the procedural complexities which accompany the insanity defence (for instance, bifurcation of the trial). Third, diminished capacity could often be established without the use of experts. Fourth, rather than the all or nothing imperative of the insanity defence, diminished capacity recognizes that the degree to which a developmental disability affects the ability to form the state of mind required to commit a criminal offence will vary from individual to individual and therefore, that the degree of culpability should also vary. And fifth, it was anticipated that providing separate defences for developmental disabilities and mental illnesses would help to increase the awareness of the distinction between these conditions.²¹⁸ In spite of these persuasive arguments, the Model Act was not proclaimed in the United States.

While the formal concept of diminished responsibility has been rejected in Canada and the United States, the defence of diminished responsibility does exist in England,²¹⁹ Scotland²²⁰ and some jurisdictions in Australia.²²¹ However, even in these jurisdictions it is restricted in application to the offence of murder. Thus, there do not appear to be any jurisdictions that have embraced the concept of diminished responsibility to the extent advocated in the American Bar Association. Nonetheless, the ABA proposal is compelling and should not be dismissed without specific consideration in the Canadian context. While it will not likely see favour in the form advocated by Nowlin, nor to the extent proposed by the ABA, it may nonetheless have application in the Canadian legal lexicon in view of other factors such as objective *mens*

²¹⁶ *Ibid.* at 60.

²¹⁷ See B. Sales, “Model Developmentally Disabled Offenders Act,” in *Disabled Persons and the Law: State Legislative Issues* (New York: Plenum Press, 1982).

²¹⁸ W. L. Fitch, “Mental Retardation and Criminal Responsibility” in *The Criminal Justice System and Mental Retardation*, *supra* note 3 at 131 [hereinafter Fitch].

²¹⁹ *Homicide Act*, 1957 (U.K.), c. 11, s. 2.

²²⁰ *Galbraith v. HM Advocate* 2002 JC 1 at 21-22.

²²¹ *Criminal Code Act* 1899 (Queensland) section 304A (added 1961); *Crimes Act* 1900 (New South Wales) section 23A (added 1974); and *Criminal Code Act* 1983 (Northern Territory) section 37.

rea and mandatory minimum sentences²²² which do not provide for any account of incapacity short of a mental disorder defence.

3.5 Evidence

3.5.1 Overview

The law of evidence deals largely with the admissibility and exclusion of evidence at trial. Information can be excluded for a variety of reasons. It may be excluded for competing considerations of policy or principle, as with unconstitutionally obtained evidence, or it may be excluded because of practical considerations related to the efficiency of the trial process.

Most of the law of evidence consists of common law rules. There is also federal and provincial legislation that modifies some of the common law rules and establishes procedures for the admission of evidence. The rules of evidence relate to a range of issues from relevance and materiality, to hearsay, to character evidence, to similar fact evidence. For the purpose of considering the rights of persons with developmental disabilities in the criminal justice system, it is not necessary to canvass the rules of evidence in their entirety. Instead, the discussion will be limited to the rules dealing with self-incrimination, compellability and competence to testify.

3.5.2 Section 24 of the Charter

Much of the law of evidence as it relates to persons with developmental disabilities has already been considered in the context of police investigations. Most notably, the law relating to self-incrimination and the right to silence was thoroughly explored in the discussion on constitutionally guaranteed rights.²²³ Although the rules of evidence govern the admissibility and exclusion of evidence *at trial*, it is those same rules that will govern police conduct in the investigation stage because evidence that has been unconstitutionally obtained runs the risk of being excluded, thereby decreasing the likelihood of a successful prosecution. As such, police have a vested interest in ensuring that evidence obtained by them will be admissible for the purpose of trial.

The previous discussions have focused on requirements that must be met by police in order to avoid arguments by defence counsel of a *Charter* violation and subsequent arguments that evidence should be excluded on that basis. However, evidence that has been unconstitutionally obtained will not be automatically excluded

²²² See, for example, *R. v. Morrisey*, [2000] 2 S.C.R. 90 where the SCC declared as constitutional the 4 year mandatory minimum sentence for the offence of criminal negligence causing death with a firearm (in spite of the objective intent requirement for the offence). As a result of this decision, the sentencing process for crimes involving mandatory minimum sentences, which would normally contemplate the issues related to cognitive impairment of the offender, is not applicable.

²²³ See Section 3.3, Police Investigations, above.

but is instead subject to a further test for the purpose of determining whether it should be admitted.

Section 24 of the *Charter* sets out the mechanisms for enforcing *Charter* rights. In particular, section 24(2) deals with the exclusion of unconstitutionally obtained evidence. Section 24 provides as follows:

1. Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
2. Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

There is a plethora of case law dealing with section 24(2) and the rules for determining whether the admission of evidence “would bring the administration of justice into disrepute.” This review will not deal with the process or rules by which unconstitutionally obtained evidence is admitted or excluded. Rather, the focus has been and will continue to be on the protection afforded by the constitutional right itself.

Given that the law governing the right against self-incrimination and the right to silence has already been canvassed thoroughly, the discussion of evidence will be primarily limited to the rules related to competence and compellability of witnesses. The protection of witnesses against self-incrimination will also be touched on briefly as it pertains to the trial process.

3.5.3 Rules of Evidence

Protection of witnesses Against Self-incrimination

The *Canada Evidence Act*²²⁴ establishes rules regarding the admissibility and exclusion of evidence of witnesses. For the purpose of this discussion, it is important to distinguish between witnesses generally and the accused as a witness. Although an accused will become a witness if he/she makes the decision to testify on his own behalf, he/she is not required to do so. The privilege against self-incrimination is guaranteed by section 11(c) of the *Charter*. This right applies during the conduct of formal proceedings, such as bail hearings, preliminary inquiries, and trials and prevents the Crown from being able to compel an accused to testify as a witness in his own hearing. Section 11(c) of the *Charter* provides that:

²²⁴ R.S. 1985, c. C-5 [hereinafter CEA].

11. Any person charged with an offence has the right

...

- c) not to be compelled to be a witness in proceedings against that person in respect of the offence.

The privilege against self-incrimination as it applies to an accused person is distinct from the protection afforded to witnesses, generally, against self-incrimination. Witnesses in a formal proceeding cannot refuse to answer questions on the grounds that the answers may be self-incriminating. The CEA and provincial evidence acts recently removed the privilege of a witness to refuse to answer questions on the basis that the answers may be self-incriminating. Instead, these statutes now provide protection to individuals who are forced to reveal in testimony that they have committed offences and they are granted immunity against having the testimony used against them in a subsequent proceeding.²²⁵

Compellability

Previously, accused persons were disqualified from testifying in their own criminal prosecution because of their interest in the outcome. Subsection 4(1) of the CEA²²⁶ now permits accused persons to testify on their own behalf, although they are not compellable by the Crown.²²⁷

The choice of a defendant to testify on his own behalf should be carefully considered by the accused and his counsel as part of the defence strategy. Many defendants choose not to testify at trial, first, because there is a presumption of innocence. The accused need not speak to the charges in order to establish his lack of guilt because it is up to the Crown to prove the guilt of the accused beyond a reasonable doubt. Neither the judge nor jury can draw a negative inference from the choice of the accused to remain silent. The second reason an accused may choose not to testify is that once they become a witness they are open to cross-examination by the Crown. There is significant risk associated with cross-examination and given that the accused cannot be compelled to take this risk, it is generally considered a risk not worth taking.

²²⁵ *Ibid.* at s. 5. See also section 13 of the *Charter*, *supra* note 55 which constitutionalizes the immunity of witnesses from having incriminating evidence used against them at a subsequent proceeding, except in a prosecution for perjury or for the giving of contradictory evidence.

²²⁶ CEA, *ibid.*

²²⁷ Section 4(3) of the *Alberta Evidence Act* R.S.A. 2000, c. A-18 also provides that a party to a proceeding cannot be made to testify against himself in provincial prosecutions: "Nothing in this section makes the defendant in a prosecution under an Act of the Legislature compellable to give evidence for or against himself or herself."

Competence of a Witness to Testify

The CEA establishes the rules for dealing with a witness whose mental capacity is in question.²²⁸ It is doubtful whether an accused who has been deemed fit to stand trial in the first place would then be deemed to lack the mental capacity to give evidence under the provisions of the CEA. As such, it can be presumed that the capacity provisions of the CEA are more relevant to the testimony of compellable witnesses, rather than an accused.

The decision of an accused to testify on his own behalf is related to the competence of the accused. Yet again, the issue of an operating mind rears its head. If an accused has an operating mind sufficient to make him fit to stand trial, then he/she will be presumed capable of making the decision about whether to testify on his behalf. As noted earlier,²²⁹ the fitness test requires only that the accused have limited cognitive capacity to understand the process and to communicate with counsel.²³⁰ Provided the accused possesses this limited capacity, it is not a prerequisite that he/she is capable of exercising analytical reasoning in making a choice to accept the advice of counsel or in coming to a decision that best serves his interests.²³¹ As a result, there may be an increased risk that a person with a developmental disability will disregard the advice of counsel and choose to testify on his own behalf for the sake of being able to tell his side of the story.

The CEA also provides for accommodation of witnesses with mental disabilities who are nonetheless capable of giving evidence. Where a witness with a mental disability has the capacity to give evidence, but has difficulty communicating by reason of the disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.²³² The court may also conduct an inquiry to determine if the means by which a witness may be permitted to give evidence is necessary and reliable.²³³ Again, the degree to which this provision would be applicable to an accused with a developmental disability is questionable. However, it is possible that an accused person with a developmental disability may be more impaired in his capacity to express himself than in his actual cognitive abilities, and in these instances, accommodation would be made for that individual to testify by an alternate means.

Cross-examination of Previous Statements

Unlike the provisions related to competency, the provisions of the CEA relating to cross-examination of previous statements are relevant to the circumstances of persons with developmental disabilities. If an accused person makes a confession or provides

²²⁸ CEA, *supra* note 224 at s. 16.

²²⁹ See discussion under Section 3.4.3 dealing with Fitness to Stand Trial, above.

²³⁰ *Taylor*, *supra* note 120.

²³¹ *Ibid.*

²³² CEA, *supra* note 224 at s. 6(2).

²³³ *Ibid.* at s. 6(3).

an exculpatory statement during the course of a police investigation, the accused can be cross-examined on those statements should he/she decide to testify at trial. The CEA provides for the cross-examination of the accused as to his previous statements and specifies that the witness need not be given the opportunity to review the previous statements, whether they were made in writing or orally.²³⁴

In the case of a person with a developmental disability who may be subject to suggestibility, significant confusion could ensue in the course of his testimony if he/she is not reminded of his previous statements or given the opportunity to review them. This confusion could result in non-cogent testimony or it could result in the accused providing contradictory evidence. Although the CEA stipulates that if the cross-examination is intended to contradict the witness, the witness' attention must be called to the parts of the statement that are to be used for the purpose of contradicting the witness,²³⁵ this will not assist the developmentally disabled offender and may result in further confusion. Given the tendency of developmentally disabled persons to conceal their confusion and to try to please persons in authority, the accused may attempt to explain away the contradiction by providing additional information, he/she may simply agree to both statements without clarifying the discrepancy, or he/she may deny having made the original statement altogether. Regardless of the response, the credibility of the accused will be called into question.

Where the witness does make a contradictory statement, the judge may require the production of the original statement (whether it be audio, video, or in writing) for inspection and may make such use of it for the purposes of the trial as the judge sees fit.²³⁶ However, while the judge may examine the original statement for the purpose of assessing its authenticity, it is not open to the judge to examine it for its voluntariness. Indeed, it is the role of defence counsel to raise the issue of voluntariness and any *Charter* violations in a *voir dire* before the submission of the statement into evidence in the first place.

3.5.4 Summary of the Rules of Evidence in Relation to Persons with Developmental Disabilities

Beyond the specific protections afforded by constitutionally guaranteed rights, the rules of evidence do not afford any specific protection to accused persons with developmental disabilities. Indeed, the CEA stipulates the rules related to the testimony of witnesses. Given that an accused person cannot be compelled to testify on his own behalf, the application of the CEA to accused persons is constrained. Where an accused does waive his constitutional right not to testify, some of the provisions of the CEA will apply, particularly those related to cross-examination; however, the rules related to mental disability and the capacity to testify are likely to be trumped by the test of fitness under the *Criminal Code*.

²³⁴ *Ibid.* at s. 10.

²³⁵ *Ibid.*

²³⁶ *Ibid.*

3.6 Sentencing

3.6.1 Overview

The imposition of a sentence by the judge is one of the most critical points in the criminal justice system. It is this judgment that determines how, where, and under what conditions an offender will be dealt with. Consequently, regardless of whether the accused person has been found guilty or has plead guilty, no other portion of the criminal process rivals the sentencing process in terms of its potential effects on the accused person and impairment of liberty. The effect of sentencing is compounded when one considers the fact that developmentally disabled defendants are more likely to plead guilty, and therefore more likely to be sentenced, than defendants who are not developmentally disabled.²³⁷

Part XXIII of the *Criminal Code* deals with sentencing. It sets out the regime for alternative measures,²³⁸ the purpose and principles of sentencing,²³⁹ an overview of punishment generally,²⁴⁰ procedure and evidence for sentencing proceedings,²⁴¹ and all of the dispositions available in a sentencing proceeding.²⁴²

The sentencing procedure requires flexibility to ensure a result that is fit for both the offender and for the administration of criminal justice. To that end, parliament has rarely prescribed mandatory minimum sentences to be imposed following a finding of guilt for a particular offence. While there are a handful of offences that do carry mandatory minimum sentences, it is generally believed that judicial discretion is the best mechanism for ensuring a fit sentence.

Discretion is an important part of the sentencing process and judges are empowered to determine what constitutes a fit sentence in each case. Indeed, the Supreme Court has held that there is no such thing as a uniform sentence for a particular crime — sentencing is an inherently individualized process.²⁴³ While a system based on discretion has the advantage of individualized and, therefore, more appropriate sentences, the use of discretion also creates the potential for disparity in approach and in result. Until recently, the disparity problem was even more pronounced because the *Criminal Code* provided no guidance as to the objectives of sentencing or its relevant principles. Instead, judges were required to fill in the conceptual blanks as part of a discretionary exercise, relying on precedent to bring some consistency to the process. However, in 1996 the *Criminal Code* was amended to establish the purpose and principles of sentencing.

²³⁷ Brown & Courtless, 1967 cited in F.J. Laski, “Sentencing the offender with mental retardation: Honoring the imperative for intermediate punishments and probation” in *The Criminal Justice System and Mental Retardation*, *supra* note 3 at 138.

²³⁸ *Criminal Code*, *supra* note 1 at s. 717, previously discussed, above, under Section 3.4: Dispositions.

²³⁹ *Ibid.* at s. 718 – 718.2.

²⁴⁰ *Ibid.* at s. 718.3.

²⁴¹ *Ibid.* at ss. 720 – 729.

²⁴² *Ibid.* at s. 730 and following.

²⁴³ *R. v. Cam*, [1999] SCC.

3.6.2 Sentencing Provisions in the *Criminal Code*

Purpose and Principles

The *Criminal Code* provides that the fundamental purpose of sentencing is “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society.”²⁴⁴ It also provides that any sanction imposed must satisfy one or more of the following objectives:

- a) denouncement of unlawful conduct;
- b) deterrence of the offender and other persons from committing offences;
- c) separation of offenders from society where necessary;
- d) assisting in rehabilitating offenders;
- e) providing reparations for harm done to victims or to the community; and
- f) promotion of a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.²⁴⁵

The fundamental principle of sentencing is proportionality. A sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.²⁴⁶ The proportionality principle permits differences in severity of punishments only to the extent that these differences reflect variations in the degree of blameworthiness of conduct. One crime which is punished more than another is justified only to the extent that one crime is regarded as more serious than another.²⁴⁷

The *Criminal Code* also specifies a number of other principles that the court must consider when imposing a sentence. They include mitigating and aggravating circumstances, consistency (a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances), totality of sentence, incarceration as a last resort, and consideration of non-custodial sanctions, particularly in relation to aboriginal offenders.²⁴⁸

Although the *Criminal Code* provides a menu of objectives to guide the use of judicial discretion, it does not prescribe a hierarchy or means of prioritizing them. As a result, judges must determine the proper aims of sentencing decisions in any given

²⁴⁴ *Criminal Code*, *supra* note 1 at s. 718.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.* at s. 718.1.

²⁴⁷ A. Manson, P. Healy, & G. Trotter, *Sentencing and Penal Policy in Canada* (Toronto: Emond Montgomery, 2000) at 42 [hereinafter Manson, Healy & Trotter].

²⁴⁸ *Criminal Code*, *supra* note 1 at s. 718.2.

case. Further, while the amendments to the *Criminal Code* are basically a restatement of the sentencing aims previously established in the case law,²⁴⁹ they also reflect a new emphasis on restorative justice goals — goals which do not usually correlate with the use of prison as a sanction.

Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances are case specific factors considered by the sentencing judge that relate to the circumstances of the offence and the offender.

The *Criminal Code* identifies some of the aggravating circumstances to be considered by the court in fashioning a fit sentence. They include breach of trust, motives of prejudice or hate, and evidence that the offence was committed in the context of organized crime.²⁵⁰ The list is not exhaustive, however. Other judicially recognized aggravating factors include:

- Previous convictions;
- Actual or threatened violence or use of weapon;
- Cruelty or brutality;
- Substantial physical injuries or psychological harm;
- Offence was committed while individual was subject to judicially imposed conditions;
- Multiple victims or incidents;
- Group or gang activity;
- Impeding victim's access to justice system;
- Substantial economic loss;
- Planning and organization;
- Vulnerability of victim; and
- Deliberate risk taking.²⁵¹

²⁴⁹ *Ibid.* at s. 718.

²⁵⁰ *Ibid.* at s. 718.2.

²⁵¹ Manson, Healy & Trotter, *supra* note 247 at 143.

