TOOLKIT 22

PLANNING TO QUESTION PEOPLE WITH SOMEONE WITH FETAL ALCOHOL SPECTRUM DISORDER (FASD)

AUGUST 2026

The Advocate's Gateway

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The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants are specialist skills.

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

1. INTRODUCTION

1. This Toolkit brings together policy, research and guidance relating to definitions of Fetal Alcohol Spectrum Disorder (FASD), how FASD can affect communication, and what should be done to facilitate effective participation of an individual with FASD in the court process. It also includes examples of good practice.
2. FASD refers to a spectrum of closely related neurodevelopmental conditions resulting from prenatal alcohol exposure (PAE). When a foetus is exposed to alcohol, it can lead to irreversible damage to the brain and body of the impacted individual, leading to FASD.
3. FASD can cover a wide spectrum of impairments, and many individuals with FASD may also have co-occurring conditions, and, in these cases, reference should be made to other relevant toolkits alongside this one.
4. The current Toolkit provides a range of guidance which can support those with FASD in the courtroom. Information about an individual's specific capabilities or condition is essential and, if not supplied, should be requested.
5. As noted, the guidance in this Toolkit is not intended to be a replacement for a communication assessment by a Registered Intermediary (see **Toolkit 16: Intermediaries: Step by Step**). In this Toolkit, the term 'Registered Intermediary' will be used (it is noted that other intermediary roles such as an Approved Intermediary also exist). This toolkit consolidates current policy, research and guidance on how autism may affect communication in court. It offers general recommendations for mitigating the participation (understanding, communication and interaction) challenges that individuals with autism may experience in legal contexts.

2. SUMMARY

6. FASD is a 'spectrum' of impairments, and no two individuals will have the same profile. An individual may have a high IQ and be articulate and live independently, but still have no grasp of planning and consequences of behaviour, resulting in problems with the law; while another may have a low IQ, sensory issues and be unable to live independently. Others may have a combination of strengths and impairments, often described as a 'spiky profile.'

7. Despite significant impairments, individuals with FASD frequently appear capable, informed, and competent and do not always show outward signs of impairment. In fact, those with FASD may display what is referred to as 'superficial talkativeness.' On a superficial level, they can engage in conversation; however, when asked more in-depth or abstract questions, it becomes obvious that they do not really understand what is being asked or happening.

8. A lack of obvious symptoms can result in professionals misconstruing individuals with FASD as lazy, manipulative, or noncompliant. Conduct may be viewed as deliberate and malicious rather than recognising that FASD-related brain impairments can directly contribute to such behaviours.

9. Despite growing awareness of FASD, witnesses and defendants living with FASD may not always be recognised as having the disorder, potentially putting them at a substantial disadvantage in the criminal justice system (CJS). FASD is often underdiagnosed or misdiagnosed (Popova et al., 2016).

10. There is a lack of understanding and awareness amongst professionals on how FASD can contribute to offending behaviours (**Gilbert et al., 2021**). Research has shown that those with FASD involved in justice systems are exacerbated by systemic failure from legal, judicial and forensic professionals in both recognising and accommodating the complexities of this disorder (**Flannigan et al., 2018**).

11. Research has shown that 60% of individuals born with FASD could experience problems with the law at some point during their life due to complications of FASD (**Streissguth et al., 1996**). Individuals with FASD are 19 times more likely to encounter the CJS. International research shows that the prevalence of individuals within the CJS may be as high as 46% (**Mela et al., 2022**).

12. Legal and justice professionals are in a unique position to identify individuals living with FASD and to protect their legal rights (**Brown et al., 2024**).

13. Individuals with FASD have many strengths. They may be talented musicians, artists or sports people, proficient public speakers with wide vocabularies, and are often said to be highly resilient, good-natured, determined, and hard-working (**Flannigan et al., 2021**). With the right kind of support, especially from a young age, outcomes for individuals with FASD can be positive.

3. WHAT IS FETAL ALCOHOL SPECTRUM DISORDER?

Definition

14. Fetal Alcohol Spectrum Disorder (FASD) is a diagnostic term which refers to a spectrum of disorders resulting from brain and central nervous system damage caused by prenatal alcohol exposure.

15. It is a lifelong disorder that can cause a range of difficulties including:

    a. cognition (intelligence, attention, short- and long-term memory),

    b. executive function (inhibition, working memory, sustaining attention, ability to adapt to changing situations and decision making),

    c. adaptive function (social communication, personal independence and daily living skills), and

d. self-regulation (ability to regulate mood and emotions).

Diagnosis

16. The United Kingdom (UK) follows the Scottish Intercollegiate Guidance Network (SIGN) Guidelines adopted by the National Institute of Health and Care Excellence in England in 2022 (SIGN, 2019).

17. Assessments are made of ten neurodevelopmental areas noted below:

- Affect regulation
- Brain structure
- Academic achievement
- Cognition
- Adaptive function
- Social communication
- Executive function
- Attention, language
- Memory
- Motor skill

18. A diagnosis is made using one of the three outcomes below:

Table 1: UK Diagnostic Guidelines (SIGN, 2019)

Diagnosis of FASD with Sentinel Facial Features This may be made if an individual meets the following criteria: • simultaneous presentation of the three sentinel facial features (short palpebral fissures, smooth philtrum and thin upper lip); AND • PAE confirmed or unknown; AND • evidence of severe impairment in three or more of the identified ten neurodevelopmental areas of assessment (referred to above) or, in infants and young children, presence of microcephaly.
Diagnosis of FASD without Sentinel Facial Features This may be made if an individual meets the following criteria: • confirmation of PAE; AND • evidence of severe impairment in three or more of the identified ten neurodevelopmental areas of assessment.
At risk for neurodevelopmental disorder and FASD, associated with prenatal alcohol exposure This designation should be given to individuals when: • there is confirmation of PAE; AND • evidence of severe impairment in three or more of the identified ten neurodevelopmental areas of assessment for FASD are not met but there is some indication of a neurodevelopmental disorder in combination with a plausible explanation as to why the neurodevelopmental assessment results failed to meet the criteria for significant impairment (for example, patient was too young; the assessment was incomplete).

19. Advocates should be aware that some individuals may have been diagnosed using older terms such as:

- Fetal Alcohol Syndrome (FAS)
- Alcohol Related Neurodevelopmental Disorder (ARND)

20. Whilst every person with FASD will have a unique profile of both strengths and challenges, Figure 1 below indicates some of the possible outcomes resulting from PAE.

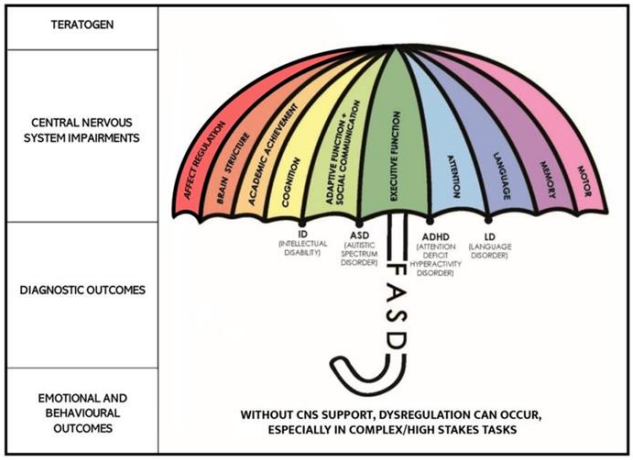

Figure 1: Possible diagnostic outcomes resulting from PAE

21. Despite the recent **Nice Quality Standard 2022**, rates of diagnosis remain low and advocates may well be acting on behalf of many clients with FASD who do not have a formal diagnosis.