While no mitigating factors have been enumerated in the *Criminal Code*, there are a number of circumstances that are commonly accepted by the courts as mitigating factors:

- First time offender;
- Absence of previous convictions;
- Guilty plea and remorse;
- Evidence of impairment;
- *Evidence of emotional, physical, and psychological impairment;*
- Employment record;
- Provocation and duress;
- Delay in prosecution;
- Gap in criminal record and intermediate recidivist; and
- *Disadvantaged background.*²⁵²

Pre-sentence Report

The *Criminal Code* provides that a pre-sentence report may be ordered by the court for the purpose of assisting the court in determining whether the offender should be discharged (absolutely or conditionally) or sentenced.²⁵³ The report should contain information regarding the offender's age, maturity, character, behaviour, attitude, and willingness to make amends, and the offender's history of criminal dispositions, including the use of alternative measures.²⁵⁴

Sentencing Options

The *Criminal Code* provides for a range of sentencing options. The options range in severity from absolute discharge (which relieves an offender of a conviction) to imprisonment.

²⁵² *Ibid.* at 132-141.

²⁵³ *Criminal Code*, *supra* note 1 at s. 721.

²⁵⁴ *Ibid.* at s. 721(3).

Absolute and Conditional Discharge

The *Criminal Code* provides for the options of absolute and conditional discharge.²⁵⁵ If an accused pleads guilty or is found guilty of an offence, this provision enables the court to discharge an accused where two conditions are met: a) it is in the best interests of the accused; and b) it is not contrary to the public interest. The first condition presupposes that the accused is of good character, has no previous convictions, that it is not necessary to enter a conviction to deter or rehabilitate the accused, and that the entry of a conviction may have significant repercussions.²⁵⁶ The public interest condition will be met where the deterrence of others is not of significant importance.²⁵⁷

Where it is determined that a discharge shall be given, a finding of guilt is recorded but no conviction is entered. A conditional discharge, which is accompanied by a probation order, is contingent on the accused fulfilling the obligations under the probation order. If the accused breaches the terms of the probation order during the conditional period, the court reserves the right to convict and sentence the offender.

Probation

If a person is convicted of an offence, the *Criminal Code* provides for the making of a probation order.²⁵⁸ In deciding whether to grant a probation order, the court considers the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission. A probation order may be granted on its own, in which case the sentence is suspended and no other punishment is imposed for the offence (unless there is a breach of a term of the probation order). Alternatively, a probation order may be imposed in addition to a fine or term of imprisonment not exceeding two years.

Probation orders are comprised of compulsory and optional conditions. Compulsory conditions, which will form part of every probation order, require the offender to: a) to keep the peace and be of good behaviour; b) appear before the court when required to do so; and c) notify the court or probation officer of any change in name, address, employment or occupation.²⁵⁹

Optional conditions may require an offender to: a) report to a probation officer; b) remain in the jurisdiction; c) abstain from consuming alcohol or drugs; d) abstain from carrying a weapon; e) provide support for the care of dependants; f) perform up to 240 hours of community service over a period not exceeding 18 months; or g) with the offender's approval, actively participate in a treatment program. The court may also

²⁵⁵ *Ibid.* at s. 730(1).

²⁵⁶ *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.) [hereinafter *Fallofield*].

²⁵⁷ *Ibid.*

²⁵⁸ *Criminal Code*, *supra* note 1 at s. 731(1).

²⁵⁹ *Ibid.* at s. 732.1(2).

make other reasonable conditions to protect society and facilitate the offender's successful reintegration into the community.²⁶⁰

Intermittent Sentence of Imprisonment

In cases where a sentence of imprisonment of 90 days or less is imposed, the court may order that the sentence be served intermittently at specified times.²⁶¹ This enables an offender to serve the term of imprisonment on weekends, for instance. A probation order accompanies the sentence and requires the offender to comply with conditions when not in confinement. As with the discharge and probation orders, the court will impose this sentence having regard to the age and character of the offender, the nature of the offence, and the circumstances surrounding its commission. In addition, the court must also consider the availability of appropriate accommodation.²⁶²

Fines

The *Criminal Code* empowers the court to impose a fine, but only where the court is satisfied that the offender is able to pay.²⁶³ The fine may be in addition to or in lieu of any other sanction.²⁶⁴ Offenders who are fined may discharge the fine by earning credits for work performed in a fine options program.²⁶⁵

Imprisonment

The sentence of imprisonment is available as a penalty for all offences. Sentences of less than two years imprisonment are served in a provincial prison,²⁶⁶ while sentences of greater than two years, including aggregate sentences, are served in federal penitentiaries.²⁶⁷ Although some offences specify a maximum or minimum term of imprisonment, for all other offences, the *Criminal Code* provides for a maximum term of 5 years.²⁶⁸ Generally speaking, conditions in federal penitentiaries tend to be better than provincial prisons because there are more resources and programs. Conversely, federal sentences may require the offender to leave the province and be away from family and community supports.

²⁶⁰ *Ibid.* at s. 732.1(3).

²⁶¹ *Ibid.* at s. 732(1).

²⁶² *Ibid.* at s. 732(1).

²⁶³ *Ibid.* at s. 734(2).

²⁶⁴ *Ibid.* at s. 734(1).

²⁶⁵ *Ibid.* at s. 736.

²⁶⁶ *Ibid.* at s. 743.1(3).

²⁶⁷ *Ibid.* at s. 743.1(1) & (5).

²⁶⁸ *Ibid.* at s. 743.

Conditional Sentence of Imprisonment

In the early 1990s there was a general sentiment in Canada regarding the overuse of sentences of imprisonment.²⁶⁹ The 1996 enactment of Part XXIII of the *Criminal Code* was intended to address this concern. The two primary objectives of the sentencing reform were to reduce the use of prisons as a sanction and to expand the principles of restorative justice.²⁷⁰ The introduction of the conditional sentence of imprisonment in Part XXIII was one mechanism made available to help promote these objectives.

A conditional sentence of imprisonment allows the court to order that the sentence be served in the community under the terms of a conditional sentence order.²⁷¹ The sentence is restricted to cases where the sentence of imprisonment imposed is less than 2 years and the court is satisfied that serving the sentence in this manner would not endanger the community and would be consistent with the fundamental purpose and principles of sentencing.²⁷² The safety criterion is a condition precedent to the assessment of whether the sentence is fit and proper. The “safety of the community” refers to the threat posed by the specific offender. This threat is evaluated based on the risk of the offender re-offending and the gravity of the damage that could ensue in the event of re-offence.²⁷³

Initially, there was confusion regarding whether this sentence was intended by parliament to be a custodial sentence or whether it was intended to be an alternative to custody. The Supreme Court of Canada clarified that the conditional sentence of imprisonment may include both custodial and non-custodial elements.²⁷⁴ The order should be tailored to take into account the needs of the offender and those of the community into which the individual will need to be reintegrated. This includes taking full advantage of all community-based services, including residential programs — even those that may have a compulsory residential element.²⁷⁵ The court made it clear that the intent of this sentencing option is to invite courts to draw on all available services in the community to act as an alternative to imprisonment in penal institutions.²⁷⁶

As with the probation order, there are compulsory and optional conditions of a conditional sentence order. The conditions associated with the conditional sentence of imprisonment are similar to the conditions for a probation order.²⁷⁷ The optional conditions provide that the court may impose conditions for securing the good conduct of the offender and for preventing repetition by the offender of the same offence or

²⁶⁹ A. Doob, “Community sanctions and imprisonment: Hoping for a miracle but not bothering to even pray for it” (1990), 32 *Canadian Journal of Criminology* 415 at 415.

²⁷⁰ *R. v. Proulx*, [2000] 1 S.C.R. 61 [hereinafter *Proulx*].

²⁷¹ *Criminal Code*, *supra* note 1 at s. 742.1.

²⁷² *Ibid.* at s. 742.1(b).

²⁷³ *Proulx*, *supra* note 270.

²⁷⁴ *R. v. Knoblauch*, [2000] 2 S.C.R. 780 [hereinafter *Knoblauch*].

²⁷⁵ *Ibid.* at para 41.

²⁷⁶ *Ibid.*

²⁷⁷ *Criminal Code*, *supra* note 1: see s. 742.3(1) as compared to s. 732.1(2).

commission of other offences.²⁷⁸ The Supreme Court has made it clear that the risk of re-offence should also be assessed in light of the conditions attached to the sentence and notes that it may be possible for any apparent risk to be reduced to a minimal one by the imposition of appropriate conditions to the sentence.²⁷⁹

3.6.3 Application of the Sentencing Regime to Persons with Developmental Disabilities

Proportionality

The articulation of the purpose and principles of sentencing should, in theory, operate for the benefit of persons with developmental disabilities. Most notably, the fundamental principle of proportionality which requires that sentences be proportionate to the gravity of the offence and *degree of responsibility of the offender* should have a direct bearing on any sentence imposed on a developmentally delayed offender. Thus, while the existence of an impairment due to developmental disability may not meet the threshold to negate criminal responsibility in the trial procedure (particularly if it is not severe impairment), the principles of sentencing appear to contemplate the consideration of these factors. The question to be answered is how?

The remainder of this discussion will canvass the specific means and provisions by which a court may factor in the existence of a developmental disability in the course of fashioning a fit sentence.

Objectives of Sentencing

Recognition of Mitigating Factors

An offender's developmental impairment may be considered a mitigating factor for the purpose of fashioning a fit sentence. As noted above, evidence of impairment, including emotional, physical, and psychological impairment, as well as evidence of a disadvantaged background may be seen as mitigating factors. Within the context of sentencing, it is presumed that intended consequences of crimes should be treated more severely than consequences caused negligently or without awareness or consciousness. Similarly, cool-headed, deliberate choices are considered more culpable than choices that have been clouded by impairment.²⁸⁰ Evidence of impairment caused by developmental disabilities can affect judgment regarding the consequences of one's actions and should therefore be considered a mitigating factor. Lastly, although the existence of developmental delays is not causally related to a disadvantage background, many individuals who are developmentally impaired will also experience disadvantaged backgrounds due to their increased risk of victimization and social isolation.²⁸¹

²⁷⁸ *Ibid.* at s. 742.3(2)(f).

²⁷⁹ *Proulx, supra* note 270 at para 72.

²⁸⁰ Manson, Healy & Trotter, *supra* note 247 at 132-141.

²⁸¹ See discussion under Section 3.1: Introduction, above.

The sentencing principles and objectives in the *Criminal Code* were considered by the Supreme Court of Canada in *R. v. Gladue* in relation to the disproportionate incarceration of aboriginal offenders.²⁸² The court ruled in *Gladue* that sentencing judges must take judicial notice of a variety of well-established and psychological contributors to Aboriginal criminality in determining appropriate sentences for Aboriginal offenders.²⁸³ Nowlin comments on the inherent confusion and double standard of the criminal law in this respect. He notes that on one hand, the criminal law artificially enucleates the offender's intentions from his social and biographical context for the purpose of establishing guilt. On the other hand, however, it then invites consideration of this very "social and biographical context" for the purpose of assessing blameworthiness at the point of sentencing.²⁸⁴ Nowlin suggests that the sentencing objectives in the *Criminal Code* are evidence of the acceptance by the criminal law that an offender is not always entirely responsible for a crime because his behaviour may be a function of his circumstances.²⁸⁵

The incongruence between the notions of responsibility for the purpose of assessing guilt and notions of responsibility at the point of sentencing is evident. The recognition of this inconsistency begs the question that if part of the aim of mitigation in sentencing is to recognize guiltlessness, "why convict at all?"²⁸⁶ Although this argument was developed in the context of Aboriginal offenders, the same reasoning clearly applies in the context of developmentally delayed offenders. If the developmental impairment or resulting disadvantaged background of an offender may be recognized for the purpose of mitigating blameworthiness at the point of sentencing, then why not recognize it at the point of determining guilt?

Specific Deterrence – N/A?

The concept of specific deterrence in relation to developmentally disabled offenders raises unique considerations. While some persons with developmental disabilities will have the capacity to appreciate the relationship between the imposed consequences and their actions, other persons, including those with FASD,²⁸⁷ may lack the capacity to learn from consequences. In these instances, the specific deterrence value of any sentence will be minimal. To that extent then, deterrence as a goal of sentencing for persons with developmental disabilities will be of little significance and should be given little consideration in the sentencing equation.

²⁸² *R. v. Gladue*, [1999] 1 S.C.R. 688 [hereinafter *Gladue*].

²⁸³ *Ibid.* at para 82.

²⁸⁴ *Nowlin*, *supra* note 205 at 62.

²⁸⁵ *Ibid.* at 62-63.

²⁸⁶ Alan Norrie, *Crime, Reason and History* (2d ed) (London: Butterworths, 2001) cited in *Nowlin*, *supra* note 205 at 63.

²⁸⁷ See discussion under Section 3.2: Preliminary Matters, above.

Emphasis on Rehabilitation

Another of the sentencing objectives is to assist in rehabilitating offenders. Although “rehabilitation” of most persons with developmental disabilities is not possible, the goals of educating and promoting functioning and independence are obviously desirable and should be considered by the court. It is unclear, however, whether the extension of this objective will necessarily follow in light of the different nature of education versus treatment programs and the possible failure of the government to approve education programs for the purpose of sentencing.

Pre-sentence Report

The use of a pre-sentence report could be very useful to inform the court of the circumstances of an accused with developmental disabilities. Unfortunately, the *Criminal Code* only provides that the court may order the preparation of a report for the purpose of determining whether the accused should be discharged.²⁸⁸ Arguably, a report of this nature would be useful for the sentencing of all persons with developmental disabilities, regardless of whether the court is considering a discharge or not.²⁸⁹

Sentencing Options

Discharges and Probation Orders

Where a person with a developmental disability has been found guilty of an offence or has pleaded guilty to an offence, some sentences will be more appropriate and desirable than other sentences. In ideal cases, a sentence of a conditional or absolute discharge will enable the individual to avoid a criminal conviction. This sentence will also ensure the offender will not be subject to victimization through imprisonment. Alternatively, conviction, along with the imposition of a probation order, will also help to ensure the accused does not experience victimization from a more intrusive sentence. Because conditional discharges and probation orders require adherence to a set of conditions, support from family members and community supports will therefore be essential. Without the support of community resources, the conditions of the discharge or order may be breached and the individual will find himself/herself subject to a more intrusive sentence.

Conditional Sentence of Imprisonment

The conditional sentence of imprisonment may be a useful mechanism to help keep persons with developmental disabilities out of prisons for more serious crimes where a term of imprisonment is deemed necessary. Again, the imposition of this sentence may insulate the offender from the potential victimization that could be experienced in the prison system. However, given that this sentencing provision is

²⁸⁸ *Criminal Code*, *supra* note 1 at s. 721(1).

²⁸⁹ This will be discussed in more detail, below, under Issues.

subject to an evaluation of the specific threat of the offender re-offending and the potential gravity of the damage,²⁹⁰ if the individual is seen to be at risk of re-offending, as might be the case involving offenders with FASD, the sentence may be deemed inappropriate. Further, the court has indicated that the availability of supervision in the community will be a relevant factor to consider in determining whether this sentence is appropriate. Consequently, the provision alone for this sentence by the *Criminal Code* will be of little significance to the developmentally disabled offender where insufficient resources have been dedicated to the establishment of community and residential support programs.

Issues for Persons with Developmental Disabilities

Although the sentencing regime has a number of components that make it amenable for accommodating the specific needs of offenders with developmental disabilities, there are still a number of obstacles that limit its effectiveness.

Lack of Awareness of the Disability

Regardless of the accommodations made for persons with developmental disabilities within the structure for determining guilt or the sentencing regime, the system will be in no better position to protect the rights of these persons in the absence of an awareness of the disability. Indeed, one of the underlying problems is widespread ignorance of, or insensitivity to, the cognitive impacts of developmental disabilities, particularly those associated with FASD.²⁹¹

Although the *Criminal Code* makes limited provision for the preparation of a pre-sentence report by a probation officer in the limited context of discharges,²⁹² the ability of the court to seek information regarding the medical circumstances of the accused is severely constrained. In *R. v. Gray*, the B.C. Provincial Court attempted to deal squarely with the issue of FASD in the context of sentencing.²⁹³ In the course of the sentencing hearing the trial judge became concerned that accused might be suffering from FASD or a related cognitive disability. The provincial legal aid authorities declined to fund a public-facility FASD assessment for the accused, so the trial judge ordered a private-facility FASD assessment of the accused at the Crown's expense, pursuant to the mental disorder provisions in Part XX.1 of the *Criminal Code*. The Crown appealed and the B.C. Superior Court overturned the judgment on the basis that the mental disorder provisions do not grant jurisdiction to a trial judge to direct assessment at a particular private facility. The B.C. Superior Court also held that the trial judge lacked jurisdiction to order expenditure of public funds on an FASD assessment for an accused at a sentencing hearing.²⁹⁴

²⁹⁰ Proulx, *supra* note.

²⁹¹ R.E. Moore and M. Green, *supra* note at 106.

²⁹² S. 721.(1).

²⁹³ *R. v. Gray*, 2002 BCPC 58.

²⁹⁴ *R. v. Gray*, 2002 BCSC 1192 [hereinafter *Gray*].

Although the mental disorder provisions provide the court with jurisdiction to order an assessment for the purpose of determining fitness or criminal responsibility in relation to the mental disorder defence,²⁹⁵ the court has no jurisdiction to make an assessment order under that section for the purpose of sentencing.²⁹⁶ Thus, failing the ability of the accused to pay for an assessment, or the willingness of legal aid to provide an assessment at the request of defence counsel, the state of the offender's cognitive impairment may not come squarely before the court.²⁹⁷

Lack of Availability of Programs and Services

Convicted persons with developmental disabilities are, by definition, special needs defendants. Unfortunately, the special services that are essential to meet the special needs of convicted offenders are woefully lacking. Availability and suitability of conditional sentences are, to some extent, constrained by the existence of community services. Even if the court can be persuaded of the appropriateness of the sentence, inadequate or unavailable community resources mean the offender will be unlikely to satisfy the conditions of the sentence. This reality is born out in at least one study conducted by the NY State Office of Mental Retardation and Developmental Disabilities where it was observed that persons with mental retardation are more likely to violate their probation and to be re-incarcerated as a result.²⁹⁸ Consequently, the effectiveness of many of the sentencing provisions will be limited to the extent that they are accompanied by the necessary government funding to ensure adequate community resources.

Mandatory Minimum Sentences

Although uncommon, there are a number of specific offences in the *Criminal Code* which require the imposition of a mandatory minimum sentence, usually in the form of a term of imprisonment. For instance, criminal negligence causing death requires a mandatory minimum sentence of 4 years imprisonment.²⁹⁹ Mandatory minimum sentences have unique implications for persons with developmental disabilities because the imposition of a custodial sentence is not only likely to be futile from a rehabilitation or deterrence perspective (particularly in the case of FASD offenders who have an impaired appreciation of cause and effect), it is also likely to result in more harm than good. Persons with developmental disabilities are easy

²⁹⁵ *Criminal Code*, *supra* note 1 at s. 672.11.

²⁹⁶ *R. v. Snow* (1992), 76 C.C.C. (3d) 43 (Ont. Gen. Div.).

²⁹⁷ In *Gray*, *supra* note 294, the Crown did offer to have a pre-sentence report prepared by Forensic Psychiatric Services. A report of this nature would have provided a general assessment of Mr. Gray in order to assist the Court in the sentencing proceedings. Mr. Gray declined to accept the Crown's offer for a general assessment on the basis that a specialized pre-sentence report in the form of a FASD assessment was essential for a fair sentencing hearing (at para 13-14).

²⁹⁸ New York State Office of Mental Retardation and Developmental Disabilities, *Mentally Retarded Offenders: Considerations for Public Policy* (Albany: 1987) cited in Noble and Conley, *supra* note 8. This study focused on the experience of prisoners with mental retardation who are released from prison, observing that they exhibited difficult adjustment problems, as opposed to offenders given a sentence of probation in the first instance.

²⁹⁹ *Criminal Code*, *supra* note 1 at s. 220(a).

targets in prisons for other more savvy offenders. They may be coerced to participate in illegal or unacceptable activity in the institution for the benefit of others, they may be easily provoked and therefore subject to ongoing discipline and consequences within the facility, or they may become victims of sexual assault by other offenders.

3.7 Conclusion

As noted at the outset, equal treatment under the law does not always amount to equality under the law. This review considered the disadvantages and legal vulnerability of persons with developmental disabilities in the criminal justice system and the reality that additional procedures may be required to ensure the equitable application of legal principles to this group.

This review canvassed some of the issues faced by persons with developmental disabilities in the criminal justice system and identified the current constraints of the law in responding to them. Its primary purpose was to highlight the applicable law and procedures and identify limitations of those laws and procedures in relation to persons with developmental disabilities.

Having reviewed the primary stages of the criminal justice system and their application to persons with disabilities, there are a number of characteristics that stand out. At best, some are simply unhelpful for ensuring the protection of the rights of persons with developmental disabilities and, at worst, some actually do violence to the principles of fairness and equality that are intended to inform the application of the *Charter* and the *Criminal Code*. The following aspects raise particular concerns:

Police Investigations

- There are no explicit interview procedures or specific training for interviewing or identifying persons with developmental disabilities. This means that even if the desire existed to address the intellectual deficiencies in the investigation procedure, police are constrained in their ability to do so due to a lack of skill and information about the needs of this group.
- There are no guidelines to ensure the presence or involvement of caregivers, support workers, or guardians of persons with developmental disabilities in the investigation procedure. Just as police are required to contact guardians of minors who are investigated for an offence, so too should it be a requirement to contact guardians of persons with developmental disabilities, if they exist.
- The exclusive reliance on *Charter* rights to ensure the adequate protection and equal treatment of persons with developmental disabilities in the investigation procedure puts too much faith on the ability of law enforcement agents to meaningfully extrapolate generally articulated principles to the unique circumstances of persons with developmental disabilities and presumes that the principles, as articulated, are relevant to the specific concerns of this group.

- The enunciation of a low threshold of capacity to establish an “operating mind” for the purpose of assessing whether an individual was adequately informed of their right to silence and their right to counsel and whether they were capable of waiving those rights.

Disposition

Diversion

- There is a risk of misuse of diversion as a disposition in weak cases where the police or Crown may have inadequate evidence or basis to arrest a detainee or to proceed to trial.
- There is a possibility that persons with developmental disabilities may accept responsibility for an offence in order to avoid the daunting and intimidating formalities of the criminal justice process. Coupled with the reality that some persons may lack the capacity to assume criminal responsibility, this tendency may significantly undermine the rights and due process afforded to individuals engaged in the criminal justice system.
- Lastly, the overuse of diversion or adoption of diversion as a general policy may threaten the equality of persons with developmental disabilities and may be a throwback to the days when “retarded” persons were treated paternalistically with little regard for their rights. The circumstances of each individual case need to be assessed to determine the appropriateness of diversion to the individual and society.

Fitness to stand trial

- Although the fitness disposition is relevant to the circumstances related to persons with developmental disabilities, the application of the “operating mind” test limits the availability of this disposition to all but the most severe developmental disabilities. A determination of fitness to stand trial requires only that the accused have a limited cognitive capacity to understand the process and communicate with counsel, it does not require that the accused have the capacity to exercise analytical reasoning or to make decisions that are in his best interest. This low threshold of capacity arguably threatens the fair treatment of persons with developmental disabilities who may be intellectually impaired in their ability to make reasoned and informed decisions, but who nonetheless meet the minimal the minimum cognitive requirements to participate at trial.

Defence of Mental Disorder

- The defence of mental disorder can result in a verdict of not criminally responsible by reason of mental disorder. This defence applies in circumstances where an individual, on account of their mental disorder, is incapable of appreciating the nature or quality of the act or omission or of knowing that it was wrong. It negates criminal responsibility by creating an excuse for the offence committed. As with the fitness test, this defence appears equally applicable to persons with developmental disabilities based on the definition of mental disorder. However, the defence appears to be underutilized by persons with developmental disabilities (in the absence of a mental illness). The reasons for this underutilization are unclear, although it may be related to a perception by criminal justice personnel that the defence is inapplicable because developmental disabilities are by and large not treatable. The permanent nature of a mental disorder is not a consideration under the *Criminal Code* that relates to the application of this defence, however.
- Another possible reason for the apparent underutilization of this defence by developmentally disabled persons may be related to the nature of their impairment. It may be presumed, albeit inaccurately, that cognitive impairment does not impact the ability of one to form a “moral judgment” (as required for the mental disorder defence) as much as it impacts one’s comprehension and ability to communicate (as required for the fitness test). However, this presumption reflects a clear misunderstanding about the nature of these disorders. The underutilization of this defence is particularly problematic in the context of persons with FASD whose impairments are directly related to their capacity to appreciate the effect of their actions.

Objective *Mens Rea*

- Another aspect of the criminal law that undermines the fairness of the justice system in relation to persons with developmental disabilities is the application of an objective *mens rea* as the requisite mental element for some crimes. For these offences, where the behaviour of an individual markedly departs from the standard of care exercised by a reasonable person, and a prohibited act under the *Criminal Code* occurs, the individual will be held criminally responsible. Neither individual intention nor personal characteristics are relevant and nothing short of incapacity will mitigate the responsibility of a person in this context. An objective *mens rea* presumes a level playing field amongst the abilities of individuals to exercise reasonable judgments about risk. The application of this presumption to persons with developmental disabilities, in particular, those with FASD, can result in substantial unfairness. As a result, this group may be vulnerable to inequitable treatment in the determination of guilt based on their specific disabilities.

Diminished Responsibility

- The doctrine of diminished responsibility reflects the reality that there are wide variations in the mental and physical capacities of individuals and that this variation is relevant to criminal responsibility for unlawful conduct. The doctrine presumes that where an individual is not wholly unimpaired, the individual cannot be wholly responsible for their harmful conduct. Although this doctrine is not formally recognized in the *Criminal Code*, some critics have argued that it should be available for specific intent crimes. Specifically, it should be adopted where an accused person, although not substantially incapacitated so as to trigger the mental disorder defence, is nonetheless sufficiently impaired to raise concerns about whether he/she has the capacity to make a reasoned choice about his actions. It has been argued that there is incongruence in the criminal justice system between the willingness of judges to recognize social and biological circumstances as mitigating factors for the purpose of sentencing, while rejecting these factors and convicting an individual or accepting a guilty plea where the same factors are in issue.

Rules of Evidence

- Although the *Charter* protects accused persons against self-incrimination in formal criminal proceedings, the *Canada Evidence Act* applies where an accused person decides to testify on his own behalf. Once an accused person makes this decision, he/she is subject to cross-examination on his previous statements (if there are any) and to the cross-examination rules, which do not require that the witness be given the opportunity to review his previous statements — whether written or oral. For any person, the “trickery” that goes on in cross-examination may result in significant confusion, incoherent testimony, or distortions of the truth. For persons with developmental disabilities, these outcomes and their prejudicial effects are arguably compounded by the nature of the intellectual impairment.

Sentencing

- Although the sentencing regime in the *Criminal Code* is amenable to the circumstances of persons with developmental disabilities, particularly through the principle of proportionality and the recognition of mitigating factors for the purpose of assessing blameworthiness, there are several components that do not adequately reflect the needs of persons with developmental disabilities. For instance, the limited availability of the court to order pre-sentence reports is inadequate. Currently, the court can order these reports in relation to absolute and conditional discharges. Unless it is considering these sentencing options, however, the court is constrained in its ability to acquire information about an offender to determine a fit sentence.

- Another aspect of the sentencing rules that may result in unfairness to persons with developmental disabilities relates to the goal of specific deterrence. When the court is considering whether to impose a sentence of probation or the conditional sentence of imprisonment, it must consider the risk of re-offence. Given that the criminal justice system relies heavily on community resources to support offenders in the context of probation orders and conditional sentence of imprisonment, where insufficient provincial resources are allocated for these supports, two things may happen: 1) persons with developmental disabilities may either be regarded as ineligible for these sentencing options in the first place; or 2) they may receive these sentences and be set up for failure in the absence of adequate support.

While the criminal justice system, law and procedures have some capacity to accommodate the circumstances of persons with developmental disabilities, there are many additional protections required, and many aspects that should be altered to ensure the fair and equitable treatment of this group. The *Charter*, on its own, is arguably insufficient to protect the rights of persons with developmental disabilities who come into contact with the police. A police code of practice, similar to that proposed in New South Wales, Australia, would go a long way toward achieving fairness. In addition, increased education among police, lawyers and judges about the nature and realities of developmental disabilities, in particular FASD, would help to promote the appropriate application of fitness pleas and the mental disorder defence. Lastly, reconsideration by the courts of the objective *mens rea* mental element and consideration by parliament of the doctrine of diminished responsibility would result in criminal laws that are more relevant to the circumstances of persons with developmental disabilities.

4.0 KEY RESPONSES FROM CLIENTS AND SUPPORT STAFF

4.1 Description

A crucial part of understanding the experiences of people with developmental disabilities in the Criminal Justice System (CJS) is to hear their thoughts and stories along with the opinions of those who support them through the process. Interviews and focus groups were conducted with clients who had previous involvement in the CJS, as well as with support staff who had assisted clients. Respondents varied in their level of involvement with some having more extensive involvement than others; however, all individuals interviewed were able to articulate their experiences and describe the impact on their lives.

A total of seven clients were interviewed (see Appendix B for focus group protocol). Respondents were asked to relate specific experiences they had within the CJS. Questions were asked about police/client interaction, the client's knowledge of the justice system, and whether or not they had support staff present or any other assistance during their experiences in the CJS.

Three interviews were conducted with support staff who had assisted numerous clients through the CJS (see Appendix C for interview schedule). Questions were asked about their experiences as well as their perceptions of the CJS and its ability to accommodate persons with development disabilities. In addition, respondents were asked to provide some insight into what they believe their role is once a client gets involved in the CJS. Finally, support staff provided their thoughts on what would make the process more beneficial to the clients and more accessible for support staff.

An additional interview was conducted with a family member who supported her child through the CJS. The family member was asked to relay her experience. This response was used to substantiate analyses of both the client and support staff interviews.

Following is a case study depicting a scenario of what can happen when people with developmental disabilities or mental illness become involved in the CJS. The results from the client and support staff interviews are then presented.

4.2 Simon Marshall Case

The Saturday, September 24, 2005 edition of the Globe and Mail reported the following case of Simon Marshall. In the summer of 2005, Simon Marshall of Quebec City, Quebec was cleared of crimes for which he had already served five years in prison. In 1997, Mr. Marshall was arrested and convicted for terrorizing the citizens of Sainte-Foy, Quebec through a series of sexual assaults. Despite numerous questions concerning Mr. Marshall's intellectual capacity, the courts found him guilty of 13 criminal counts for which Mr. Marshall was sentenced, and eventually served five years. After

being released in 2003, Mr. Marshall confessed to further sexual assaults. However, DNA tests performed cleared him of any involvement in those assaults. Further DNA testing cleared Mr. Marshall of the previous crimes for which he was convicted and sentenced.

Investigations into what caused an innocent man to be convicted and sentenced for crimes he did not commit revealed a complicated case. Mr. Marshall was initially arrested after police were called to a Subway restaurant where patrons accused him of peeping into women's washrooms. Mr. Marshall was arrested for the crime, and after refusing representation from a lawyer, he proceeded to confess to the sexual assaults that had plagued the city. Mr. Marshall readily confessed to a number of crimes. He had information about the crimes, which was thought to not have been released to the public; it was later disclosed that this information had been made public knowledge. In addition to his confession, Mr. Marshall matched the physical profile of the suspect in these crimes. Quebec police admitted that although they had DNA evidence from the crimes, they did not test it against Mr. Marshall's DNA, as he had already confessed to the crimes. However, it was later discovered that there were a number of red flags which could have signaled Mr. Marshall's innocence.

First, Mr. Marshall's willingness to confess to the crimes was questioned by one of the arresting officers. Others made note that the individual who had eluded police in the past was one that was crafty and cautious. This did not compare to the individual who had only completed a grade 9 level education at age 20, who reportedly seemed disoriented and confused when questioned, and so readily confessed to a number of crimes. Other signals which were present at the time that Mr. Marshall confessed include his refusal to have legal representation, and questioning whether or not a lawyer would help him with his hat that was torn during the altercation at the time of arrest. In addition, Mr. Marshall would often confess to crimes, only to withdraw the confession, then later confess to the same crime again. It was also reported that during the investigation, officers gave Mr. Marshall hints to "jog his memory"; something that caused Mr. Marshall, who suffered from schizophrenia, to "fill in the blanks" to the stories. Despite questions surrounding Mr. Marshall's willingness to confess to the crimes, he was sentenced and served five years in jail.

Quebec City police indicated in a statement that the responsibility of the wrongful conviction should be shared among a number of individuals including judges, lawyers, psychologists, and the police officers. Taking offense to the statement that new recruits needed additional training when questioning persons who are suspected to have mental illnesses, Bernard Lehre, head of the Quebec City police brotherhood, stated that on occasion it is difficult to discern those who are mentally ill from those who are intoxicated or in the midst of some other form of crisis.

While it is true that the responsibility lies with many individuals, it is also true that had there been someone to advocate on Mr. Marshall's behalf, the outcome may have been different. Regardless, this account highlights the complications that exist within

the CJS when persons with diminished capacity encounter the system. The following stories and accounts shed more light on the problem.

4.3 Client/Family Responses

Seven clients were interviewed regarding their encounters with the justice system. Four of the clients were interviewed in a focus group and three participated in one-on-one interviews. The respondents varied in their level of involvement within the CJS. In most cases, clients reported multiple experiences.

4.3.1 Understanding the Process

The majority of clients interviewed reported that they had problems understanding the legal proceedings. This lack of understanding occurred at all levels of the CJS, from interactions with the police to court proceedings. Some clients believed that the police tried to intentionally confuse them in order to get them to confess to the crimes they were being accused of. One client stated that:

They [police] would confuse you. They would, like, say something and they would confuse you. They would switch the words up to make you confused and then they want to hear what they want.

Other clients believed that the police asked questions repeatedly to “catch them in a lie,” or that the police would accuse them of something they had not done in an attempt to get a confession out of them. It was also stated that police officers have a tendency to speak rapidly, which adds to the confusion for clients who quite often need things explained at a slower pace. One client reported that when they asked the police to slow down, they received a negative response. These experiences left many clients feeling mistrustful of the police and the CJS on the whole.

This confusion was echoed by the family member interviewed who stated that her child did not understand the process when she was involved in the CJS. Further, the individual did not have any person available who could assist him/her.

There were some clients, however, who reported that they understood their interactions with the police. They cited different reasons for this. One client claimed that he/she was quite knowledgeable of the law and of the legal process, due to his/her previous involvement in the justice system. Another respondent stated that whether or not he/she knew what was going on and whether or not he/she agreed with what he/she was being accused of, he/she was hesitant to argue with a police officer. Instead, he/she accepted what was being said for fear that disagreement would result in a confrontation, which would inevitably benefit the police officer.

Despite some negative experiences with the police, clients were able to identify qualities of police officers who were helpful to them. Most responses to the question of

what made a police officer good or what made the experiences positive centered on the desire to be treated “like a human being.” One respondent stated:

They ask you questions and they actually listen to what you say. They do not just assume it without actually hearing your side and what you have to say about the whole situation.

Another client indicated that on one occasion complaints were made against him/her and the police ended up coming to his/her house. After deciding not to lay charges, they ended up talking to the client and putting them at ease about the situation. In the responses where the clients reported having positive interactions with the police, the main reason stated was that the police were understanding and respectful.