22. Advocates should also be aware that FASD is often considered an 'invisible' disorder as many children do not exhibit physical differences and even where present, features can lose their distinctiveness as an individual grows older (**Spohr et al., 1993; Streissguth et al., 1991**).

Prevalence of FASD

23. The average global prevalence of FASD is estimated to be around 1%. In some countries such as the UK, Canada, the United States and Australia, the prevalence rate may be closer to 5% or one in 20. The UK is estimated to have the fourth-highest rate of alcohol consumption in pregnancy in the world at over 41%.

24. FASD may be more common in the UK than Autism Spectrum Disorder (ASD) (**Schölin et al., 2021**). A study in Greater Manchester by the University of Salford estimated FASD prevalence at 1.8–3.6% of the population, equating to 1.2–2.4 million people in the UK (McQuire et al., 2019).

25. FASD can be more common in certain parts of the population. International evidence reviews place the prevalence of FASD in children's social care settings, such as foster care, higher than the general population (**Popova et al., 2019**).

26. Studies in the UK have reported prevalence amongst looked after children to be 34% (**Gregory et al., 2015**) with one study reporting 58% of its cohort of looked after children at a moderate or high risk of PAE (**Dawson et al., 2025**).

27. Recent research has also reported that FASD occurs among children involved in the juvenile justice system up to 40 times more than the general population (**Flannigan et al., 2018**).

28. Further, a global systematic review suggests that those with FASD are 19 times more likely to have formal involvement as defendants in the CJS (**Popova et al., 2019**). Studies have reported prevalence rates in forensic settings of up to 31% in Canada (**McLachlan et al., 2019**), and 36% in Australia (**Bower et al., 2018**).

29. Given these prevalence rates, legal and justice professionals are likely to encounter youths and adults impacted by FASD on a regular basis.

Co-occurring Conditions

30. FASD is often not the primary diagnosis given to a defendant or witness because historically there has been no clear and accessible diagnostic pathway. As an aetiological condition, FASD is associated with approximately 428 co-occurring conditions (Popova et al., 2016) and can be both underdiagnosed and commonly misdiagnosed as other conditions, further contributing to its 'invisibility'.

31. The advocate is more likely to act on behalf of a client with FASD whose formal diagnosis is ASD, ADHD or a learning disability or learning difficulty (or a combination of these). This does not mean the person does not have FASD; rather FASD may have been simply overlooked or misdiagnosed.

32. Compared to the general population, an individual with FASD is 10 times more likely to have ADHD, 20 times more likely to engage in substance misuse, and 25 times more likely to be diagnosed with a psychotic disorder (**Popova et al., 2016; Weyrauch et al., 2017**).

33. An increased rate of co-occurring mental health disorders, as well as suicide and addictions, amongst individuals with FASD has also been reported as well as (**Flannigan et al., 2022; Popova et al., 2016**). Generally, compared to ADHD, FASD accounts for more severe and complex impairments (**Greenspan et al., 2021**) and is less likely to respond to conventional and behavioural intervention.

34. Should an advocate or Registered Intermediary be concerned that a person has any of the following conditions, the following toolkits are relevant:

    - **Toolkit 3 (Planning to question someone with Autism)**
    - **Toolkit 4 (Planning to question someone with a learning disability)**
    - **Toolkit 5 (Planning to question someone with a Hidden Disability)**
    - **Toolkit 10 (Identifying Vulnerability in Witnesses)**
    - **Toolkit 12 (Planning to question someone with a Suspected (or Diagnosed) Mental Health Disorder**
    - **Toolkit 15 (Witnesses and Defendants with Autism)**; and
    - **Toolkit 17 (Vulnerable witnesses in Civil Courts)**.

35. In addition, advocates and Registered Intermediaries should refer to and draw upon the 20 Principles of Questioning (**Cahill, Lamb & Wheatcroft, 2022**) as well as **The Equal Treatment Bench Book July 2024 (February 2026 Update).**

Environmental Adversity

36. Individuals with FASD experience extremely high rates of both pre- and post-natal adversity from early on in life, including poor prenatal care, exposure to other substances, and pre-term birth (**Price et al., 2017; Tan et al., 2022**).

37. There is considerable evidence that youth with FASD are more likely to experience numerous adverse childhood experiences as well as early life adversity (**Flannigan et al., 2021; Price et al., 2017**) in addition to lack of family support, a known protective factor against justice system involvement (**Pei et al., 2016**).

FASD Awareness

38. Despite the over-representation of individuals living with FASD in the CJS, the symptoms of FASD often remain undetected, undiagnosed and misunderstood by professionals in the legal system, leaving those with FASD extremely vulnerable in justice system settings.

39. The vast majority of defendants with FASD have not been formally recognised by the CJS (**Allely & Gebbia, 2016**). **Burd et al. (2004)** reported that only one out of 3,080,904 imprisoned individuals in their study had been previously diagnosed as living with FASD. Similarly, **McLachlan et al. (2019)** found that 86% of justice-involved participants in their study had not been previously diagnosed with FASD.

40. It is increasingly recognised that there is a need for greater knowledge and awareness of FASD amongst professionals (**Gilbert et al., 2021**) as well as better identification of systems-level barriers, including delayed diagnosis and lack of services.

41. Research has shown a significant lack of understanding and awareness of FASD amongst legal professionals, judicial officers, as well as forensic mental health clinicians (**McLachlan et al., 2020**). Failure to accurately identify and support an individual with FASD can lead to a range of legal issues, including miscarriages of justice (such as false confessions and wrongful convictions), inappropriate sentences and difficulties in complying with probation orders. Research has shown the increased vulnerability of

individuals with FASD in prison to victimisation (**Weir, 2023**) and difficulties in complying with prison rules and routines (**Day, 2022**).

42. Early and accurate diagnosis can improve the accuracy of fitness to plead and culpability decisions and contribute to fairer sentencing outcomes.

Summary of Indicators of FASD

43. The following are a summary of possible indicators of FASD. Please note that these are only possible indicators and not all need to be present where FASD may be suspected.

Table 2: Indications of FASD derived from the centres for disease control and prevention

Physical Indicators

- Challenges with memory and attention
- Low birthweight, smaller head shape, smaller height, and/or lower body weight
- Medical Problems (such as problems with the heart, kidneys, or bones)
- Language and speech delay
- Limited comprehension, learning disability, lower IQ/intellectual disability, or developmental disability
- Motor deficits or poor coordination
- Abnormalities in facial features, especially noted smooth ridge between the nose and upper lip (philtrum) and small eyes
- Sight and/or hearing deficits
- Abnormal sleeping patterns or disturbances

Behavioural and Psychological Indicators

- Limited adaptive functioning
- Sensory differences
- Co-morbid psychological diagnosis (often ADHD, anxiety, depression, conduct disorder, etc.)
- Hyperactivity
- Impulsivity, difficulty learning/linking cause and effect, and/or poor judgement
- Difficulty with school, work performance, and management of appointments
- Easily manipulated and poor social skills
- Sexualized behaviours or inappropriate sexual behaviours
- Attachment challenges

Environmental Indicators

- Being raised by someone other than biological parents
- Having a biological parent that is deceased
- School failure
- Criminal justice involvement
- Having a history of and/or becoming a victim of physical and/or sexual abuse
- Having a history of being neglected/maltreatment
- Living in poverty or having lower socioeconomic status
- Dependent living
- History of psychiatric institutionalism
- Having a history of alcohol and/or substance use and/or having a biological caregiver with substance and/or alcohol use disorder