4.3.2 Personal Contact

A number of respondents indicated that at the time of initial contact with the police, they did not have someone there to assist them and explain the procedure. This is an important factor since, as was mentioned earlier, the majority of respondents did not fully understand what they were being accused of, and in one case, the respondent indicated that he/she was not comfortable articulating any disagreement with the police.

Some respondents indicated that they believe the police often assume things and make decisions without having their input, and are usually more concerned with laying charges than with hearing the truth. Respondents believe that this was largely responsible for the police not encouraging them to contact others for assistance when they were being charged. While some respondents indicated that their attempts to contact outside help “fell on deaf ears,” others admitted that many times the option of an outside contact did not occur to them.

In the situations where clients were able to have a staff member present, they reported more positive interactions with the police. Clients indicated that the support staff was able to act as a liaison between the client and the police, explaining things to both the police and the client. In some cases, staff members were able to assist the clients with written statements. The respondents indicated that they believe it would work to their advantage to have someone present to act on their behalf. They thought that in addition to helping explain the process and assisting with the writing of statements, the presence of staff would encourage the police to treat the clients more respectfully. Others indicated that staff may be able to advocate for clients in a way that clients could not; staff could explain the client’s behaviours to the police, which would affect the way the police interacted with the clients. As one client put it:

If somebody knows you, like your supportive roommate, they know the difference if you were like that or would put yourself in that type of situation. They might be able to tell the cops a little bit more than them just speaking to you.

4.3.3 Disclosure

One major concern with having staff available to advocate for clients is that clients would have to disclose that they have a developmental disability. This is something that clients are sometimes hesitant to do, especially in cases where they have a hidden disability. The issue of disclosure was something that came up often during the interviews, and one that the respondents had varying opinions on.

Overall, clients were not sure whether it would be beneficial to disclose their disability to the police officers. Some clients indicated that they would prefer not to disclose that they have a disability. Their reasoning behind this varied. One client felt that when police are told that an individual has a developmental disability, their first instinct is to treat them as if they are suicidal. One client reported that on one occasion he/she was taken for a psychiatric evaluation after being apprehended by the police. Other reasons behind not disclosing include that they believe the police might think the client is lying or that the police may take advantage of the client and their disability. Clients were also weary of being judged negatively and of the police thinking that they were making up excuses to get away with a crime. One respondent stated that police hear many excuses from individuals trying to get away with crimes and they would not want to be placed in that category.

Some clients indicated that they believe disclosure was not useful as the police often lack the knowledge about how to interact with people with developmental disabilities. For example, disclosure may encourage the police to speak slower, but it will not help them to put things into plain language so that the client can understand. Instead, police may speak to the individual as if they were a child or ask them if they want their parents present, rather than trying to explain things in simple terms. Respondents found this attitude belittling and insulting.

They might explain things in terms of easier words but that doesn't mean that we would understand all the other things and they...tend to treat me like I'm not a person, not human.

According to these respondents, this problem is symptomatic of society at large in that they believe people in general tend not to consider people with developmental disabilities and when they are faced with them, they do not know how to interact with them. As one individual put it, "nobody really knows what to do with us."

When considering the level of knowledge individuals in the Criminal Justice System have of people with developmental disabilities, one respondent expressed an opinion that was unlike those voiced by other respondents. He/She believes the majority of individuals involved in the Criminal Justice System have some form of developmental disability; therefore, justice officials are both familiar and knowledgeable about the different stigmatized forms of developmental disabilities. Thus, he/she did not believe that there is the stigma attached to having a developmental disability, which other

respondents alluded to. This individual also stated that he/she prefers to disclose his/her disability and that the fear of being negatively “labeled” was not a concern.

Despite the differences of opinion, the clients ultimately agreed that disclosure would be beneficial, if it improved the interaction between the client and the police. However, it was agreed that this would only be the case where police officers are familiar and comfortable with people with developmental disabilities.

4.3.4 Experiences in Court

Two of the respondents were involved in the Criminal Justice System beyond contact with the police. One individual provided information on meeting with a lawyer and appearing in court, while the other individual has appeared in court a number of times, and has also been in jail a number of times as a juvenile offender.

Craig's Story

Craig¹ indicated that his first and only contact with the CJS came as a result of a speeding ticket. Craig stated that he objected to what he was being charged with, but he was hesitant to voice his opinion to the police. He indicated that he did not feel like he had much power or control over his situation for a number of reasons. Because this was the first time he was involved with the CJS, he was unsure and sometimes confused about the process. Craig relied heavily upon the advice of a friend who had prior involvement with the CJS. Craig was also hesitant to disclose that he had a developmental disability, as he feared officials would suspect him of using that as an excuse for his actions. For these reasons, Craig simply reacted to his situation, and had little opportunity to be proactive and seek information.

Commenting on his appearance in court, Craig stated that he wanted to inform the judge that he had a developmental disability in an attempt to get the judge to understand his confusion. However, in addition to not wanting to appear like he was making an excuse, Craig also indicated that he did not feel comfortable disclosing his disability in the court while others were present. Thus, he would have appreciated the opportunity to disclose his disability in private.

When asked about his thoughts on his legal representation², Craig's response was especially negative. Craig was only able to contact representation after his first court appearance, which he made on his own. When he did seek representation, his agent was disappointed that Craig had initially appeared in court without representation. Craig insisted that he was not trying to “get off” with what he was accused of, but that he was only seeking to understand the process.

¹ The name has been changed for this report to ensure confidentiality.

² Craig referred to this individual as his agent rather than his lawyer.

Paul's Story

Paul's³ experience with the CJS is quite different from what Craig experienced. Unlike Craig, Paul had a number of experiences with the court system, and was the only client interviewed who spoke about spending time in prison. Due to his history, Paul did not express the same frustration towards the CJS as the other respondents. According to Paul, his more favourable attitude can be attributed to the fact that he had previous experiences in the CJS, which made him more comfortable with the proceedings than the others.

Paul related a number of incidents with the police, court officials, and with the correctional system. He spoke of incidents where, after having confrontations with the law, he was able to talk with the officers who had previously questioned him. Paul indicated that he had a good relationship with his lawyer, who defended him a number of times. Due to this mutual trust and understanding, he was able to interact with his lawyer on a level that was beneficial to him in the end. Paul, however, acknowledged that he had unfavourable experiences in the correctional system. He felt that the biggest problem was that, often, correctional officers are unaware that individuals have developmental disabilities. While Paul realized that some individuals may not want to be singled out, he also acknowledged that informing officials of the circumstances may help those with disabilities adjust to their surroundings.

Finally, unlike other respondents, Paul believes that most police officers are aware of developmental disabilities and can distinguish persons with a developmental disability from persons without a development disability. He believes that once justice officials become aware of a developmental disability, they work to accommodate the individual.

4.3.5 What Would Make the Process Easier?

While respondents were able to express their concerns about the CJS, they were also able to offer suggestions as to what would make the process easier for them. The main suggestion was to make allowances for clients to better understand the legal process. This includes having police officers who are capable and willing to explain the process in a manner that clients can understand which also respects the dignity of the individuals involved. One client stated that he/she wished the police officer involved in his/her case had simply asked "What don't you understand?" Other comments included the request that police speak slowly while not patronizing the client, and also that they not use terms that may be seen as negative or degrading to people with developmental disabilities when they are required to explain things more than once. This is especially a concern for those whose disability is not visible.

Finally, respondents emphasized the importance for them to be able to call someone for assistance throughout the process. This support person needs to be

³ The name has been changed for this report to ensure confidentiality.

informed enough to offer the appropriate level of assistance. This is especially crucial at the initial stages of the process, specifically while interacting with the police.

4.3.6 Final Thoughts

In conclusion, respondents were asked to express what they want criminal justice officials to know about people with developmental disabilities and what they would like to see the Criminal Justice System offer people with developmental disabilities. Not surprisingly, respondents expressed the need for respect and understanding for people with developmental disabilities. Respondents felt that although some people may not appear to have a disability, officials should consider the possibility when individuals present certain characteristics. Respondents also indicated that they wanted to be seen as “human beings” and be treated in a similar fashion as people without developmental disabilities.

Other responses included the desire for police officers to “listen” to individuals rather than make assumptions based on the fact that they have a developmental disability. Respondents once again reiterated the need for assistance, whether it be a criminal justice official who is familiar with the needs of people with developmental disabilities, or a caregiver or support staff who is knowledgeable about the law.

4.4 Support Staff Interviews

Three support staff agreed to be interviewed for this project. These individuals were all from the same agency and had supported clients through the CJS in their positions. All three individuals were Specialized Funding Coordinators and had experiences with numerous clients, some of whom had become involved in the CJS. They, therefore, had multiple experiences to draw upon. Due to their positions and experiences, these staff members had a specific vantage point from which they could comment on the adequacy of the CJS in managing cases involving persons with developmental disabilities. They could also voice their opinions on the Persons with Developmental Disabilities Board’s role in supporting clients who become involved in the CJS.

4.4.1 Support Staff’s Role in the Legal System

All three staff members agreed that it was within their job description as support staff to assist their clients through legal proceedings, although they all emphasized that this should be in conjunction with other forms of supports. One respondent qualified this response by saying that he/she believed that staff involvement is more crucial at the police level, but that as clients progress through the CJS, their involvement should be scaled back. This is because staff’s knowledge of the CJS is more limited as clients go deeper into the system. Respondents felt that staff should be present to explain things to the client, as well as to provide details about the client to the police (e.g., disability characteristics, associated behaviours, client history). Respondents cautioned that disclosing a client’s disability is not meant to violate their confidentiality and should not

be done without the client's consent. Rather, staff can help explain behaviours associated with a client's disability.

Respondents were concerned that police officers may not process a client through the CJS as they would other individuals if they know the client has support staff available. One respondent believed that in a number of his/her cases, the police were not interested in laying charges if it was an issue that they felt the support staff could manage. This respondent gave an example where a complaint was phoned in to the police regarding a client who had previous experience with the law. Rather than investigate the history of the client, the police chose to call the staff to manage the client's behaviour. The staff refused to accept responsibility, largely due to the fact that the client had numerous previous complaints against him/her for which he/she was never charged. The staff insisted that he/she not get involved and that the police deal with the client as they would any other individual.

4.4.2 Staff Knowledge of the Legal System

Respondents were asked about their level of knowledge of the CJS. The three reported having only basic knowledge of the CJS; they did not feel confident providing legal advice to their clients. The family member interviewed reported having very little knowledge of the CJS, and did not feel she had the resources to lend the necessary support.

As clients got further into the system, support staff felt that their level of confidence and knowledge decreased; they were more helpful during interactions with the police and less helpful to the client when they appeared in court. Staff also reported that much of their knowledge was gained from assisting previous clients through the system. The respondents who had helped numerous clients felt more confident that they could help future clients. Respondents also indicated that clients who were more familiar with the system due to prior involvement had more knowledge about the proceedings than they did. The issue of supporting clients is further complicated when clients end up in correctional facilities. In such cases, people with developmental disabilities often lose their government funding. In order for staff to continue providing support, they have to do so on their own time.

Respondents pointed out that as clients get more involved in the CJS, it becomes harder to assist them, not only due to a lack of knowledge about the system, but also due to a lack of accessible information. One staff was able to help his/her client by doing basic research, however, once the client was charged, the police were resistant to release certain information to the staff, which may have allowed him/her to more capably assist the client.

4.4.3 Clients' Understanding of the Legal Process

While support staff believed, in most cases, that they had assisted their clients to be aware of what was transpiring, they also acknowledged that the clients would later

get confused or forget important information once removed from the situation. A client may understand what a police officer is saying to them at the time, but may forget or not realize the relevance of what was said at a later date. This creates complications because the legal process is a lengthy one, and clients may often forget what transpired on a previous occasion. Staff were also frustrated when they had to explain something to a client numerous times, but the client never seemed to “get it.”

It is very difficult to gauge a client’s understanding of the legal process. Respondents explained that, often, clients whose disability was more visible had a better understanding of the process than those whose disability was less visible. Police would interact with those with a visible disability in a way that was more understandable, whether or not the individual actually understood what was occurring. In some cases, police officers interacted with individuals who did not appear to have a developmental disability at a level that they could not comprehend. This, in turn, affects the role that support persons are required to assume.

4.4.4 Police Interaction with Clients and Knowledge of Developmental Disabilities

While the support staff agreed that the level of awareness demonstrated by police officers towards people with developmental disabilities has increased over the past years, especially with newer officers, they also felt that officers still lack the level of knowledge to appropriately handle specific disabilities. In the past, police have not handled cases involving people with developmental disabilities as seriously as in other cases, giving clients a “slap on the wrist,” rather than treating them as they would other people without developmental disabilities. Respondents thought that this could potentially be harmful to clients who are not given appropriate and natural consequences for their actions. Respondents did note a difference in attitude towards their clients by officials who had completed some form of sensitivity training surrounding people with developmental disabilities.

Staff were quick to point out that they believe it is the lack of knowledge around developmental disabilities that causes police officers to interact inappropriately with their clients. One respondent emphasized that there is a need for greater communication among those providing services for people with developmental disabilities, in order to clarify the roles that different individuals play. This problem is one that is often seen when a client is involved in institutions outside of the traditional service-provider relationship. Staff believe that better education in order to overcome what they call the “intimidation factor” would aid police officers when interacting with clients.

The respondents also pointed out the benefits of having the Disabilities Liaison Officer within the Calgary Police Department. All three staff members indicated that they have called on this officer in the past, and that his level of understanding towards various clients is beneficial. Respondents expressed the desire to create similar positions throughout the CJS.

4.4.5 Disclosure

The topic of disclosure was one that drew mixed reactions from support staff. Generally, they agreed that it is important for justice officials to be aware of a client's disability and any associated behaviours. However, this opinion was not without reservation. First, staff believe that clients may use their disability to their advantage, thus disclosure may create a situation where a person with a developmental disability is held less accountable for his/her actions than others may be. This is largely due to the fact that, as mentioned previously, police officers may be more lenient with people with developmental disabilities.

Another result of disclosure is that officials are aware that there are a number of support persons who can assist the individual. Staff believe that this knowledge may encourage officers to deal with clients more leniently, deferring the administration of consequences to staff rather than administering consequences themselves. One staff in particular felt that this ultimately does a disservice to the client, as they are prevented from experiencing the natural consequences of their behaviour and learning from their actions.

4.4.6 Diversion

When asked about the idea of diverting people with developmental disabilities away from the traditional CJS into more appropriate and specific services that would better address their needs, support staff had mixed responses. On the one hand, staff recognized the merits of such a process. In cases where a person with a developmental disability was unable to understand the consequences of his/her actions, but had a level of comprehension high enough that the program would be effective, diversion would be beneficial.

On the other hand, respondents recognized that when more serious crimes are concerned (e.g., violent crimes), allowing an individual to be diverted away from the CJS may be an injustice, not only for that individual but for society at large. However, people with developmental disabilities have higher needs and require an environment that is safe. A common facility to incarcerate offenders does not allow people with developmental disabilities to learn, but serves only as a holding place where they will most likely be victimized. Staff therefore, cautiously supported the idea of diversion.

4.4.7 Experiences with the CJS and Advice for Other Support Staff

Respondents listed a number of factors that contributed to positive experiences with the CJS. Based on past experiences, they also had some ideas about what could make the process easier and more beneficial to the client. One factor is having helpful officials who are able and willing to explain the legal proceedings to both the client and the staff, and also act as an advocate for the client.

One concern expressed about the CJS is the length of the process. Staff noted that the delayed response time of officials was often frustrating to clients who did not fully understand the process. A lengthy process also increases confusion and forgetfulness. While respondents noted that this is a systemic problem with no easy solution, it must be considered when assisting a client through CJS process. Another systemic consideration is the sharing of information. When a client is being assisted by a staff member, there is need for the staff to be able to access information regarding the client's situation; respondents noted that this does not always occur.

While it is important for clients to have staff present, respondents felt that staff should be careful not to get too involved and should allow the justice officials to adequately perform their job. This will help prevent officials from overly depending on support staff during the process and will allow the client to experience natural consequences, which as mentioned above, is an important experience for clients. Staff also noted that since they are usually not familiar with the law, their role is only to provide needed support, rather than acting as a legal advisor. In addition, staff should remember that while advocating for their client, they also need to let justice officials perform their job.

Because they are in unfamiliar territory, support staff are often not likely to be as persistent as they should be. One respondent explained that he/she had to be persistent on a number of occasions, in order to get the necessary information to support the client through the legal process. This is especially true when the information is sensitive and the individual does not have a legal guardian. The respondent's advice to other workers is that if something does not seem right, they should pursue the justice officials involved until they are satisfied that their client is receiving adequate treatment.

Finally, respondents expressed a concern over whose responsibility it is to ensure that clients receive adequate treatment when they enter the legal system. While they acknowledged that part of their job is to work in consultation with other professionals to advocate for and protect the rights of their clients, they also indicated that support staff may not always be the most adequate people for this role due to their lack of experience with the legal system. In addition, while they noted that there are usually social workers or counselors in the court system, they believed that the Persons with Developmental Disabilities Provincial and Regional Boards have a responsibility to ensure that clients are adequately represented when they become involved with the legal system.

5.0 KEY INFORMANT INTERVIEWS: CRIMINAL JUSTICE SYSTEM

5.1 Description

In order to gain a better understanding of the Criminal Justice System (CJS) in Alberta as it pertains to people with developmental disabilities, key informant interviews with justice system personnel were conducted. Questions were asked about legislation, protocols, and existing practices in order to identify gaps and inform recommendations for change. Findings from this component of the project was used to develop the content for the workshops on best practices and accommodations that can be made to more effectively support people with developmental disabilities in the CJS.

Twelve interviews were conducted in total. Respondents included police officers, lawyers, court workers, representatives from the correctional system, and social service/specialized program staff. Some of the respondents had experience specific to people with developmental disabilities and some spoke from a more general perspective; having worked with similar populations (e.g., mental health), they were able to provide general knowledge of the issues and challenges within their profession.

The sample was selected using a snowball method, starting with contacts made through the advisory group and following up on referrals and suggestions from other respondents. The project co-directors met with the Police Advisory Committee on Disabilities in Calgary at the start of the project, and one co-director is a member of *Disability and the Law*, a practice community of the Public Legal Education Network of Alberta (PLENA). These networking activities allowed for greater access and connections to various justice personnel who had experience working with people with developmental disabilities.

The interviews followed a schedule developed to help guide the discussion (see Appendix D for the interview schedule). The schedule began with an introduction, which provided an overview of the project and outlined how the interview would run. The respondents were assured of complete confidentiality and anonymity.

Interview questions were developed to generate information that would address the objectives in this study (see Section 1.2 Objectives of the Project). A definition of developmental disability was read to the respondent prior to asking any questions. This provided a common foundation upon which the rest of the interview was based, and clarified any complexities around the definition.

The respondents were then asked about their personal experience; they were asked to talk about their professional positions and about their experiences working with people with developmental disabilities in this capacity. From there, the interview was broken down into three streams representing the different phases of the justice system: 1) Policing, 2) Legal Representation and the Court Process, and 3) Corrections. The interviewer followed the questions in one of the three streams, depending on the job of

the respondent. This was done to understand the perspectives and experiences that are associated with the different roles in the CJS. All respondents were asked to comment on criminal responsibility and diversion, and to suggest recommendations for change.

The interviews lasted approximately 30 to 45 minutes. When all of the questions had been addressed, respondents were provided with an opportunity to contribute additional comments and speak freely about the topic. The interviews allowed the respondents to provide a systemic or organizational perspective, as well as a perspective based on individual experience.

5.2 Objectives

There were three main objectives when conducting the interviews with justice personnel. The first was to gain a greater understanding of any legislation and/or protocols that exist within the current system. It is unclear what, if any, legislation exists in Alberta, specific to this population in the CJS. It is also unclear whether agencies, organizations, and associations involved in the CJS are following any set protocols when working with people with developmental disabilities.

The second objective was to gain a greater understanding of the challenges and issues that exist when working with people with developmental disabilities in the CJS. These challenges and issues may prevent people with developmental disabilities from understanding and exercising their legal rights. However, justice personnel may be limited in terms of what they can do in order to accommodate this population. Understanding the challenges and issues faced can inform changes in the way this issue is addressed.

The third objective was to identify services, resources, or alternative programs that exist to support people with developmental disabilities through the justice system process. Lack of such supports would indicate the need to develop programs or services that better accommodate people with developmental disabilities in the CJS (or provide an alternative), preventing their victimization by the system.

These objectives guided the organization, reading, and interpretation of the data during analysis. Notes taken during the interviews were organized to highlight common and recurring themes, which were based on their relevance to the topic.

5.3 Definition

The following definition of developmental disability was provided to the respondents at the beginning of the interview:

A state of functioning that begins in childhood (i.e., before age 18) and is characterized by significant limitations in both intellectual capacity and adaptive skills. The Persons with Developmental Disabilities Provincial

program uses the following three criteria to make a determination of developmental disability:

- *onset prior to age 18;*
- *significantly below average intellectual capacity; and*
- *related limitations in two or more of the following adaptive skills areas: home living, communication, community use, social skills, health/safety, leisure, self-care, self-direction, functional academics, work.*

For the most part, respondents agreed with this definition. However, a few important points were highlighted that warrant further discussion.

First is the inclusion of Fetal Alcohol Spectrum Disorder (FASD) in the definition of developmental disability. FASD is a neurological disorder with resulting behavioural affects. This brain injury is permanent, irreversible, and associated with learning and behavioural difficulties. FASD essentially occurs pre-birth, resulting from a woman's consumption of alcohol during pregnancy.

An FASD diagnosis is consistent with the definition of developmental disability, with the exception of one criterion: *significantly below average intellectual capacity*. Respondents noted that some individuals with FASD have average or above average intelligence quotients (IQs), but have lower adaptive skills and delayed functioning. Rather than measuring IQ to determine a developmental disability, respondents suggested that the focus be on the age of onset, adaptive skills, and functioning.

Respondents emphasized that while they consider FASD to be a developmental disability, it is also important to recognize it independently in order to address the specialized needs of this population.

A second theme that arose in the discussions around definition was the difference between developmental disability and mental illness. All of the respondents agreed that there was a difference; developmental disabilities involve cognitive damage which affects adaptive skills and functioning, while mental illness does not involve cognitive damage, but adaptive skills and functioning may still be affected. Respondents pointed out that mental illness can occur at any age and that it can be controlled, treated, and/or cured, unlike a developmental disability.

While the difference exists, respondents also acknowledged the overlap between the two. Many individuals who have a developmental disability are also diagnosed with mental illness (dual diagnosis). Some respondents felt that this reality needs to be taken into account when responding to these populations. Particularly in the context of the CJS, both people with developmental disabilities and those with mental illness encounter similar barriers and limitations, and require additional support.

5.4 Policing

Representatives from two policing agencies in Alberta participated in the CJS interviews. These respondents had, to some extent, dealt with people with developmental disabilities through their work. They agreed that this was a population within the CJS for which there was minimal information and/or supports available. Respondents suggested that increased education and additional resources are needed to effectively accommodate people with developmental disabilities in the justice system.

5.4.1 Legislation and Protocols

The respondents were asked about existing legislation or protocols that might provide direction to police officers when dealing with people with developmental disabilities. Currently, there are no existing protocols, provincially or at an organizational level, or specific pieces of legislation that address this population within the CJS. Policy and procedure manuals guide general police conduct, but there is no special consideration of people with developmental disabilities.

The officers discussed how mental health legislation in Alberta can sometimes be adapted and applied to situations involving people with developmental disabilities. More often than not, use of this legislation is not the most appropriate response, but rather the only option. Although there is overlap between mental illness and developmental disability (discussed in the previous section, 5.3 Definition), respondents felt that it is important to ensure that legislation addresses each issue independently.

In terms of organizational protocols, the officers felt that cases involving people with developmental disabilities need to be dealt with on an individual basis; one set of instructions cannot be applied to every situation. One respondent explained the process that a frontline officer goes through when responding to a call. The officer first arrives at the scene and establishes safety. He or she then does an informal assessment of the situation. Officers may, at this time, be able to identify issues such as mental illness or delayed functioning, if there are visible indicators. However, respondents stressed that it is not a police officer's job to conduct formal assessments and determine alternative plans of action for individuals with special needs. Frontline officers do not have time, nor do they have the expertise required to conduct such assessments. That being said, police officers are often put into positions where such insight and ability is expected.

Ultimately, the justice process is directed by the courts. The police will file a report if they believe an offence has been committed. Laying charges is not always appropriate, but sometimes it is the only option. However, the Crown has the final say as to what cases proceed to court and what that process will look like. Beyond the initial response to an incident, police have little input or involvement in terms of what happens to a person in the CJS.

5.4.2 Training and Education

When asked about training and education for police officers around developmental disabilities, the respondents explained that there is some training done with new recruits on *all* disabilities. This is done to make officers aware of some of the issues they may be facing in their role and to provide them with some information in terms of identification and response.

The Calgary Police Service also offers disability workshops for any officer who is interested in refreshing and updating information; participation is voluntary. Educational resources, such as *Crime Prevention and Personal Safety of Persons with Disabilities*¹, have been developed and are used.

Respondents identified two important positions that exist within their police organizations: the Disability Liaison Officer of the Calgary Police Service and the FASD Project Officer (Community Justice Project) of the Lethbridge Police Service. The specific responsibilities of these officers will be discussed in a later section, but both individuals are able to provide additional information and material resources to the rest of the police organization.

5.4.3 Challenges and Issues

Respondents agreed that identification is the biggest issue faced by police officers in this area. Sometimes a developmental disability is obvious in a person and can be easily identified. However, this is not always the case. The disability is not always “seen”; some people can get through the entire criminal justice process without having their disability identified.

The expectation of police officers to go beyond the “call of duty” was highlighted by respondents. They discussed how the police are often called, even when a situation does not warrant a police response. One officer discussed being repeatedly called out to a group home to assist in controlling residents. The respondent felt that the police can become a “dumping ground” when people do not know where else to call (i.e., there are no community supports available). Police officers do not have, and should not be expected to have, the expertise or time to conduct assessments, provide treatment, or address special needs. The respondent did not deny the need for such activity, but felt strongly that there should be a separate body or organization (i.e., community resources) to fulfil this role.

Respondents talked about other issues related to identification. One issue is the lack of resources and supports within the CJS for people with developmental disabilities. If a person with a developmental disability is identified, but there are no supports to appropriately accommodate that individual in the system, identification is somewhat of a

¹ This study guide, along with two videos and a crime prevention brochure, is part of an educational resource developed by the Calgary Police Service and the Persons with Disabilities Police Advisory Committee in Calgary.

fruitless effort. Another related issue is refusal by the individual in question to admit to having a disability or to consent to services. If a person is not prepared or willing to take responsibility in an effort to meet his/her own needs, nothing can be done. There may also be situations where an individual does not realize or understand that he/she has a developmental disability.

Communication and understanding were also identified as challenges for police when dealing with people with developmental disabilities. Statements, in particular, can be difficult to get due to a variety of issues such as: lack of understanding, poor recall of details, poor communication skills, eagerness to please, fear, and inconsistent responses. An inadmissible statement or lack of a statement altogether can have a detrimental impact on a case and possibly on the individual in question.

The issue of understanding can be quite complex when dealing with someone who has a developmental disability. One respondent referred to the following example: the police were repeatedly called to a store where a woman with a developmental disability was caught stealing. The store owner did not want to press charges, so the police would talk to the woman about stealing and take her home. The officers later found out that the woman would only steal when she needed a ride home. The purpose of stealing was only to get a ride; the woman manipulated the situation to meet her needs, not fully understanding the seriousness of her actions and the possible consequences associated with the crime. The woman understood stealing simply as a means to get a free ride.

5.4.4 Supports and Services

Respondents agreed that there are large gaps in service and minimal supports for people with developmental disabilities in the CJS. Increasing funding cuts to community programs for people with developmental disabilities are resulting in a reliance on programs that are not necessarily appropriate (e.g., relying on a response from a program designed to address mental illness). However, respondents identified a few existing resources in this area that warrant mention.

First is the Disability Liaison Officer of the Calgary Police Service. The liaison officer builds relations between the police, persons with disabilities, and organizations that provide services to persons with disabilities. The liaison officer also assists other officers in investigating cases involving people with disabilities, and acts as a resource to all officers in the field. Education, awareness, and training are part of the liaison officer's job. People with developmental disabilities are included in this portfolio, which was created to address *all* disabilities.

While acknowledging this great resource, it should be noted that the Disability Liaison Officer is not called for every case involving a person with a disability. In most cases, a frontline officer will handle the call without additional supports.

The Community Justice Project in Lethbridge is a community partnership created for the awareness, education, and management of Fetal Alcohol Spectrum Disorder (FASD) within the youth justice system². An important partner in this initiative is the Lethbridge Police Service, who provides an officer for the project. This officer plays a specific role within the project, but also acts as a resource for the entire police organization. Other members of the service can refer to the FASD Project Officer if and when they are dealing with an individual with FASD.

Respondents discussed a couple of other options that police might consider when dealing with a person with a developmental disability: 1) the Mobile Response Team, Mental Health & Psychiatric Services, Calgary Health Region, and 2) Southern Alberta Forensic Psychiatry Services. Both of these resources are designed to serve the mental health population. However, representatives from these programs explained that they will look at any referral from police, legal counsel, or the courts. An increasing number of referrals involving people with developmental disabilities are coming through. While these resources may not be entirely appropriate, they may be the only available option.

One respondent suggested that frontline officers access Community Liaison Police Officers as possible resources on specific cases. The respondent described a situation where a police station was getting repeated calls from one location in the community - a group home for people with developmental disabilities. There was often violence in the home, but constant calls to the police station were not solving the problem. The respondent discussed how a Community Liaison Police Officer might be very helpful in a situation like this. A Community Liaison Police Officer is more familiar with community issues, has developed relationships within the community, and has more time to devote to exploring alternative solutions to meet the needs of various individuals. This may be an option for frontline officers to consider in the future.

Respondents felt that most police officers realize that the CJS is not the most appropriate place for everyone. They highlighted the need for an alternative program that could explore more appropriate options and strategies for people with developmental disabilities, rather than placing the added responsibility on police officers themselves.

5.4.5 Caregivers, Family Members and Guardians

Respondents discussed the important role of caregivers, family members, and guardians in the justice process. When a person with a developmental disability becomes involved with the CJS, it is extremely beneficial to have a support person present to help navigate through the process. Respondents emphasized how helpful caregivers and/or family members can be to the police. They can provide information about the individual, the disability, and the context of the incident. They can alleviate stress and confusion for a person with a developmental disability, facilitate

² This project will be discussed in more detail under Section 6.0 Alternative Practice Models.

understanding and communication, and assist the individual in giving statements, or even provide statements themselves.

Police respondents stated that information from a caregiver or family member can make a big difference in their own understanding of the incident or situation. A caregiver or family member usually has the greatest knowledge of the individual in question; sharing that information provides the context and foundation needed to build an appropriate strategy.

Based on their experience, police respondents said that caregivers and family members are often present through the police process. However, many of them feel lost themselves and find it difficult to navigate through the system. It is as important, or perhaps even more so, that caregivers, family members, and guardians are knowledgeable about the CJS and aware of the available resources for people with developmental disabilities.

While involvement by caregivers and family members is encouraged, respondents also recognized that sufficient resources may not be available. Resource people, such as the Disability Liaison Officer and the FASD Project Officer, are there to offer information and support, but are limited by time and workload demands; most of the time, caregivers and family members are left to figure out the process on their own. In addition, caregivers and family members may have misperceptions about the function of the police, which may result in a lack of cooperation from either side. Caregivers and family members may get angry about the police response, may have unrealistic expectations about what the police can do, or may misuse police services. On the other hand, police officers may not realize the value of a caregiver or family member's input to a case involving a person with a developmental disability. Respondents emphasized the importance of moving past these issues in order to best meet the needs of the individual in question.

5.5 Legal Representation and the Court Process

The interviews that focused on legal representation and the court process included legal representatives from both the prosecution and the defence, as well as representatives from specialized court and diversion programs. Respondents had a vast range of experience and had encountered many cases involving people with developmental disabilities, delayed functioning, FASD, and mental health issues in the CJS. The general feeling was that the number of offenders with developmental disabilities in the CJS is increasing, yet a big gap still exists in terms of services to support and accommodate this population effectively.

5.5.1 Training and Education

Respondents explained that there is no formal training on developmental disabilities within the legal field. Education around dependent adult legislation is the most lawyers receive in terms of official training in this area. Justice personnel, of

course, can take it upon themselves to pursue education on this issue. Research, discussion papers, and seminars/workshops about people with developmental disabilities are possible avenues that can be accessed to gain more information.

Some justice communities are more progressive than others in terms of providing information. In Lethbridge, there has been a move towards educating justice personnel on FASD; seminars were held for police, prosecutors, and judges. Initiatives like this increase awareness within the CJS. However, training around options, alternatives, and resources, as well as information that addresses the wider spectrum of developmental disabilities is still lacking.

All of the respondents felt that training was particularly important for the police, as this is the first point of contact in the CJS; identification of disabilities and special needs should occur here. Respondents believed that there is some level of awareness training within police organizations, but this is usually for liaison officers and not for those on the frontline, where it is most needed. In addition, frontline officers need readily available resources to assist in dealing with these cases appropriately.

Respondents acknowledged that while police training is important, sole responsibility should not be placed here. They discussed how the entire justice system should be trained and educated in order to address this issue effectively.

5.5.2 Challenges and Issues

As in the interviews with police respondents, legal and court representatives believed identification of people with developmental disabilities to be the biggest issue. Respondents discussed how a developmental disability may be difficult to see, may be denied or unrecognized by the individual in question, or may be misunderstood. Often times, if a person with a developmental disability does not self-identify to their legal representative or the court, he/she will get lost in the CJS process. Respondents felt that an increasing number of people with developmental disabilities are going through the system unidentified.

Related to identification is the lack of services and supports necessary to accommodate a person with a developmental disability in the system. Again, respondents noted that even if identification happens, there may not be resources in place to support the individual through the process. Identification seems almost pointless when there is a lack of knowledge, a lack of expertise, and a lack of options. The process then continues “as normal” without meeting the specific needs of that individual.

Understanding and communication were also mentioned as challenges when working with people with developmental disabilities. Lack of understanding about what is illegal has great implications when considering criminal responsibility. People with developmental disabilities may never fully understand the seriousness of their actions and the accompanying consequences. On the other hand, people with developmental

disabilities may very well understand that what they did was illegal and may have made the decision to commit the crime with full intent. The degree of understanding in relation to the crime then needs to be assessed: when and by whom it is assessed is another question.

Respondents also discussed understanding in relation to the CJS process. People with developmental disabilities may have difficulty understanding why things are happening and what the expectations are. Particularly when providing statements, a person with a developmental disability may not realize the implications of making a statement, or may make false statements based on fear, eagerness to please, or basic lack of understanding. Supports and resources are needed to facilitate the process so that people with developmental disabilities are fully able to exercise their legal rights.

One respondent spoke about the issues associated with communication when people with developmental disabilities are providing statements or testifying in court. The respondent emphasized the need to determine if the disability is preventing memory and understanding, or if the disability is preventing expression. If the disability is only preventing expression, then that person could probably and reasonably be supported through the court process. If the disability is preventing memory and understanding, then the process would need to be facilitated with alternative supports. The respondent suggested that this issue would also be forefront for police officers when conducting investigations and laying charges.