*Table 2 is reproduced with kind permission from Dr Jerrod Brown (**Brown et al., 2024**, p. 7).*

44. Within the context of a court setting, some possible indicators of FASD are listed overleaf (**Table 3**).

Table 3: Indicators of FASD in a court setting

Indicator	Description
Desire to please	Predisposed to chattiness, compliance, and gullibility
Decision-making	Impulsive and inconsistent decision-making (e.g., waiving of legal rights)
Memory problems	Proneness to short- and long-term memory deficits, suggestibility, confabulation, and false confessions
Social awkwardness	Social inappropriateness (e.g., laughing or smiling at unseemly topics), poor interpersonal boundaries, perceived immaturity, and verbal and nonverbal communication skills deficits
Sensory sensitivities	Exacerbated negative behaviours in response to sensory perception issues
Affect	Flat affect, no remorse, or lack of understanding the severity of offense
No perceived gain from crime	Illogical, offensive behaviour or conduct

Table 3 is reproduced with kind permission from Jerrod Brown, Amy Jozan, and Megan Carter (**Brown et al., 2022**)

45. Relative to the general population, individuals living with FASD, diagnosed or undiagnosed, are more likely to experience impairments affecting abilities needed to successfully navigate legal processes. These may include a lack of legal knowledge and understanding as well as ability to assist in their defence.

46. Once involved in the justice system, individuals living with FASD may appear to act unpredictably or recklessly during legal proceedings, seem unwilling to meet probation requirements, or be unable to follow rules whilst imprisoned. The acronym **ALARM** has been identified to help check for signs that are the most prominent in identifying vulnerabilities of those with FASD.

A	daptive behaviour
L	anguage
A	ttention
R	easoning
M	emory

Screening Tools

47. FASD screening can help professionals across the CJS to improve recognition and awareness of individuals with FASD. It can offer a resource-efficient way to identify individuals who may benefit from further diagnostic assessment as well as supports and adjustments (**Jewell et al., 2024**).

48. Advocates should keep in mind that an IQ assessment or measurement of facial features (defined in Table 1 above) is not sufficient to identify the capacity to adequately participate in a legal process, and expert assessment should be sought where FASD is suspected.

49. Where an advocate suspects an individual may have FASD, a number of screening tools are available. Some assessment tools require minimum qualification requirements to administer and interpret; it is the responsibility of the professional to ensure that they are suitably qualified to administer a tool.

50. A number of tools are noted below.

- The *Life History Screening Tool* is useful to identify the presence of background history factors that may be 'red flags' for FASD (**Grant et al., 2013**).
- The *Brief Screen Checklist* and its revised version designed for incarcerated adults may flag potential FASD cases (**MacPherson et al., 2011**).

- For youth probation contexts, the *Screening and Referral Tool* includes a 10-item checklist to guide referrals for diagnostic assessment (Conry & Asante, 2010).
- Additional instruments include the *Fetal Alcohol Behavior Scale*, which demonstrated alignment with FAS/FAE profiles among adult inmates (**Streissguth et al., 1998**), and the Fu*nctional Screening Tool* and *Quick Functional Screening Tool*, which shows promising sensitivity but limited specificity in correctional settings (Kerodal et al., 2021).
- The *Brief Screen Index* has been piloted but revealed minimal differentiation between diagnosed and non-diagnosed individuals (**Kerodal et al., 2021**).
- Other approaches, such as the *FASD Risk Assessment Questions*, have yielded high specificity but low sensitivity (**McLachlan et al., 2020**).
- Tools like the *Risk Factor Matrix* and *Expert Panel Screening Tool* have demonstrated moderate predictive utility in youth justice programs (**Chudley et al., 2018**).

4. THE IMPACT OF FASD IN THE COURTROOM

51. The following section discusses potential impairments in more detail and provides recommendations and good practice examples.

52. A brief overview is provided in Table 4 below.

Table 4: Overview of affected neurobehavioral functioning

OVERVIEW OF AFFECTED NEUROBEHAVIOURAL FUNCTIONING	
Intellectual Disability	• IQ may be low to average • Some individuals have high IQ • Developmentally immature for their chronological age
Executive Functioning	• Difficulties with planning, organisation and skills need for daily living • Poor impulse control and lack of inhibition • Lack of risk awareness • Impaired decision-making and judgement • Difficulties learning from past mistakes • Difficulties understanding cause and effect • Difficulties with abstract thinking • Impaired visual-spatial reasoning • Difficulty with chronology and timescales
Memory, Attention and Information Processing	• Difficulties in visual and verbal memory • Poor short-term recall • Poor working memory • Impaired or inconsistent memory • Attention difficulties • Information processing difficulties
Adaptive Functioning	• Difficulties with social communication and participation • Difficulties with social perspective • Emotional immaturity

Self-Regulation	• Difficulties with mood and behaviour regulation • Aggression • Anxiety • Sensory processing impairments
Communication	• Often enhanced expressive abilities • Impaired receptive understanding and communication • Prone to confabulation • Highly suggestible • Prone to compliance and acquiescence

Intellectual Disability

53. FASD is the largest known cause of intellectual disability in the world (**Greenspan & Novick Brown, 2022**) and those with FASD may function at the intellectual and developmental capacity of someone much younger than their chronological age.

54. The FASD population is an exceptionally heterogeneous and complex group, with varying life experiences, clinical profiles, and levels of functional ability (**Flannigan et al., 2018**).

55. Many individuals with FASD have an IQ in the low-average range (70–85) and some have a higher IQ. This means that individuals with FASD often do not meet the formal (clinically defined) criteria of 'learning disability' in the UK where, according to the NICE Guideline 2015, IQ must be lower than 70 (see also **Toolkit 4: Planning to Question Someone with a Learning Disability**).

56. An individual who does not meet the medical definition of disability under NICE Guidelines may still have a disability under Equality Act 2010 (EA 2010) because the legal definition of disability under EA 2010 is much broader than that set out in the NICE Guidelines. Advocates, courts and judges must comply with their equality duties and make reasonable adjustments as set out above.

57. Even if an individual has an IQ in the 'normal' range, individuals with FASD often have profoundly impaired adaptive and executive functioning and may operate on at a level much lower than their IQ indicates. The diagnostic criteria of learning disability/intellectual disability are slowly changing in recognition of this.

58. The **DSM-5-TR (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition) (American Psychiatric Association, 2022)** - the official diagnostic standard used in the United States, has now departed from a rigid IQ cut-off point and defines intellectual disability primarily by deficits in adaptive functioning, with IQ scores as supportive evidence.

59. The **World Health Organisation's International Classification of Diseases, ICD-11 (World Health Organisation, 2019)**, is the official diagnostic system used by the NHS in the UK, which also emphasises adaptive functioning over IQ alone.

60. Recognition that FASD can be a severe disorder which may not meet the strict IQ-based medical definition of a learning disability but nonetheless produces impairments and support needs on par with learning/intellectual disability has led to it being described as an 'intellectual disability equivalent' (**Greenspan et al, 2015**).

61. The key takeaway for those representing individuals in the CJS is that individuals with FASD may have significant difficulties comprehending and following court procedures without additional support, even if their IQ is in the normal or higher range.

Difficulties with Executive Functioning

62. Executive functioning is a set of cognitive mental processes, located in the brain's prefrontal cortex, that enables focusing, organising and controlling behaviour and helps an individual to successfully complete daily tasks, problem solve, make decisions, and adapt to new situations.

63. It includes the following:

- **Planning, focus and attention, organising and daily living skills:** Research has found that adults with FASD continue to experience difficulties and can require high levels of support. In one study of 415 individuals with FASD over the age of 21, 83% were unable to live independently (**Streissguth et al., 1996**). Individuals with FASD may struggle to remember rules and requirements and have difficulties in dealing with abstract reasoning (e.g., understanding concepts like time, consequences, or hypothetical situations). As a result, individuals with FASD may have difficulty complying with legal and courtroom rules as well as with the requirements of criminal justice supervision in custodial and community settings. This could include difficulties attending appointments on time, meeting reporting requirements, bringing required documentation and following instructions. Individuals with FASD usually communicate and understand information more clearly when it is concrete, literal, and specific.
- **Inhibition, impulse control, risk awareness and judgement:** Individuals with FASD struggle with impulse control, judgement, and adequately weighing consequences before acting. They can have longer-term cognitive deficits in reasoning, insight, and the capacity to understand the implications or consequences of their words or actions, making them more vulnerable to committing a criminal act. Studies have shown that those with FASD can find it difficult to assess information and situations and exercise appropriate judgement. The inability to learn from past behaviour and weigh consequences has been cited as one of the most devastating effects of FASD (**Novick Brown & Greenspan, 2022**). This is crucial in the forensic context, particularly in relation to repeat offences as learning cannot take place when everything is constantly experienced as a new situation. Impulsivity, paired with communication impairments, processing challenges, and language deficits, may result in risky behaviour including rash decision-making against one's own interests (**Novick Brown & Greenspan, 2022**). Acting or speaking impulsively, without a considered understanding of consequences, may also make an individual with FASD more susceptible to incriminating themselves for a crime they have not actually committed, especially when under pressure or during cross-examination in court. Further, studies have shown that during interrogative questioning, those with FASD were significantly more impulsive and more easily susceptible to interrogative pressure, changing their responses to questions (**Gilbert et al., 2022, 2024**).

64. Gillick competency (***Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 WLR 830**, **[1986] 1 AC 112** ("*Gillick*") ("a sufficient understanding and intelligence to enable him or her to understand fully what is proposed") is limited in the determination of law to medical treatment. Nevertheless, since, *Gillick* has been more widely used to help assess whether a child has the maturity to make their own decisions and to understand the implications of those decisions.

65. In this regard, 'the child should be able to:

- Understand the nature and implications of the decision and the process of implementing that decision.
- Understand the implications of not pursuing the decision.
- Retain the information long enough for the decision-making process to take place.
- Weigh up the information and arrive at a decision.
- Communicate that decision.'

66. It is important, therefore, to consider if the individual can:
    - Understand the problem or issue, and what it involves.
    - Understand the risks, implications and any consequences, that may arise from their decision.
    - Understand the advantages and disadvantages of the issue they face.
    - Understand any advice or information they have been given.
    - Understand any alternative options (should these be available).
    - Articulate a rationale around their reasoning and decision making.

Difficulties with Adaptive Functioning

67. Adaptive dysfunction is defined as a failure to meet standards in one or more aspects of daily life, including communication, social participation and personal independence.

68. Impairments have been reported in individuals with FASD across these domains, even when intellectual functioning is high and can become more apparent and severe as a child enters adolescence and adulthood, and as demands for independence increase.

69. In particular, individuals with FASD may face challenges in the following:

    - **Social communication and perspective:** Individuals with FASD have been shown to have poor social judgment and understanding of the social consequences of their decision-making. They may fail to demonstrate 'street-wise' avoidance of public situations that might put themselves or others at risk. In addition, they may show blunted emotional responses and reduced ability to understand others' perspectives or feel empathy. They may lack an appropriate understanding of social cues and rules of different situations. This can manifest in various ways, including impaired insight into others' thoughts and intentions and the potential consequences of their own actions. During questioning, they may fail to 'read between the lines' or understand social gestures or abstract questioning, interpreting questions literally. These impairments can affect ability to understand questioning and court procedures.

    - **Developmental Immaturity:** Individuals with FASD will have a different developmental age in some areas compared to their actual chronological age. As Figure 2 below shows, at age 18, for example, an individual with FASD may have the social skills of a 7-year-old and the living skills of an 11-year-old. This 'mismatch' can leave them vulnerable. Developmental immaturity can result in poor and uninformed legal decision-making. For example, a suspect living with FASD may believe that they will be released from custody quickly if they confess to a crime, even if they were not involved in the crime or may waive their legal rights without a proper understanding of implications.

Figure 2: Chronological and developmental profile in an individual with FASD

Reproduced with kind permission from Malbin, D. (2017).

GOOD PRACTICE EXAMPLE

The Manitoba FASD Court, established as part of the FASD Youth Justice Programme in Canada in 2004 as the world's first dedicated FASD Court, made a number of environmental accommodations for those with FASD, including: using a smaller courtroom, slower pace of proceedings, non-fluorescent lighting, silent keyboards for clerks, and using symbols as explanations for probation conditions.

Anxiety and Stress

70. Individuals living with FASD have a propensity to be more prone to anxiety, fear, stress and confusion when exposed to high stress contexts. Such challenges may propel those with FASD further into the CJS, as they make choices based on removing themselves from these situations (e.g. the quickest way to end a police interview or finish court testimony) rather than on understanding the need for truth.

71. Aggression, inappropriate actions, impulsivity, non-compliance and withdrawal are typical behaviours that become increasingly likely when a person with FASD is experiencing anxiety or stress.

72. Questioning someone with FASD about a traumatic event may engender even more heightened levels of anxiety than the already elevated levels associated with FASD. Anxiety in the courtroom can affect an individuals' ability to understand and process what is said to them, and to make themselves understood. Memory can also be impacted negatively during high levels of stress.

73. Individuals may not, themselves, recognise they are feeling anxious and thus signs may not be immediately obvious (e.g., coughing, picking at skin, yawning, looking down). Anxiety may be heightened by:

    - Being in an unfamiliar situation and environment
    - Being surrounded by unfamiliar people
    - Changes to regular routines
    - Changes to what is scheduled (such as change of trial location or time)

74. If someone with FASD also exhibits anxiety then assessment and support should be considered, such as the appointment of a Registered Intermediary.

GOOD PRACTICE EXAMPLE

It may prove useful to create a 'feelings' scale or thermometer for a witness or defendant with FASD (e.g., 1=calm/okay, to 5=scared/upset) and to regularly ask how they are feeling in relation to the scale. Providing a scale can help to actively monitor their emotional state, identify if a line of questioning is causing particular anxiety (e.g., to help rethink the approach to questioning), and to decide when breaks are required.

See also **Toolkit 14: Using Communication Aids in the Criminal Justice System.**

Sensory Issues

75. Difficulties with processing sensory information can quickly overwhelm those with FASD and affect mood, irritability and behaviour. Individuals with FASD may have sensitivity to loud noises (e.g., sirens, doors closing, loud voices, computer tapping), bright lights, unfamiliar odours, and other sources of enhanced stimulation. Such difficulties with sensory stimulation can have a profound effect on the person's ability to give evidence as a witness or defendant. These difficulties may include:

    - Sensory overload may risk the individual not being able to pay attention or provide incorrect or unreliable testimony in order to remove themselves from the environment as quickly as possible (as observed in 'false confession' behaviours).
    - When individuals with FASD struggle to cope with sensory information in the environment, they may become stressed or anxious. Stress

responses may include fight (e.g., verbal and/or physical) / flight (e.g., placing a distance between person and danger) / freeze (e.g., being tense, still, silent) / flop (e.g., automatic muscle loosening reaction and/or mind shutdown).