Respondents felt that the overall issue is simply that the CJS is not an appropriate system for dealing with people with developmental disabilities. There are hard and fast rules in the CJS, and the reality is that the system exists to police, not to treat. People with developmental disabilities do not understand the process, often end up getting punished for their disability, and are unable to exercise their legal rights due to lack of resources and support. They get lost in the system and end up coming back again and again (“revolving door syndrome”), never getting the help they need. Respondents agreed that in order to effectively accommodate this population in the CJS, special treatment needs to come from external or alternate programs.

5.5.3 Sentencing and Rehabilitation

Sentencing people with developmental disabilities is another challenge for those working in the CJS. Respondents discussed how criminal convictions and the accompanying consequences have little or no effect on most people with developmental disabilities. The intended outcome, rehabilitation, is rare if a person does not understand the purpose of the sanction because of cognitive damage. The sentence will not have a lasting impact and the individual may eventually end up in court again, and possibly in jail. Respondents stated that the likelihood of reoffending is high when an individual does not have his/her needs addressed appropriately.

Respondents felt that prison in particular is not an effective sentence for people with developmental disabilities. Because of the effect developmental disabilities have

on understanding and functioning, an individual with a developmental disability is more likely to be victimized within a prison setting, and will likely not be able to meet the expectations of the system. While there are some special treatment units in prison (discussed in more detail in Section 5.6 Corrections), they are primarily designed for offenders with mental illness and can only accommodate small numbers.

The respondents believed that having a developmental disability should impact sentencing decisions. They stated that judges will consider mitigating circumstances when sentencing, which would include the context of the crime and a person's disability. However, respondents explained that if there are no appropriate sentencing options, judges have no choice but to sentence as they would any other offender.

Respondents felt that what is needed are sentencing options that are appropriate to the disability. They suggested supports and services to monitor future behaviour in the community. Sentences need to be specific to people with developmental disabilities; they cannot be thrown into programs that are not designed to meet their needs (e.g., mental health programs). Respondents emphasized the importance of having community resources in place to support alternative programs. In the long run, such options and alternatives will be cheaper for society, will keep the public safe, and will end the repetitive cycle of involvement in the CJS.

5.5.4 Supports and Services

When asked about services that would provide support for cases involving people with developmental disabilities, respondents stated that there were few programs that could be accessed. In fact, specific to this population, there were no programs to provide support through the court process. The few resources that have been utilized by respondents are designed for the mental health or general populations; these will be discussed here.

Respondents identified two programs that were created to serve the needs of offenders with mental health issues: 1) Southern Alberta Forensic Psychiatry Services, and 2) Calgary Diversion Service, Mental Health & Psychiatric Services, Calgary Health Region. Both programs can be accessed prior to or during the court process in order to request a psychiatric assessment. While the mandates of these programs are to address the needs of the mentally ill who are involved in the CJS, representatives from both programs said they will see and conduct an assessment on any referral. If a developmental disability is identified, the program staff will decide what is "doable" in terms of sanctions and services depending on time, resources, and workload. However, the supports and resources in place for these programs to access are designed for individuals with mental health issues. An offender with a developmental disability may end up in a psychiatric ward of a hospital or other long-term facility that is not necessarily appropriate.

Respondents also talked about a few resources that are available to the general public, but may provide extra support to people with developmental disabilities. The

Elizabeth Fry Society of Calgary runs a Court Program to provide support and information to people in first appearance court. Court liaison workers approach people in the courthouse to find out if they have a lawyer, have any extenuating circumstances, and/or if they need additional information about the court process. The worker will explain the process and refer the individual to duty counsel³ if they do not have a lawyer.

A representative from this program said that the court liaison worker may find out in the course of normal conversation that an accused has a developmental disability (or there may be caregivers/family members present to provide such information). If this happens and the individual does not have a lawyer, the court liaison worker would inform duty counsel of the disability, or would tell the accused that he/she needs to inform duty counsel of the disability. An accused with a developmental disability may be able to access early case resolution duty counsel. This may be a more appropriate avenue, but it is not specific to people with developmental disabilities.

One last option that might be accessed is Legal Aid. One respondent explained that if a developmental disability is identified in an accused, Legal Aid might take the case and provide a lawyer; this sometimes happens with individuals who have mental health issues. If this happens, the case would fall under “special circumstances,” regardless of the crime and may be given special consideration in court. However, the accused needs to apply for this service from Legal Aid, and Legal Aid decides whether to take the case based on the individual’s income, the type of crime, special circumstances, and the policy of each participating agency.

Respondents felt that what is really needed is some kind of committee or formalized program that could arrange for supports before the court process begins and provide recommendations to the court. Respondents also acknowledged that community programs, specific to this population, need to be available in order to do this. Two respondents suggested creating something similar to the Community Justice Project in Lethbridge, which supports FASD youth involved in the CJS, for adults.

Related work in this area is being done by the *Disability and the Law* practice community of the Public Legal Education Network of Alberta (PLENA). The practice community provides the opportunity for professionals in the field to come together, dialogue, and collaborate on matters of common interest. The *Disability and the Law* practice community, in particular, works to identify and meet needs for public legal education on the part of people with disabilities and those working with such people, and to make legal issues around disabilities more visible in the general community. The group is currently working on: developing a lawyer referral service for people with disabilities; conducting an inventory of public legal education and information resources; creating a practice community brochure and referral information; and creating a public awareness video. This work encompasses *all* disabilities, including developmental

³ Duty counsel provides legal information and represents accused in first appearance court in order for them to make a plea. Duty counsel is free through Legal Aid. Duty counsel does not represent accused in criminal trials.

disabilities, and may lead to the provision of appropriate supports and resources in the legal arena.

5.5.5 Caregivers, Family Members and Guardians

All of the respondents agreed that caregivers, family members, and guardians have an important role to play when a person with a developmental disability is involved in the CJS. Caregivers can get and communicate information about the court process to the client, facilitate understanding, and help the client navigate through the system. This is particularly important because counsel takes direction from their client only; a caregiver, family member, or guardian needs to provide information so that the individual in question can make the best decision for him/herself, and then communicate that to counsel. Respondents noted that in order for caregivers to do this effectively, they need to be knowledgeable about the system themselves.

Caregivers, family members, and guardians can also provide information to the legal side, in terms of the individual's disability and any accompanying issues. Justice personnel need to value the knowledge and input from caregivers as they most likely have the most accurate information and insight. Justice personnel should acknowledge that caregivers might feel lost in the system and attempt to educate them on processes and options. Respondents emphasized that information sharing is the key.

5.6 Corrections

Interviews were also conducted around the correctional system in Alberta, as it pertains to people with developmental disabilities. The interviews included representatives from Alberta Justice, community corrections, specialized institutional programs, and alternative mental health programs.

Respondents explained that one of the biggest problems in corrections right now is that there is an increasing number of offenders who have some type of developmental disability. One respondent reported that approximately 10-20%⁴ of the offender population has a low IQ (below 60 points). This respondent explained that the current focus in the system is on FASD. However, while there have been efforts to address this issue, the focus is not proportionate to the number of offenders with FASD. A majority of the resources are used for FASD initiatives, while offenders with FASD only make up a small percentage of the population; it is important to accommodate for these offenders, but efforts must be widened to include other developmental disabilities as well.

⁴ This is not an official statistic.

5.6.1 Training and Education

When asked about training and education for correctional staff, respondents said that there has been a lot of training around FASD. In the year 2000, all frontline correctional staff and managers in Alberta participated in an FASD training session. Currently, all new correctional staff attend a 2-3 hour session on FASD as part of their training. In addition, correctional institutions have staff who are interested in and knowledgeable about FASD, along with material resources provided to all centres.

Although we consider FASD a developmental disability in this project, respondents pointed out that there has not been any training for correctional staff on other types of developmental disabilities. Staff in specialized programs, such as the Specialized Mental Health Unit, receive on-going training on all disabilities, but this is not available for general institutional staff.

5.6.2 Challenges and Issues

Once again, respondents agreed that identification was a big issue within the correctional system. Correctional staff are not equipped to assess or diagnose offenders, and there are no standards or guidelines to help in identifying developmental disabilities. One respondent felt it was rare to get such information from the police or legal counsel. Another respondent acknowledged that there is no mandatory information sharing within the adult system, but felt that the remand facilities usually identify disabilities prior to offenders entering long-term institutions. In addition, family members and caregivers sometimes inform correctional staff of developmental disabilities, delayed functioning, or other related issues.

Communication and understanding were both issues identified by representatives in the correctional field. In an institution, people with developmental disabilities often struggle with expectations and routines because of difficulties around communication and understanding. People with developmental disabilities and the mentally ill will be more than likely preyed upon in the general population. Respondents discussed the importance of accommodating people with developmental disabilities in the existing system. In order for them to be successful, it is necessary to separate offenders with chronic problems and provide specialized treatment.

5.6.3 Supports and Services

When asked about supports and services for people with developmental disabilities within the Alberta correctional system, respondents identified Specialized Mental Health Units (Assessment and Treatment Unit) that exist in both the Fort Saskatchewan Correctional Centre and in the Calgary Remand Centre.

The specialized units provide treatment for offenders with organic brain damage, mental illness, and suicidal tendencies; people with developmental disabilities are included in this group. Generally speaking, the unit is for anyone who does not fit into

the general population. The unit is physically separated from the other inmates, and offenders within the unit receive specialized treatment. Also offered are programs such as anger control, life skills, leisure planning, etc., that meet the specific needs of this population. Simplified information and language is used to communicate effectively with offenders who have lower IQs. Staff in the Specialized Mental Health Units receive on-going training on all disabilities.

The philosophy behind these units is that the correctional system is responsible to provide protection for these people and ensure they receive appropriate treatment; these offenders have special needs that require an alternative approach. Inmates with developmental disabilities need to be treated differently in order to be treated fairly. It is essential that inmates know their rights, understand the system, can communicate their needs, can resolve conflict, and can access and understand legal support.

Other than the Specialized Mental Health Units, there are no programs or services to support people with developmental disabilities in the correctional system. Respondents emphasized the importance of connecting with the community to effectively support people in the system; the CJS simply does not have the resources available to deal with *all* the potential problems.

5.6.4 Caregivers, Family Members and Guardians

Respondents felt that caregivers, family members, and guardians can play an important role when people with developmental disabilities find themselves in the correctional system. Caregivers and family members can be advocates and provide support for the individual; therefore, it is essential that they themselves understand what people with developmental disabilities are going through in the system.

On the other hand, respondents acknowledged that often caregivers and family members are no longer involved once an individual reaches the correctional system. While there are some attempts at maintaining that tie (e.g., some family therapy is conducted in the Specialized Mental Health Unit), it is generally hard to keep families connected. This also has negative implications when considering the offender's return to the community upon release.

5.7 **Diversion**

“Diversion is a great idea... if it is appropriate.” This was a common theme that arose in the key informant interviews with justice personnel. Respondents agreed that people with developmental disabilities should be held responsible for their criminal actions to some degree; however, accountability should be maintained through appropriate processes and consequences. It is important that people understand the seriousness of what they have done and the associated consequences, as well as what the consequences mean. They must also understand the process within the CJS and how to exercise their legal rights. Accommodating people with developmental

disabilities in this way will increase their likelihood of success; recidivism is far more likely without understanding.

Respondents felt that diversion is possible if the appropriate resources are in place. If a person with a developmental disability is going to be diverted from the CJS, the alternatives and options that replace the justice process need to be available. This may mean specialized services and programs in the community, along with the human resources necessary to work on diversion plans and coordinate services.

A few respondents explained that the priority of the CJS is to protect the public. There are situations where diversion is not an option, simply because the crime is too severe and a controlled setting (i.e., prison) is necessary. If incarceration is necessary, it is important that specialized programs within the system are utilized. However, respondents noted that this type of programming is not always available, or may not be able to accommodate people with developmental disabilities. The correctional system *can* help people with developmental disabilities, *if* there is enough money and resources to do so appropriately.

The general feeling in the interviews was that if we can keep people with developmental disabilities out of the CJS, we should; if we cannot keep people with developmental disabilities out of the CJS, we should accommodate them appropriately. The ideal scenario would be to divert people with developmental disabilities out of the CJS and into community treatment options. The CJS is a costly process. If people are consistently cycling through the system, it is not beneficial to anyone; not the individual, not the community, and not the system as a whole. However, limited resources that specifically address this population prevent diversion from happening.

5.8 Recommendations for Change

When asked about recommendations for change in this area, some common themes arose among the respondents. At a very basic level, respondents simply identified the need to address the issue. Respondents explained how developmental disabilities used to be an area of concern, but the attention has now shifted to other issues in the CJS. There is a need to revisit the issue and create new excitement about working with and supporting people with developmental disabilities.

As identification was consistently highlighted in the interviews as a challenge, many respondents suggested focusing resources in this area. Early identification and assessment of developmental disabilities among people involved in the CJS is key. Other respondents discussed the need to then share that information with all areas of the justice system. One respondent used the term “flagging” to ensure awareness of people with developmental disabilities within the system.

The idea of sharing information was mentioned in almost all of the interviews. Respondents emphasized the importance of having *all* components of the CJS *and* the community working together to address the issue. Respondents suggested the need for

increased funding for program development; community services and supports, specific to the needs of people with developmental disabilities, need to be in place. The CJS then needs to rely on, and collaborate with, service providers and community agencies in order to make the appropriate accommodations within the system.

All but one respondent felt that specialized program models should be utilized when dealing with people with developmental disabilities in the CJS. The majority of respondents supported the idea of committees and networks that would work on a case-by-case basis to address each situation and collaborate on the most appropriate plan of action. Also suggested by a couple of respondents was the creation of a support person or advocate, who could lead people with developmental disabilities through the system. One respondent felt that this could possibly be the role of the caregiver – to advocate, share information, and facilitate communication.

The one respondent who did not agree with specialized program models felt that the focus should rather be on greater public awareness and providing information to the general system so that accommodations can be made within. Other respondents also mentioned the need for public awareness, education, and practical training among CJS personnel, service providers, and the community at large.

6.0 ALTERNATIVE PRACTICE MODELS

This section is devoted to alternative practice models: programs and initiatives to consider when developing supports and resources for people with developmental disabilities in the CJS.¹ Some of these programs are specific to people with developmental disabilities, some serve other vulnerable populations, and others are narrower in scope, providing a specific service or addressing one particular component of the CJS. However, there are lessons to be learned from each of these, and all should be considered when trying to develop an effective response to this issue. Programs can be replicated or components can be adapted to meet the needs of people with developmental disabilities and better accommodate them within the Criminal Justice System.

6.1 Calgary Diversion Service

The Calgary Diversion Service diverts mentally ill offenders who are charged with a minor criminal offence from the Criminal Justice System to the Mental Health System through coordinated community action. The Honourable Judge Peplar of Calgary initiated the idea after repeatedly seeing offenders with mental health issues in his courtroom for petty crimes. Judge Peplar realized the court and correctional systems were not appropriate for people with mental illness and he wanted another option. Through collaboration with other professionals in the field, the Calgary Diversion Service began.

The goals of the program are to: 1) divert the mentally ill to more appropriate community services; 2) connect systems involved in the process (e.g., the health region, justice, etc.); and 3) continue serving the public appropriately and safely. The program is voluntary and very client-focused; staff look at individual needs and connect people to the most appropriate services.

Diversion may occur at several points throughout the justice process: 1) frontline police; 2) Arrest Processing Unit; 3) Crown Prosecutor; or 4) Remand Centre. The program has been successful in adding four questions to the protocol of the Arrest Processing Unit to help in identifying mental illness. If mental illness is suspected at any point, the Diversion staff will be contacted and an assessment will be done. The program will see anyone who is referred, including people with developmental disabilities. Once an assessment is complete, next steps will be decided on, depending on workload and available resources.

The Diversion Service acknowledges that assessment is not the job of the police, legal personnel, or correctional staff. The program provides an option for justice personnel; they may know something is not right, but may not know what it is. This program assists in finding the most appropriate and effective solution.

¹ This is not an exhaustive list of all the initiatives that exist in this area, but a few unique programs uncovered while conducting this study.

6.2 FASD Projects for Youth

A few FASD projects for youth warrant mention. While these initiatives target only FASD and are specific to youth, they may be considered as models to be adapted to the wider scope of developmental disabilities in the adult population.

The Community Justice Project in Lethbridge takes a multidisciplinary approach to influencing change in the criminal justice area. Through mentorship and education about FASD and related effects, positive changes in the Youth Justice System are being sought. The project works to: influence effective case management; divert youth with FASD from the system, where appropriate; make recommendations to the court; identify high-risk youth and their families; and provide advocacy for families, schools, and communities.

The Community Justice Project is a partnership of many professionals and community agencies. There is one project officer, a police officer from the Lethbridge Police Service, who sits on the FASD coordinating committee. When youth with FASD become involved in the CJS, the project officer will get a file from the frontline police officers, meet with the coordinating committee, and come up with recommendations for legal counsel and the courts. The committee works to find the best supports for the youth, which are appropriate to the youth's needs, while at the same time considers what is best for the community. The ultimate goal is to end the cycle of involvement in the CJS.

The Justice Support Project for Youth in Edmonton is based on a similar premise. This project was initiated from a review of young offender centres in Alberta. Corrections, police, the Crown, community agencies, and the school boards came together to address the issues surrounding youth with FASD who are involved in the justice system. A committee was formed for the purpose of identification, sharing information, and connecting to community resources. Youth with FASD who have been in contact with the system (they do not have to be arrested or charged), can be referred to the committee, who will case conference around the youth. The committee will create a support plan and connect the youth to community supports. The ultimate goal is to keep the youth out of the system in the future.

The Enviro Wilderness School Association of Calgary has an FASD Reintegration Collaborative, which is funded by the Youth Justice Renewal Fund of the Department of Justice Canada. The Reintegration Collaborative is specifically designed for young offenders with an FASD diagnosis, and provides short-term, moderate to intensive teaching, and coaching to youth, parents, caregivers, and other professionals involved.