- Individuals with FASD may become verbally abusive or physical because of difficulties keeping calm in highly stressful situations. This may be indicative of a 'meltdown', which is a temporary loss of behavioural control in response to an overwhelming situation (see National FASD - Blast Off). Meltdowns can take different forms, including screaming, crying, biting, or complete withdrawal. If this occurs, it may take considerable time for the individual to recover to continue with questioning, and in more severe cases, may not be able to continue at all.

76. It can sometimes be difficult to identify that sensory difficulties are the reason for a person's behaviour. Individuals with FASD may develop masking or coping strategies to deal with their sensory problems, and their reactions may be seen as the 'problem behaviours' that need to be addressed - rather than the underlying sensory difficulty.

77. If the jury is not provided with expert testimony regarding an FASD diagnosis, their negative perception of a defendant's negative demeanour and lack of remorse may be particularly damaging.

GOOD PRACTICE EXAMPLE

It is good practice to have expert by experience evidence (ask the witness or defendant with FASD and their caregiver whether they are aware of or have been told that they have any difficulties and whether any adaptations are necessary in advance). A Registered Intermediary can carry out an assessment which would provide useful information on this.

Memory and Confabulation

78. FASD has been strongly linked to memory impairments in both adults and children including causing gaps in recall; difficulties with visual and verbal memory involving encoding and retrieving information; as well as with working memory. Difficulties with many aspects of memory will impact on how those with FASD can manage in a courtroom environment.

79. These may include:

- Difficulties in recalling events and dates, which can lead to confusion and inconsistency when giving testimony in court.
- Difficulties with short-term memory which is particularly affected.
- Difficulties in remembering courtroom rules and how to follow proceedings adequately.
- Recollections of the exact sequencing of an event may not be consistent or match the actual sequence of what happened. The sequence could be all jumbled, and the answers given to repeated questions may be different.

80. An individual may suffer from a specific type of memory difficulty called 'confabulation,' which is 'the act of honestly lying or providing information based on inaccurate memories' (**Allely & Gebbia, 2016**) due to damage to the frontal lobe (**Gilbert et al., 2025**). This is not the same as lying as there is no 'wilful action' (i.e., individuals do not intend to deceive).

81. In particular, advocates should be aware that:

- Individuals may produce false memories and give false information. These may be exaggerations of actual events, inserting memories of one event into another time or place, recalling an older event but believing it took place more recently, 'filling in' gaps in memory or creating a new memory that never occurred.
- Individuals may fabricate or distort facts to 'fill in' memory gaps, which may result in them providing inconsistent evidence or becoming

confused during testimony, perhaps presenting as a 'dishonest' witness.

82. The concept of confabulation does not indicate that individuals with FASD are incapable of providing reliable evidence, it only indicates a potential vulnerability that may impact their testimonies. With precautions added to the conditions of interviewing, questioning, and corroboration of testimonies, together with guidance included in this Toolkit, individuals with FASD can offer reliable evidence.

Attention

83. Attention difficulties are common in individuals with FASD particularly in more complex situations and these can combine with sensory processing difficulties discussed earlier and present significant challenges in court for those with FASD.

84. In particular:

- Individuals who struggle with impulsivity, attention regulation, and sensory overload may struggle to behave in a manner consistent with courtroom standards (e.g., the requirement to sit quietly during lengthy court proceedings).
- Individuals may be easily distracted which could impair that person's ability to effectively follow proceedings and assist in their defence during lengthy and complicated court proceedings.

Information Processing

85. Individuals with FASD have been shown to process information much more slowly than those without FASD of the same chronological age. This combined with communication impairments and language difficulties may also impair witness and defendants' abilities in a number of ways.

86. For example:

- It may have a negative impact on ability to understand their legal rights and follow complex and fast-paced legal and courtroom situations leading to poor and uninformed legal decision-making.
- It may also lead those with FASD to be unable to fully comprehend the process of instructing counsel, appropriately navigate legal strategies and make considered decisions, or appropriately comply with legal conditions placing them at considerable disadvantage in the legal process (**Allely & Mukherjee, 2019; Gilbert et al., 2022, 2024**).

Language

87. Research has found a correlation between language disorders and the presence of FASD (**Kippin et al., 2018**). Communication is multidimensional, relying on cognitive, social, and behavioural functioning. Individuals living with FASD have been shown to exhibit impairments across these three domains, raising additional significant consideration for the ability of those with FASD to adequately participate in a criminal justice process; a process often heavily reliant on verbal capacities.

88. In particular, advocates should be aware that:

Receptive language

- Individuals without a learning disability may have significant difficulty in understanding and processing language and can struggle to absorb and process what is being said to them, including charges against them, particularly if they are not given time to process that information.
- Receptive language impairments may reduce a defendant's ability to communicate with their legal representatives or follow legal proceedings.
- Individuals with FASD may have difficulty in understanding abstract concepts and organising language to describe sequential events. This can

result in difficulties for those with FASD when navigating interactions with the police (through arrest, interview, and detention) as well as during court procedures as both witnesses and suspects (Brown et al., 2024).

- Difficulties with understanding spoken language can include the following:
  - Understanding non-literal language and taking what is said literally (e.g., 'hitting the sheets' or 'breaking a leg')
  - Understanding the actual sentence structure
  - Keeping a sentence in mind for long enough to analyse it for meaning (sometimes referred to as 'short-term auditory memory difficulties')
  - Inferring what is meant, when language is not clear
  - Understanding what the interviewer is interested in hearing, including what is and what is not relevant
  - Becoming 'overloaded' with spoken (verbal) information

Expressive Language

- Despite difficulties with receptive language, it is noted that those with FASD may present as expressive and articulate due to their expressive verbal language skills. This is termed 'frontal lobe paradox' (**Fisher-Hicks et al., 2021; Newstead et al., 2022**), masking below-average comprehension skills with individuals being perceived as 'normal' and expected to perform to intellectual and behavioural standards consistent with their age or are otherwise seen as unmotivated, lazy, or confrontational. In the context of police investigative interviewing and courtroom procedures, individuals may appear articulate and able to understand questions and proceedings when, in fact, they are unable to understand motives or repercussions of decisions. This is particularly problematic when much of the information in courtroom contexts is presented and managed verbally.
- It will be important for a Registered Intermediary to assess the individual's communication skills and report recommendations for the Achieving Best Evidence (ABE) interview.

89. Individuals with FASD may have developed strategies (e.g., by rote learning, modelling or copying) that may conceal their difficulties.

Suggestibility

90. Suggestibility is the extent to which individuals come to accept messages that are (implicitly or explicitly) communicated to them and subsequently interpret these messages as their own thoughts (Gilbert et al., 2024).

91. This can have a number of negative consequences:

- Individuals with FASD tend to be suggestible, gullible and easily led by others and can be more inclined to get involved in criminal acts, often as accessories, where, although they may be deemed perpetrators, they have been duped into acting (**Greenspan & Woods, 2018**).
- Impairments in social functioning, working memory, cognition and naivety may contribute to suggestibility among individuals with FASD, which is exacerbated in criminal justice settings, where external stressors can heighten pre-existing vulnerabilities (**Allely & Mukherjee, 2019**).
- Poor memory combined with a desire to please authority can also contribute to interrogative suggestibility (**Gilbert et al., 2022, 2024**).
- Individuals with FASD are vulnerable to leading questions during forensic interviews, which can lead to false admissions or false confessions.

92. Legal professionals must fact-check and verify information provided by defendants living with FASD (e.g., through corroboration).

Acquiescence and Compliance

93. Acquiescence is the tendency to agree with statements or questions, particularly leading or suggestive ones, regardless of whether the answer is accurate. Compliance is a tendency to go along with requests or instructions from others, even when doing so is not in the individual's best interest.

- Individuals with FASD are prone to acquiescence, including changing responses even when faced with subtle pressure, especially in the context of high anxiety situations such as interrogative interviews by police or court proceedings (**Gilbert et al., 2022**).
- Individuals may consciously comply with suggestions even though privately they do not agree with them. This may be for several reasons, including difficulties with memory or processing or a desire to please others or avoid conflict or confrontation.

GOOD PRACTICE EXAMPLE

The Manitoba FASD Court made a number of professional accommodations for those with FASD, including ensuring everyone in court is not only knowledgeable about FASD but they are each provided, in advance, with the diagnostic information and other pertinent reports to consider a sentence responsive to the individual's needs.

If the client is eligible, the FASD Justice Program is always available for consultation and debriefing upon request to help lawyers interpret psychological testing and level of functioning. The coordinators of the FASD Justice Program attend court to provide support to youth, young adults and family and can answer any questions surrounding diagnosis, brain functioning, and the community support plan.

- Acquiescence and compliance are particularly significant in the criminal justice context, and can manifest as: agreeing to participate in offending behaviours at the request of others, falsely confessing or providing inaccurate statements or failing to assert one's own account of events under pressure.
- Higher levels of compliance might prevent an individual with FASD from asking for help or alerting the court to the fact that they have lost concentration and need a break.

5. RELEVANT LAW

Equality Act 2010

94. Individuals with FASD (even those without a diagnosis) are likely to have a 'disability' under the Equality Act 2010 (the 'EA 2010').

95. An individual with FASD will have a disability under the EA 2010 if that individual has a physical or mental impairment that has a substantial and long-term adverse effect on the individual's ability to carry out normal day-to-day activities.

96. Criminal representatives must adhere to their professional codes to uphold equality law and comply with the EA 2010 to ensure they do not discriminate in the course of their work. Courts, the CPS and Judges are also bound by the Public Sector Equality Duty (PSED) under s.149 of the EA 2010 and must have due regard to eliminating unlawful discrimination.

97. In practice, this means that courts, the CPS, Judges and legal representatives must consider whether an individual (suspected or diagnosed) with FASD is being placed at a substantial disadvantage compared to those who are not disabled and must take reasonable steps to avoid substantial disadvantage to that individual by making reasonable adjustments. Case law has determined that 'substantial' simply means 'more than minor or trivial' and the threshold is low.

98. For example, an individual with FASD may experience substantial disadvantage in:

- Accessing information (e.g., speaking too fast to allow an individual with FASD to process information or receiving only dense written directions if reading is difficult).
- Being able to effectively participate in proceedings (e.g., FASD witness struggling with complex questioning, an advocate cross-examining an FASD client about the timing of an event without appreciating the client does not understand the concept of time).
- Dealing with physical and environmental barriers (e.g., lack of quiet spaces, cramped jury box, so an FASD defendant becomes dysregulated and cannot participate).

99. The aim of a reasonable adjustment is to remove or reduce the disadvantage that a disabled person would otherwise face compared to a non-disabled person. Adjustments are not just 'nice to have', they are a legal requirement. Nor are adjustments about giving 'special treatment', but rather they level the playing field so that disabled individuals can have a fair trial and participate in proceedings. Court staff and advocates should be trained to recognise when someone may require reasonable adjustments and how to work with the individual to identify what adjustments need to be put into place to remove substantial disadvantage.

100. The reasonableness of an adjustment depends on the effectiveness of that adjustment, how easy it is to implement, the cost and resources required, the availability of external support and the impact on others. This requires a balancing exercise, but most adjustments that remove or reduce disadvantage are simple and cost-effective.

101. Examples of support and reasonable adjustments for an individual with FASD are set out in the relevant sections below, but they may include, amongst others:

- Regular breaks to manage concentration and stress
- Modifying communication in a manner that matches the individual's communication skills and understanding
- Use of easy-read versions of court documents
- Changing the phrasing of questions and instructions to use simple, short, clear and concrete sentences
- Use plain language and slower speech, avoid idioms
- Reducing sensory stimulation
    - use of screens/quieter and smaller court rooms/video links
    - non-fluorescent lighting
    - silent keyboards
    - removal of pungent odours
- Visual icons to represent instructions, orders and conditions
- Flexible seating
- Use of intermediaries
- Use of support individuals
- Permitting special measures for vulnerable witnesses (this overlaps with the Youth Justice and Criminal Evidence Act 1999)
- Pre-recorded video interviews as evidence
- Use of s.28 Hearings under the Youth Justice and Criminal Evidence Act 1999
- In the case of an investigate interview, use of non-court location if needed

Criminal Procedure Rules 2025

102. An individual with FASD is also likely to be a vulnerable person. FASD is often described as a 'hidden' disability because good expressive skills can mask significant vulnerability. Individuals with FASD are at particular risk of being overlooked as a vulnerable person because of the lack of diagnostic pathways and knowledge of the condition within all

services. It should not therefore be assumed that a person's vulnerability will have been identified prior to their first appearance in court.

103. It is important to remember not to make assumptions about an individual's capabilities based on a 'label'. Because an individual appears to be articulate and intelligent does not mean they do not need help and support. Equally, it should not be assumed that individuals who have a range of impairments and/or intellectual disabilities cannot provide instructions/evidence.

104. **The Criminal Procedure Rules (CrimPR) 2025** explicitly recognise the need to make reasonable adjustments for vulnerable parties, such as defendants and witnesses with disabilities and provide the procedural framework to apply the statutory duties under EA 2010 and to ensure the right to a fair trial under Article 6 ECHR.

105. The right to a fair trial means that an individual with FASD must be able to:

- follow and understand court proceedings
- participate in those court proceedings and instruct counsel effectively and
- give reliable evidence without being unfairly disadvantaged.

106. The court is required to take 'every reasonable step' to encourage and facilitate the attendance of witnesses and to facilitate the participation of any person, including the defendant. This includes enabling a witness or defendant to give their best evidence to comprehend the proceedings and engage fully with his or her defence (**CrimPR 3.9(3)(a) and (b)**).

107. CrimPR Part 3 sets out the court's duties to actively manage cases to ensure fair participation, including:

- Early identification of vulnerable witnesses or defendants
- Ground rules hearings (GRH) to set parameters for questioning.
- Special measures (e.g., video links, screens, intermediaries) to support vulnerable individuals.

Equal treatment Bench Book

108. **The Equal Treatment Bench Book – July 2024 (February 2026 update)** now includes a section on reasonable adjustments for individuals with FASD in Appendix B.