Similar to the other programs mentioned in this section, the Reintegration Collaborative works to develop appropriate strategies and coordinate services that meet the needs of the youth. An assessment is conducted on referrals of any justice-involved youth with FASD, a case plan is developed that addresses life skills, community

programs, schooling, etc., and recommendations are provided to the court. Program staff work closely with families and caregivers, and with the courts and correctional system. The goal is to find the most appropriate supports for the youth to end justice system involvement.

One respondent from the police interview described a scenario in which a process, similar to the processes undertaken by the above-mentioned FASD committees, was followed to deal with a case involving people with developmental disabilities. The respondent was called in to consult on a domestic violence case involving a married couple, both partners having a developmental disability. The respondent went to the disability community to obtain recommendations from experts in the field and to determine the most effective and appropriate response to the issue. A report was developed and shared with legal counsel and the judge, who followed the included recommendations for sentencing. The feedback was overwhelmingly positive and the respondent believes the case was dealt with in the most appropriate way. The respondent emphasized the need for this type of process to happen around every case involving people with developmental disabilities.

6.3 Appropriate Adult Safeguard

A unique initiative has been championed by the Police and Criminal Evidence Act (PACE) in the United Kingdom. An appropriate adult (AA) safeguard has been incorporated into police procedures to assist and protect the rights and welfare of vulnerable suspects in police custody. An AA is an independent person who can advocate for the individual in question, strengthen the reliability of statements, and ensure fairness of the process. While not mandatory, police are advised to ensure an AA is used if they think a person has a lower IQ, a learning disability, a mental disorder, or is a juvenile. These populations are considered to be “at-risk” because they may have limited understanding of legal rights, the interview questions, or the implications of responses.

The PACE Codes of Practice defines the role of the AA: he or she is not simply an observer, but should advise in the interview, facilitate communication, and assist in understanding. Although there is some overlap, the AA has a distinct role from a legal representative. The AA has a general duty to protect and assist; this may include checking the custody record, ensuring the suspect knows why they have been detained, and intervening in the interview, if necessary. The legal representative is concerned with the legal strategy, and upholding and asserting the suspect’s legal rights. An AA should not offer legal advice or discuss the alleged offence, as they have no legal expertise or legal privileges.

The use of the AA safeguard is still being evaluated, but some positive results have been reported: increases the likelihood that legal representation will be present in a police interview, lessens interrogative pressure by police, and encourages legal representation to take a more active role. It can be assumed that the AA’s assistance in

communication and understanding will facilitate the exercise of legal rights and better accommodate vulnerable populations in the Criminal Justice System.

6.4 Specialized Mental Health Unit (Assessment and Treatment Unit)

The Specialized Mental Health Unit of the Fort Saskatchewan Correctional Centre in Alberta provides specialized treatment for offenders who do not fit into the general population. Initially created for offenders with mental health issues, people with developmental disabilities may also be housed in this unit. The unit has 26 beds and is physically separated from the other inmates. Along with specialized psychiatric and medical treatment, offenders participate in programs such as anger management, life skills, leisure planning, etc., that specifically address their needs. Simplified information and language is used, if necessary, to communicate effectively with offenders who have lower IQs. Staff in the Specialized Mental Health Unit receive on-going training on all disabilities.

The philosophy behind the unit is that people with mental illness and developmental disabilities will be preyed upon in the general population. Challenges in communication and understanding place these offenders at risk. Lack of, or inappropriate, supports while incarcerated lessen the odds of success. It is the correctional system's responsibility to provide protection for these people and ensure that they get appropriate treatment. The Specialized Mental Health Unit recognizes these special needs and takes an alternative approach to treatment.

6.5 Ohio Partners in Justice

Ohio Partners in Justice is a coalition of professionals from the CJS and developmental disability system, as well as mental health professionals and other advocates of people with developmental disabilities. The Ohio Partners in Justice Action Team works "to expand and improve community resources for individuals with developmental disabilities when they become involved in the Criminal Justice System." They do this through the provision of training to law enforcement, criminal justice, and developmental disability personnel.

7.0 INFORMATION AND EDUCATION WORKSHOPS FOR SUPPORT STAFF AND CAREGIVERS

7.1 Logistics

Four information and education workshops were conducted in Calgary in February 2006. A total of 37 people participated in the workshops, which included management staff, support staff, caregivers, and family members of people with developmental disabilities. A pilot was conducted with staff from the VRRRI Research Department prior to the workshops. Feedback received in the pilot was used to revise the material for presentation.

Three locations in Calgary were chosen for the workshops: the Vocational and Rehabilitation Research Institute, the Community Living Alternative Society, and the Developmental Disability Resource Centre. These agencies work with people with developmental disabilities and their families. The hope was that utilizing such venues would encourage agency staff to participate and increase awareness of the workshops.

The workshops were 3 hours in length. There were two morning sessions, one afternoon session, and one evening session available. Any service provider, support staff, caregiver, or family member of people with developmental disabilities was welcome to participate. There was no cost to participants.

7.2 Recruitment of Participants

A brochure was created to provide information and invite participants to the workshop (see Appendix E). An electronic version of the brochure was sent to Calgary-based agencies that provide services to people with developmental disabilities and/or their families. Hard copies were also displayed at a number of participating agencies. The project co-directors also sent workshop information through the advisory group, the PLENA practice community, and other contacts made when conducting the research, specifically those support staff who participated in the study. Registration was done by phone or via email.

7.3 Workshop Design

Material covered in the workshops included: basic information about the relevant legislation in this area; a review of existing protocols, programs, and alternative models; and best practices for accommodating people with developmental disabilities in the CJS. Findings were drawn from the legislative review, experiences of people with developmental disabilities and caregivers in the justice system, and interviews with justice officials.

Content was presented by both project co-directors, following a participatory, interactive format (see Appendix F for PowerPoint slides). This included the application

of learning to hypothetical scenarios and case studies, group discussions, and a review of alternative practice models.

To set the context for the workshop, a video was shown of an interview with a woman with a developmental disability who had had many encounters with the CJS. The project co-directors developed the video with the woman's cooperation and were given permission to use the video for the purpose of the workshops. The woman spoke of her experiences, which highlighted a number of issues that would later be addressed in the workshop. This was a highly effective introduction to the topic.

After discussing some of the issues and providing an overview of the project, participants were given a "True or False" quiz.¹ The presenter went through the quiz with the participants. This exercise was done to highlight some of the questions that may exist for participants in this area, and to identify topics that would be covered in the workshop. Participants appeared to like this activity and were often surprised by some of the answers.

Participants were then given the Simon Marshall case study (discussed previously) to read. This was a very high profile case in Canada and a great example of what could happen when a person with a developmental disability becomes involved in the CJS. A group discussion followed the reading of the article and participants were asked to identify issues and concerns in the case.

Responses from the interviews with clients, support staff, and caregivers were then presented. The responses were divided into two groups: client responses and support staff responses. Participants were encouraged to relate any of their own experiences to the cases being presented. This component followed a lecture format, accompanied by PowerPoint slides for participants to follow along.

After a short break, participants came back together to hear about the CJS; this component included highlights from the legislative review and responses from the interviews with justice officials. The material was divided into three streams: Policing; Legal Representation and the Court Process; and Corrections. This portion of the workshop ended with a group discussion about "diversion."

Participants then reviewed alternative practice models in this area. Some of these programs were specific to people with developmental disabilities, some served other vulnerable populations, and others were narrower in scope, providing a specific service or addressing a particular component of the CJS. Participants were encouraged to learn from these examples and consider such programs when trying to develop an effective response to the issue. A handout was distributed, which provided more detailed descriptions of the programs and initiatives, and the presenter highlighted key characteristics. While not an exhaustive list of initiatives in this area, these were a few unique programs uncovered while conducting the study.

¹ All workshop handouts are provided in Appendix G.

The workshop concluded with “tips” for support workers, caregivers, and family members in supporting people with developmental disabilities through the justice process. Recognizing the important role these people play, the presenters wanted participants to walk away with some ideas on what they could do in such situations. The presenters also talked about “next steps”; these included possible projects that would build on this work, dissemination of findings, conferences, and a realistic look at legislative change and protocol development.

7.4 Evaluation

Participants were asked to complete a feedback form at the end of the workshop. The following three open-ended questions were asked:

- 1) What aspects of the workshop did you find useful and informative?
- 2) What aspects of the workshop did you find problematic?
- 3) Do you have any suggestions to improve/change the workshop?

Overall, the feedback was very positive. Participants noted the following aspects as useful and informative:

- Handouts and information that could be taken back to their home agency;
- Legal information;
- Case studies;
- Information on diversion;
- Group discussion;
- Tips for support workers, caregivers, and family members;
- Alternative models and resources;
- Information on the CJS and the justice process; and
- Practice scenarios and practical application of knowledge.

Participants listed a few areas that were problematic for them:

- Participants wanted to see confidentiality, *Freedom of Information and Protection of Privacy* (FOIP) legislation, and ethical considerations addressed in the workshop.

- Participants found the lack of training for justice personnel concerning.
- Participants would have liked to have a list of resources and contact numbers in Calgary².
- One participant felt that the interviews with justice officials were not necessarily representative of the whole justice system.

Participants suggested a number of ways to improve the workshops:

- Provide a copy of the PowerPoint slides to all participants.
- Some participants wanted to see more case studies used in the workshop.
- Some participants wanted to see more statistics about the number of people with developmental disabilities involved in the CJS³.
- Some participants wanted a full-day workshop, while others felt that half a day was too long.
- Some participants wanted more group sharing and more activities.
- Many participants supported the idea of creating a Resource Tool Kit for agencies⁴.

Where possible, the project co-directors modified each workshop based on the feedback from the ones previous. However, time and budget restraints sometimes resulted in little leeway to make changes. Follow-up with participants who were interested in the final report and the legislative review will happen at the end of the project.

² Similar information was compiled by the VRRRI in the form of their Resource Handbook, which was highlighted in the workshops.

³ Statistical information is not available.

⁴ This is a possible project the VRRRI may pursue in the future, based on the work done in this study.

8.0 CONCLUSIONS AND RECOMMENDATIONS

An essential part of providing quality care and individualized support to people with developmental disabilities is ensuring that support staff and caregivers have the tools, resources, and knowledge they need to do their job effectively. This applies to all areas of life, including possible involvement in the CJS. People with developmental disabilities are, and continue to be, involved in the CJS. Support staff and caregivers are often looked to for support and guidance in such situations; often, this is not a role they are prepared to fill.

The experiences of people with developmental disabilities, support staff, and caregivers in the CJS highlighted in this study have not been positive. While support staff and clients expressed the belief that some progress has been made in terms of educating police officers about disabilities, they agreed that much remains to be done. Lack of knowledge and understanding surrounding specific developmental disabilities often leads to inadequate responses to clients' behaviour. This, coupled with the lack of clients' understanding of the legal process highlights the importance for some form of advocacy for people with developmental disabilities. While support staff agree that part of their role is to advocate for clients, they are quick to point out that the sole responsibility is not theirs. Support staff suggested the need for a response that is specific to persons with developmental disabilities.

The legislative review, combined with interviews with justice officials, has revealed the lack of consideration given to the unique needs of people with developmental disabilities within the CJS. In most cases, the lack of legislation and protocols that specifically address people with developmental disabilities and guide the process is what hinders justice officials from effectively dealing with this population. Identification, communication, and understanding were also highlighted as challenges in this area.

A lack of alternative programs and community supports, specific to people with developmental disabilities, complicates the issue further. Respondents discussed utilizing programs for other vulnerable populations, or proceeding through the justice system as is, because alternative options are unavailable. While there are times when diversion is not appropriate, there are other times when it is, but diversion requires appropriate and effective initiatives outside of the system.

8.1 Recommendations for Change

The following recommendations are based on the information revealed in this study. These are suggested to better accommodate people with developmental disabilities within the CJS and should be kept in mind when considering an effective response to the issue:

- Acknowledge the issue. People with developmental disabilities are involved in the CJS. As is, the system is not equipped to effectively deal with this population. Recognizing people with developmental disabilities and their unique needs is a first step in addressing the issue.
- Identify early. Develop assessment tools or checklists to identify developmental disabilities early on in the justice process, and train justice officials in how to use them. This will assist in a more appropriate response when dealing with people in the system. While labelling is a concern, having such information should lead to fairer treatment by justice officials, and the exercise of legal rights. Identification must happen before available resources can be accessed.
- Share information, among all facets of the CJS. Police, legal representatives, and correctional staff echoed the same concern: identification is the biggest problem when working with people with developmental disabilities. Identifying the disability and sharing that knowledge, along with any other relevant information about the individual, the situation, and possible treatment will only help in finding an effective response.
- Consider specialized or alternative program models. Some initiatives have been identified in this study. Because there are no existing programs in Calgary specific to people with developmental disabilities, it is important to learn from what does exist, even if programs are designed for different populations or places. Models can be adapted and modified to meet the needs of this population and this community.
- Increase awareness. It is important to provide training and education at all levels of the CJS, so officials are more aware of the possible issues they may be dealing with. As well, it is important to educate the system on what resources are out there. Policing, legal representation, and corrections encompass many responsibilities and often, it is not feasible for officials to respond outside the structure of the justice system. Knowing what is available and who to call can make it easier and more likely that effective and appropriate treatment will happen.
- Implement protocols within the CJS. It is important to have procedures in place to guide practice involving people with developmental disabilities. Considering examples, such as the New South Wales proposed Code of Practice, could be a first step in developing protocols in our own agencies.

8.2 Tips for Support Workers, Caregivers, and Family Members

1. Navigate through the process
 - Communicate information about the process to your client; and

- Alleviate stress and confusion.
2. Get knowledgeable – Get aware
 - Learn about the CJS so that you are not lost yourself; and
 - Learn about rights, options, and alternatives.
 3. Understanding and Communication
 - Facilitate understanding and communication for both your client and justice personnel; and
 - Your client will need to make their own decisions... better that they be INFORMED decisions.
 4. Information Sharing
 - Provide information about your client, the disability, accompanying issues, and the incident – this helps justice personnel in understanding the situation; and
 - The caregiver usually has the greatest knowledge of a client – sharing information provides the context and foundation needed to build an appropriate strategy.
 5. Be valued
 - Without impeding the process, realize that you have something important to contribute and that you have a role to play; and
 - Demand that respect – be persistent – ask questions – share information.
 6. You're not a lawyer...
 - Realize your importance, but also your place; and
 - You are not there to provide legal guidance or judgement – be an advocate instead.
 7. Stay involved
 - Be there to provide support; and
 - The client will be coming back to the community.

This project took a small step in effectively accommodating people with developmental disabilities in the CJS by educating support workers and caregivers on practices, options, and adaptations that can be made. Information on the current legislation and practices in this area provided a solid basis to identify strengths and weaknesses in the system. Findings from the interviews and focus groups provided the connection between the formal legislation and lived experiences of people. An overview of alternative models and tips for best supporting a person with a developmental disability through the CJS provided practical information, in addition to a base of knowledge. A discussion about “Next Steps” provided a window for the future.

There is still a lot of work that needs to happen before people with developmental disabilities will be fully accommodated within the Criminal Justice System. Increasing awareness, education, and developing new initiatives will lead to effective and appropriate treatment. Acknowledging this population in the CJS is key; an appropriate response needs to follow. Support staff and caregivers have an important role to play in this process.

Appendix A

Request for Client Participation

LEGAL RIGHTS STUDY

**Monetta from the VRRRI and
Monica from CRILF
need your help with a study.**

The name of the study is

“LEGAL RIGHTS”

Or

**“Legislation, Existing Protocols and Best Practices Training for Service Providers and
Caregivers of People with Developmental Disabilities”**

Legal has to do with the law.

A law tells us what we can do and what we can not do.

Rights are things people should be able to have.

Rights are also things that people should be able to do.

**WE NEED PEOPLE WITH DEVELOPMENTAL
DISABILITIES TO HELP US.**



**We want to know what happened
when you talked to the police about:**

- 1. Something that happened to you.**
- 2. Something that you did.**
- 3. Something that you saw happen.**

If you talked to a lawyer or a judge we want to hear about that too.



We are going ask you questions like:

- 1. Were the people nice to you?**
- 2. Did you know what was going on?**
- 3. Did someone tell you what would happen next?**
- 4. Is there a way that someone could have made things better for you?**



If something happened that you do not want to tell everyone here, you can talk to us alone.

Do not worry, no one else will know you talked to us.



We are going to tape record what you say. No one else will listen to the tapes.

You can leave whenever you want. You do not have to talk to us if you do not want to.

Appendix B
Focus Group Protocol

Legislation, Existing Protocols, and Best Practices Training for Service Providers and Caregivers of People with Developmental Disabilities in the Criminal Justice System

Client focus group protocol:

First I would like to thank everyone for agreeing to share your stories with us. Let me introduce myself. My name is Monetta Bailey and I am a researcher at the VRRRI. Some of you might know our agency- we provide services for persons with developmental disabilities and we also have a research department where I work. This is Jill. She works in the research department at the VRRRI as well and also in the services department.

Today we want to hear about your stories involving the police, lawyers or judges.

(Read through the info sheet)

Please remember that if you do not want to talk in this group about anything, you can talk to me individually. Please talk to Jill or to me after the group if you want to talk alone.

Let me explain how this is going to work. I would like this discussion to be relaxed. I will start by asking a few questions. Then I would like you to share your stories. I might ask you questions during or after your stories. If you have any questions to ask me during this group, please feel free. If you do not understand anything you can also ask me to stop and explain it to you.

Do you have any questions before we begin?

Questions:

1. How many of you have talked to the police?
 - a. Of those who have talked to the police, how many talked to lawyers, judges, or went to prison?
 - b. Can you please tell me what happened? (Narratives)
2. Did you have a support person with you when you talked to the police?
 - a. Who was the support person...family member, paid staff, caregiver, guardian? (Repeat question 2 and 2a for lawyers, judges, correctional guards)
3. Did you understand what was going on when you talked to the police (lawyers, judges, correctional guard)?