109. These adjustments are covered in Section 4: Recommendations and Section 5: Questioning Someone who has FASD.

Youth Justice and Criminal Evidence Act 1999

110. Someone with FASD falls within the definition of a vulnerable witness. Section 16(1) and 16(2) of the **Youth Justice and Criminal Evidence Act 1999** cover those whose quality of evidence is likely to be diminished (and thereby need support to give their best evidence):

> *(1) (a) if under the age of 18 at the time of the hearing; or*
>
> *(b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within subsection (2)*
>
> *(2) (a) that the witness:*
>
> *(i) suffers from a mental disorder within the meaning of the Mental Health Act 1983, or*
>
> *(ii) otherwise has a significant impairment of intelligence and social functioning;*
>
> *(b) that the witness has a physical disability or is suffering from a physical disorder.*

111. When determining whether quality of evidence is likely to be diminished, the court must consider its likely completeness, coherence and accuracy (section 16(5)). As with other difficulties, it is possible individuals will appear more able than they are

because they have learned strategies to mask their disability.

112. A vulnerable witness would be entitled to a Communications Assessment undertaken by a Registered Intermediary who can make recommendations to the court. An individual does not need a formal diagnosis of a condition for a Registered Intermediary to highlight communication needs.

6. RECOMMENDATIONS

In Advance of Trial

113. Individuals with FASD are capable of giving high-quality evidence, particularly if adaptations are made to support them. Professionals are encouraged to consult the D.E.A.R. model (see Appendix 1), which highlights important tips to help minimise the likelihood of miscarriages of justice such as false confessions and convictions (**Brown et al., 2024**).

114. It is recommended that, in advance of a trial, the following measures be considered to support individuals:

- There is early identification of their needs. Self-reported information should not be solely relied on due to potential issues surrounding memory recall. Supporting information from family members, official records, and other professionals familiar with the individual should be obtained.
- Advocates should find out how sensory difficulties may impact a person with FASD by asking parents, professionals and individuals with FASD themselves regarding difficulties and how these may manifest themselves to find strategies to manage them before they are encountered.
- It will be necessary to obtain background information about a person's ability to pay attention, including what strategies would help (for example, whether a physical 'movement break' would be needed during break times).
- Registered Intermediaries working with individuals with FASD should address these concerns with individual witnesses/defendants and make recommendations in advance to ensure that adequate adaptations are made.
- Obtain background information about the 'triggers' for certain behaviours. This can be discussed at a GRH, and plans agreed to try to both prevent and respond to these behaviours.
- Ensure provisions are made to ensure that the mood is continually monitored throughout court proceedings. A Registered Intermediary will support the identification and assessment of relevant mood indicators; they will also conduct communication assessments.
- A Registered Intermediary should discuss with judges and advocates how the jury can be informed of the individuals' difficulties with communication at a GRH, which may affect how they are perceived at court. This should be tailored to the individual (e.g., difficulties with recalling time-based information; taking a long time to answer a question; extreme hyper-sensitivity to sounds). It may not be necessary to call an expert witness where the prosecution and defence can devise a set of simple and clear agreed facts – tailored to the individual – which can be read to the jury.
- Where possible, plan for the judge and the advocates to meet the individual in advance of questioning.
- Consider the environment and ensure that it is as familiar as possible. Where possible, a visit to the court should be arranged in advance for a witness or defendant with FASD to identify potential sensory problems and reduce anxiety and stress. Individuals can be introduced to the witness area/back entrance. They will need to see the actual rooms that they will use; if these rooms change, they should be offered the chance to visit again.
- Consider the use of a remote live link if the court building is likely to be overwhelming (see Toolkit 9: Planning to Question Someone using a Remote

Link). At the pre-trial visit, an individual can attend the live-link room and practice answering questions (unrelated to the case at hand) over live link so that the environment becomes familiar. This may indicate that a person attends better to questioning when communication is 'face-to-face' rather than 'face-to-screen' via a live link, and this adaptation can then be planned, in advance.

- Subject to court permission, suggest that photographs of courtrooms/live link rooms are taken. This is likely to help with trial preparation because the individual can later be reminded of what they saw on the familiarisation visit.
- Ensure that effective planning occurs to minimise unexpected last-minute changes to timings. 'Fixed date' trials should always be seen as preferential.
- Individuals living with FASD need to be made aware of each phase of the courtroom routine, in language at an appropriate level of comprehension and given clear timings or kept updated with any changes. Consider the use of visual aids to help an individual understand what will happen, e.g., the use of 'visual timetables' or a cue card' (see **Toolkit 14: Using Communication Aids in the Criminal Justice System**). A Registered Intermediary can help to advise on the suitability of visual aids. See Section 5.3: Using Communication Aids.
- Plan adaptations to the courtroom environment to ensure that it is quiet, calm and free of sensory distractions, for example, by minimising individuals coming in and out of the courtroom, using soft lighting, removing unnecessary clutter from a live link room. The use of silent keyboards and silent clocks should be considered.
- For an individual who has sleep difficulties, consider the time of day they should be questioned. They may benefit from being questioned later in the morning or early afternoon
- Individuals with FASD will need reminding of appointments and attendances regularly so advocates should ensure that there is a person able to do this (ideally by face to face or phone conversation several times leading up to the appointment).
- Check that the individual is able to travel to court and how that will happen (e.g., will the police bring them to court, will they arrive by taxi, etc.).

At Trial

115. It is recommended that at trial the following measures be considered to support individuals:

- Ensure the presence of a social worker or other support person to help the person understand what is happening in court and/or review information during breaks and to reduce anxiety.
- Do not assume that someone with FASD has understood explanations of matters, even if they nod or repeat statements made. Comprehension should always be verified at every stage to ensure that the individual with or suspected of having FASD understands what is going on.
- Ensure concentration is continually assessed, and strategies for maintaining attention are enabled. Use attention aids such as bullet point notes for review, simple written language and signs and flow charts if needed (see Toolkit 14: Using Communication Aids in the Criminal Justice System).
- Ensure concentration span is reflected in the number and type of breaks required. Advocates should be prepared that what works for an individual on one specific day may be ineffective on another day. Breaks can be set at an agreed time, for example, every twenty minutes as well as/and when required. Where the live link room is used, breaks can be called more easily and a short break taken without the court having to be cleared. A break may be needed that is not scheduled and should be accommodated.
- When tired or over-stimulated, individuals with FASD may become 'non-responsive' or repeat 'I don't know' even if they might know the answer.

Consider a quiet environment for questioning and a limit to the length of questioning
- Make a quiet room available during recesses to allow for sensory breaks. A vulnerable witness may need their own quiet place.
- Ask questions about a single topic at a time.
- Slow the pace of proceedings by allowing time for transitions from one activity/place to another. They can be assisted by being given clear instructions and giving some time after a transition before asking them to do something. Signposting will be helpful (e.g., first we will have a short break, then we will talk).
- Individual's with FASD may have coping strategies to keep themselves regulated. This could be rocking, using a comfort object, fiddle toy. Establish before the trial what kinds of coping strategies the individual has that may help them stay calm and how they can appropriately use them during the trial.
- Questioning should be adapted to suit the communication needs of the individual (See Below: Questioning someone who has FASD).
- Intermediaries, where involved, should look to the Judge to ensure what is agreed at the GRH is followed.

7. QUESTIONING SOMEONE WHO HAS FASD

20 Principles of Questioning

116. When questioning someone with FASD it will be important that guidance also aligns with the **20 Principles of Questioning**. The principles are designed to be an essential part of, and are now embedded into, the teaching and development of appropriate questioning for vulnerable people, including children.