4. Were the police/lawyers/judges nice to you?
5. Did the police/lawyers/judges know that you had a developmental disability?
 - a. Do you think it is better if the police/lawyers/judges know about your developmental disability? Why or why not?
6. How did you feel when you were talking to the police/lawyers/judges? Were you scared, proud to be helping the police, etc?
7. Is there anything else you wish you knew when you talked to the police?

Appendix C

Interview Schedule: Support Staff

Legislation, Existing Protocols, and Best Practices Training for Service Providers and Caregivers of People with Developmental Disabilities in the Criminal Justice System

Support staff focus group/interview schedule:

First I would like to thank you for agreeing to share your stories with us. Let me introduce myself. My name is Monetta Bailey and I am a researcher at the VRRI. Some of you might know our agency- we provide services for persons with developmental disabilities and we also have a research department where I work.

The purpose of this study is to provide tips for support staff to assist clients through the CJS. I, along with another researcher from CRILF, am conducting interviews with CJS officials, clients, and support staff in order to hear their experiences with persons with developmental disabilities in the CJS. Based on what we hear, we will develop and deliver workshops to individuals who support persons with developmental disabilities to disseminate our findings and provide training for assisting clients. The need for this training was expressed by the Service Provider Council of Calgary; the VRRI along with CRILF responded with this study.

This interview is meant to be very informal so please feel free to add any comments, ask any questions, or ask for clarification at any point during the interview. I do have some topics that I would like addressed, however, I am mainly concerned with hearing from you and hearing your experiences. You can choose to provide experiences in response to the questions rather than a structured response.

Please be assured that these interviews are confidential and anonymous. For that reason, all names or identifying characteristics will be changed for the final report and the workshops.

Do you have any questions before we begin?

Questions:

1. What is your job position and description here?
2. Have you assisted a client(s) through the CJS in the capacity of this position?
3. How far into the system have you gone with a client (e.g. police, lawyers, court, prison)?
4. Did you feel capable to provide sufficient support for your client(s)?
5. Do you feel that it is reasonable to expect support staff to assist their clients should they get involved in the CJS?

6. How would you describe the process for your client(s)?
7. Is the CJS equipped to accommodate persons with developmental disabilities? Why or why not? Are CJS officials capable of dealing with persons with developmental disabilities? What would make the CJS more accommodating to persons with developmental disabilities?
8. Would you like to share any of your experiences with clients and the CJS?
9. Some clients indicated apprehension to disclosing to CJS officials that they have a developmental disability? They gave many reasons for this including not wanting to appear as if they were making excuses for their actions, as well as fear of being treated differently. In your opinion, is it beneficial for clients to disclose their developmental disability? Can you foresee any problems with disclosure?
10. There are some programs aimed at diverting persons with developmental disabilities away from the CJS to a specialized program. Do you think this will be beneficial to have here? Why or why not?
11. Are you familiar with the Disabilities Liaison Officer with the Calgary Police Service? Have you ever contacted this individual? What is your opinion of their position?
12. Do you have any suggestions for anyone supporting a client through the CJS?
13. In your opinion, is there anything that can make the process easier?

Appendix D

Interview Schedule: Criminal Justice System

Legislation, Existing Protocols, and Best Practices Training for Service Providers and Caregivers of People with Developmental Disabilities

Interview Schedule: The Criminal Justice System

1.0 Introduction

- Self introduction and description of CRILF (if necessary).
- Brief description of the project (if necessary... a project summary is sent to respondents prior to the interview). Answer any additional questions.

To give you a bit of background, we are partnering with Vocational and Rehabilitation Research Institute (VRRRI) on this project, and have received funding from the People with Developmental Disabilities Provincial Board and from Alberta Community Development to carry it out. We have also established an Advisory Committee, which consists of representatives from the developmental disability field and from the criminal justice system.

The project is based on the need for resource development and training for service providers and caregivers on legal rights and responsibilities for people with developmental disabilities. Service providers and caregivers are often expected to support people with developmental disabilities through the justice system process, but may not have the knowledge or training to fulfill that role. Information and education will place service providers and caregivers in a better position to support people with developmental disabilities through the process.

In order to address this issue effectively, there is a need to understand the current system as it pertains to people with developmental disabilities. This includes:

- *reviewing the current legislation in Alberta;*
- *taking a comparative look at alternative practice models;*
- *interviewing justice system personnel who have experience in this area;*
- *interviewing people with developmental disabilities and their service providers and caregivers who have gone through the justice process; and*
- *developing and delivering workshops for service providers and caregivers on best practices in supporting people with developmental disabilities within the justice system.*

- Outline how the interview will run and set out ground rules.

I hope this discussion is relaxed and open. I have certain questions I would like to ask, but also welcome any comments and opinions that you feel are important. Some of the questions may not be relevant to you. If so, please let me know and we'll move on to the next question.

Please be assured of complete confidentiality; no names will be used in the report and comments will remain anonymous. I ask that you be honest and reflective in the interview; I am interested in any opinions and experiences you want to share. The interview will not be recorded, but I will be taking notes as we go along.

The interview will last about 45 minutes. Do you have any questions before we get started?

2.0 Definition of developmental disability.

For the purposes of this project, we use the following definition of "developmental disability":

A state of functioning that begins in childhood (i.e. before age 18) and is characterized by significant limitations in both intellectual capacity and adaptive skills. The Persons with Developmental Disabilities Provincial program uses the following three criteria to make a determination of developmental disability:

- *onset prior to age 18;*
- *significantly below average intellectual capacity; and*
- *related limitations in two or more of the following adaptive skills areas: home living, communication, community use, social skills, health/safety, leisure, self-care, self-direction, functional academics, work.*

2.1 Do you define developmental disability in the same way?

- If not, how do you define it?

2.2 Do you see a mental illness diagnosis as different from a developmental disability? Why or why not?

3.0 Personal Experience

3.1 Could you tell me a little about your position and what is involved in your job?

- Policing
- Legal representation
- Court process
- Correctional services

3.2 In this capacity, what has been your experience working with people with developmental disabilities?

- Victims, witnesses, offenders

4.0 Challenges and Issues

The biggest challenge appears to be this:

The Criminal Justice System must be able to provide for the fair treatment of all people appearing before it, BUT for people with developmental disabilities, equal treatment alone won't necessarily ensure that they are able to understand or exercise their legal rights.

****NOTE:** from here, the interview needs to follow the appropriate trail of questioning with respect to the respondent's discipline (Policing, Legal Representation/Court Process, or Corrections).

Policing

4.1 On the front line, is there a protocol or specific steps that an officer is expected to follow when dealing with a person with a developmental disability?

- Yes... what does the process look like?
- No... is a protocol necessary? Needed?
- Any information or education given to this topic in training
- Additional info available: *Admissible in Court and Crime Prevention and Personal Safety of Persons with Disabilities*
- Call the Disability Liaison Officer
- Call on support agencies

4.2 Are there issues around identification or assessment of developmental disabilities for officers working on the front lines? For other officers involved in police procedures (e.g., interviewing)?

- 4.3 When dealing with offenders who have developmental disabilities, what are some of the issues involved?
- Arrest procedures
 - Communication
 - Charter Rights (Miranda Rights?)
 - Legal status (e.g., offender has a legal guardian)
- 4.4 What are some of the potential issues involved in taking statements from people with developmental disabilities (as victims, witness or offenders)?
- Lack of understanding
 - Poor recall of details
 - Poor verbal communication OR lack of skill to report
 - Susceptibility to suggestions
 - Fear
 - False confessions
 - Inconsistent testimony or responses
 - Eager to please
 - Admissibility in court – evidence
 - Impact on investigation
- 4.5 What are your views on service providers or caregivers/guardians supporting a person with a developmental disability through the criminal justice process?
- Personal experience
 - Necessary
 - Helpful
 - Challenges involved
- 4.6 Have you encountered any additional challenges that we haven't talked about yet?
- Assessment and identification
 - Communication and understanding
 - Interviewing
 - Evidence
 - Standing trial, testifying in court, court proceedings
 - Appropriate supports through process, services and agencies
 - Sentencing and consequences
 - Protocols and practices
 - Education and information
 - Etc....

Legal Representation and the Court Process

- 4.1 Have you received any formal education or training around working with people with developmental disabilities? Is there anything available for lawyers/judges that you know of?
- 4.2 Are you always aware, from the beginning of the case, that your client has a developmental disability? How do you know that information?
 - Identification
 - Need for assessment
 - Documentation
 - Impact of this diagnosis...
- 4.3 What kind of supports, if any, are in place to assist you in representing a person with a developmental disability in court?
 - Agencies
 - Caregivers or guardians
 - Court advocates
- 4.4 Can you tell me about any experiences you have had working with a caregiver or service provider who is supporting a person with a developmental disability?
- 4.5 What communication challenges impact the case when working with a person with a developmental disability?
 - Difficulty in verbal communication
 - Statements – admissibility
 - Evidence
 - Witness accounts
 - Questioning on the stand
- 4.6 What kinds of issues arise in sentencing offenders who have developmental disabilities?
 - Appropriate options
 - Concept of rehabilitation
- 4.7 What supports would help you in representing a person with a developmental disability?
- 4.8 Are you aware of any pieces of legislation that address this issue?

4.9 Have you encountered any additional challenges that we haven't talked about yet?

- Assessment and identification
- Communication and understanding
- Interviewing
- Evidence
- Standing trial, testifying in court, court proceedings
- Appropriate supports through process, services and agencies
- Sentencing and consequences
- Protocols and practices
- Education and information
- Etc....

Corrections

4.1 Are there alternate programs for offenders with developmental disabilities to serve their sentences? Programs that would specifically address their needs?

4.2 What are some of the issues that arise when the needs of offenders with developmental disabilities are not addressed? For example, if an offender with a developmental disability is housed in a prison with no specialized programming?

4.3 Do correctional staff, as a whole, receive any formal training, education or information on offenders with developmental disabilities?

4.4 Do you have any information on the issue of recidivism with respect to offenders with developmental disabilities?

4.5 Have you encountered any additional challenges that we haven't talked about yet?

- Assessment and identification
- Communication and understanding
- Interviewing
- Evidence
- Standing trial, testifying in court, court proceedings
- Appropriate supports through process, services and agencies
- Sentencing and consequences
- Protocols and practices
- Education and information
- Etc....

5.0 Criminal Responsibility (ALL)

5.1 Can you comment on the following statement:

People with developmental disabilities have intellectual levels and social adaptabilities that measure well below average standards, yet they are judged to be legally responsible for their actions.

- Should people with developmental disabilities be held criminally responsible for their actions?
- Concept of diminished responsibility
- Concept of “Diversion” – should we divert such individuals out of the justice system all together?
- What about victims? Witnesses? Caregivers and guardians? Where or how do they fit into this process?

6.0 Solutions and Recommendations for Change

6.1 What are some alternative solutions to this issue?

- Specialized court
- Advocates
- Specialized programming within the system – outside of the system
- Education and training
- Legislation
- Protocols

6.2 Recommendations for change...?

7.0 Additional Comments

7.1 Is there anything else you would like to add that I haven't asked you in this interview?

Thank you...

Appendix E
Workshop Brochure

Appendix F

Workshop PowerPoint Slides

Appendix G

Workshop Handouts

WHAT DO YOU KNOW???

True or False...

1. There are separate pieces of legislation in Alberta that accommodate for and consider the unique needs of people with developmental disabilities who are involved in the CJS.
2. The police, lawyers, courts, and correctional system have specific protocols to follow when dealing with people with developmental disabilities.
3. Alternative programs are available to people with developmental disabilities to support them through the justice process or divert them to community resources.
4. The needs of people with developmental disabilities and people with mental health issues are so similar that the same responses, programs, and treatment can be applied to both groups in the CJS.
5. The CJS recognizes people with developmental disabilities and makes efforts to identify those people early in the process in order to meet their needs.
6. Caregivers, support workers, and guardians are legally required to participate in a case involving a person with a developmental disability whom they are supporting (e.g., providing statements on behalf of their client).
7. People with developmental disabilities are not considered responsible for their criminal behaviour.
8. Caregivers, support workers, and guardians should stay out of criminal justice proceedings involving their client.

9. It is really easy to tell if someone has a developmental disability.
10. Justice personnel receive special training on developmental disabilities.
11. People with developmental disabilities should not identify as such if they become involved in the CJS.
12. Lawyers will always ask the caregiver, support worker, or guardian of a client with a developmental disability how they should proceed with the case.
13. In court, people with developmental disabilities can use a defense of having a mental disorder.
14. People with developmental disabilities are not fit to stand trial.
15. People with developmental disabilities are hardly ever sent to jail.
16. Once in the CJS, there is little, if any, support for people with developmental disabilities.
17. The police are mean to anyone with a developmental disability.
18. The Calgary Police Service has special officers who deal with cases involving people with developmental disabilities.
19. Prison is an appropriate sentence for people with developmental disabilities because they receive specialized treatment and they are in a controlled setting.
20. If a person with a developmental disability cannot afford a lawyer, they can easily get Legal Aid.

Proposed Police Code of Practice New South Wales, Australia³¹⁴

Other jurisdictions have considered the importance of explicit police practices for dealing with persons with developmental disabilities and have recommended the development of formal police procedures for conducting criminal investigations. For instance, New South Wales in Australia proposed a Code of Practice to replace the existing Police Commissioner's Instructions. The Code of Practice, which would be readily available at all police stations for consultation by police officers, detained persons and other interested persons, would establish explicit procedures for police investigations involving people with an intellectual disability.³¹⁵

Due to its comprehensive nature, it bears repeating here the more relevant aspects of the proposed Code.

i. Guidelines for identifying an intellectual disability

The Code would set out the indicators for police to watch for in a suspect's behaviour or circumstances to assist in making a determination of whether a developmental disability exists. The indicators to watch for include:

- difficulty understanding questions and instructions;
- responding inappropriately or inconsistently to questions;
- short attention span
- receipt of a disability support pension;
- residence at a group home or institution
- education at a special school or in a special education classes;

³¹⁴ This excerpt comes from a larger document entitled, *A Critical Legal Analysis of the Rights of Persons with Developmental Disabilities in the Criminal Justice System*, prepared by Sheryl Pearson, legal consultant, for the Canadian Research Institute for Law and the Family and the Vocational and Rehabilitation Research Institute. (2006)

³¹⁵ New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996); R.W. Conley, R. Luckasson & G.N. Bouthilet, eds., *The Criminal Justice System and Mental Retardation: Defendants and Victims* (Baltimore, Maryland: Paul H. Brookes Publishing Co., 1992).

- inability to understand the caution.³¹⁶

ii. Guidelines for questioning a person with an intellectual disability

The Code would also establish factors for police to consider when questioning a person with an intellectual disability. The factors might include:

- the need to use language and concepts that will be understood;
- the need to take extra time in interviewing;
- the risk of the person's susceptibility to authority figures, including a tendency to give answers that the person believes are expected;
- the dangers of leading or repetitive questions;
- the need to allow the person to tell the story in his/her own words;
- the person's likely short attention span, poor memory and difficulties with details such as times, dates and numbers;
- the need to ask the person to explain back what was said; and
- the possibility that the person may be taking medication which may affect his or her ability to answer questions.³¹⁷

iii. Guidelines for administering a police caution

The Code would establish factors for police to consider while administering the police caution:

- a person may have difficulties comprehending the concept of the right to silence;
- there are possible evidentiary implications that may arise from the failure of a suspect to understand the caution; and
- the suspect may need to be reminded periodically of the caution.³¹⁸

³¹⁶ *Ibid.* at 77–78.

³¹⁷ *Ibid.* at 78.

³¹⁸ *Ibid.* at 79.

iv. General guidelines for the investigative procedure

The Code would also establish the following general guidelines for investigation procedures:

- The standard questions relating to the adoption of the interview record should be appropriate to the person with the intellectual disability. While interviews should be electronically recorded where possible, if not electronically recorded, the interview should be read back slowly and the person frequently asked whether it is correct.
- Identification parades should not be used for people with intellectual disabilities where unfairness to the suspect is likely to result due to the unusual manner or appearance of the particular suspect.
- An accused's intellectual disability must be taken into account when setting bail conditions.
- A person with an intellectual disability has the right to a lawyer. Absent exigent circumstances, questioning of a suspect after arrest should only take place if a lawyer representing the person is present.³¹⁹

v. Guidelines related to a support person

- Police must ask the person whether they wish to have a third person (support person) present during police questioning. If the person wishes to have a support person, the police must take reasonable steps to arrange one.
- A lawyer should also consider the need for a support person and ask the individual whether they would like a support person present.³²⁰

³¹⁹ *Ibid.* at 79–80.

³²⁰ *Ibid.* at 80.

WHAT CAN YOU DO...?

Tips for Support Workers, Caregivers, Family Members and Guardians for Best Supporting People with Developmental Disabilities through the Criminal Justice System

- 1) Navigate through the process
 - Communicate information about the process to your client
 - Alleviate stress and confusion
- 2) Get knowledgeable – Get aware
 - Learn about the CJS so that you are not lost yourself
 - Learn about your rights, options and alternatives
- 3) Understanding and Communication
 - Facilitate understanding and communication for both your client and justice personnel
 - Your client will need to make their own decisions... better that they be INFORMED decisions
- 4) Information Sharing
 - Provide information about your client, the disability, accompanying issues, and (maybe) the incident – you can even provide statements
 - This helps justice personnel in understanding the situation
 - The caregiver usually has the greatest knowledge of a client – sharing information provides the context and foundation needed to build an appropriate strategy
- 5) Be valued
 - Without impeding the process, realize that you have something important to contribute and that you have a role to play
 - Demand that respect – be persistent – ask questions – share information

6) You're not a lawyer...

- Realize your importance, but also your place
- You are not there to provide legal guidance or judgement – you are not there to get your client “off”
- Allow the process to happen
- Be an advocate instead

7) Stay involved

- Don't impede the process, but do stay involved
- Correctional representatives say keeping caregivers involved is a big problem
- This has implications because the client will be coming back to the community
- Be there to provide support and advocacy

Appendix H

Fact Sheet