117. The key elements consist of principles for preparation, principles for conduct and principles for questioning.

Planning Questions in Advance

- Questions should be asked chronologically and in a sensibly structured way.
- Write out draft questions in advance because this will help to identify potential problems. In R v Lubemba, R v JP [2014] EWCA Crim 2064 the Court of Appeal (para 43) stated that: 'So as to avoid any unfortunate misunderstanding at trial, it would be an entirely reasonable step for a judge at the GRH to invite defence advocates to reduce their questions to writing in advance.'
- Where a Registered Intermediary is involved, the questions must be forwarded to them in advance of the GRH (see Toolkit 16: Intermediaries: Step by Step).
- Amendments for agreement at the GRH should be undertaken, where necessary, and as agreed with the Judge.
- Ensure additional time required for questions and responses are put in place in advance.

Using Communication Aids

- A Registered Intermediary should do an assessment 'to make recommendations as to special measures and other adjustments to enable the best communication' (Registered Intermediary Procedural Guidance Manual, 2024). With this in mind, the appropriateness of using a range of communication aids should be considered during the RI's assessment process (see **Toolkit 14: Using Communication Aids in the Criminal Justice System** and **Toolkit 16: Intermediaries: Step by Step**).
- Individuals should be supplied with comprehension and attention aids that are deemed necessary (e.g., video recording, pictorial instructions, bullet-point notes, flow charts and summary documents) to help with processing of information provided during court proceedings.
- A person should be permitted to use pictures/visuals to tell you something if needed.

- Although communication aids (e.g., drawings, post-it notes, using props) may be helpful, it may be confusing for the witness or defendant if too many of these are used in combination. It may prove helpful to find out which aids/props work best with the particular individual. The earlier these aids are used, the better for helping an individual and making them feel comfortable.
- All communication aids/props to be used in interviews/court should be tested with the person prior to interview and/or giving evidence.
- A Registered Intermediary will be able to ascertain which aids work best for the individual concerned.

Using Appropriate Cues and Prompts

- Use the person's name at the start of a question (rather than at the end) as this will help to signpost, so they know they are being addressed. Check in advance their preferred name.
- Look directly at the witness when asking questions (though note this may be challenging for some individuals).
- Use a neutral tone of voice.
- Signpost topics and tell the individual you are going to ask them questions, e.g., 'I am going to ask you questions about...'
- Use names of individuals and places – avoid pronouns, e.g., rather than saying 'Did you see her?' say, 'Did you see Melanie?'
- Drawings can also be used to encourage the witness or defendant to provide more detail or as a cue to memory. This is because self-drawn images usually have a stable representation in the person's mind. A Registered Intermediary can check this by making a deliberate naming error during assessment. Recognise that some witnesses may not be comfortable drawing and may require a Registered Intermediary to draw and label the image for them. Ensure that it is accurate at each stage.
- Pictures or photos can also assist with obtaining information. Use follow-up prompts such as pointing to the picture and saying: e.g., 'Tell me more about that part.'
- During court cross-examination, questions will be more specific, such as 'what colour was X?; 'how big was X?', and so on. These should also be tested during assessment.

Checking Understanding

- Receptive language processing difficulties (see Section 2.10) are common in individuals with FASD, especially in high-pressure environments. Repeating questions too quickly or rephrasing can disrupt the individual's thinking, and they may need to start processing the question again from the beginning, causing stress and delays. Instead, allow sufficient time to respond, which should be assessed on a case-by-case basis.
- During questioning, provide additional processing time and further time to respond - slow the pace of questioning as much as possible according to the person's ability to respond.
- Remind the witness they may take their time to answer questions.
- Ensure understanding at all stages of questioning. When giving explanations avoid asking 'Do you understand?' They may think that they understand when they do not, or they may be unwilling to explain that they don't understand. Instead, check for understanding by asking a short direct question about the topic you have just explained.
- Consider in advance what questions will be asked and whether visual support will be necessary to ensure the witness or defendant fully understands what is being asked. A Registered Intermediary can ensure the visual support is tailored to the needs of the individual. Visual support may include the use of timelines or topic cards representing separate events (in the case of multiple events). See also **Toolkit 14: Using**

Communication Aids in the Criminal Justice System.

- A card with a symbols or words on indicating 'I don't understand' can also be used for the vulnerable person to point to if words become difficult. See also **Toolkit 14: Using Communication Aids in the Criminal Justice System.**

Question Types and Responses (also refer to 20 Principles of Questioning)

The use of 'when' and 'how long' type questions

- Due to potential difficulties in memory and recall as described earlier, 'when' questions can be particularly difficult for individuals with FASD. They can find it difficult to recall event details together in context (such as time-based information) unless specifically prompted. Questions relating to 'how long' specific events lasted can also be problematic because FASD may impact upon the individuals perception of time.
- Link questions relating to timing with concrete events, such as, 'was it light or dark outside?''
- It may prove useful to provide the witness or defendant with a timeline with different points labelled. Rather than saying, 'What time did you go there?', ask them to point on the timeline: 'Was it before/after breakfast?'; 'Was it before/after your holiday?'
- The use of a timeline or other visual aid should be part of the Registered Intermediary recommendations and discussed during the GRH.
- Individuals with FASD may struggle with time concepts, so avoid questions in the present tense. For example, 'So, now are you at the party and talking to Melissa?'
- Use the past tense for events that have already happened, e.g., 'Did you speak to Melissa at the party?'

Avoid 'why' type questions

- Individuals with FASD may be prone to impulsivity and lack personal understanding into why they have behaved a certain way, especially in a crisis. Therefore, avoid asking why they have done something as the response may not be accurate.

Avoid open-ended questions

- Questions such as 'Tell me about the party?' should be avoided. Questions should be precise or narrow (but non-leading) to reduce ambiguity, e.g. 'Who did you meet at the party?'

Avoid compound questions and legal jargon, which may confuse

- Avoid stacked and multi-part questions, e.g. 'Was Melissa at the party when you arrived and did she stay at the party until it ended?' Ask one point per question, e.g. 'Was Melissa at the party?'
- Avoid double negatives, e.g. 'You wouldn't disagree that Melissa was shouting, would you?' and ask direct questions, e.g. 'Was Melissa shouting?'
- Avoid legal or management jargon.
- Examples of questions that are complex and recommendations for simplifying them are outlined at length in other toolkits (see: **Toolkit 2: General Principles from Research, Policy and Guidance, Toolkit 4: Planning to Question Someone with a Learning Disability and Toolkit 15: Witnesses and Defendants with Autism**) and the 20 Principles of Questioning.

Avoid statements posed as questions

- The question, 'So, you saw her enter the house?' may not be recognised as something that can be disagreed with. The question should be

rephrased clearly, e.g. 'Did you see Melissa go into the house?'

Avoid 'forced choice' questions

- Given a person with FASD may be suggestible and more likely to acquiesce or comply with statements, forced choice questions should be avoided as these create opportunities for error when the correct alternative may be missing.
- Questions with choice should always include an open aspect, e.g., What colour was the jumper?' to avoid potential for misunderstanding and/or errors.

Avoid 'tag' or directive-leading questions

- Ensure there are no 'tag' or directive-leading questions (**Gous & Wheatcroft, 2020**). For example, avoid 'You went to the party, didn't you?' and ask the question directly without a tag, e.g., 'Did you go to the party?'

Avoid non-literal language

- Abstract concepts are difficult to understand for person with FASD, e.g., 'When you spoke with Melissa, did you see eye to eye?' Instead use simple, plain English, e.g., 'Did you and Melissa disagree about anything?'
- Ask direct, literal questions. Avoid questions such as 'Do you remember the day you went to the party?' (a witness may think you mean which day was it, e.g. Monday), instead ask 'Did you go to the party?' or 'What time did you leave the house?'
- Do not use metaphors such as 'I want to run something by you'; instead, ask 'I am going to ask you a question about…'.

Avoid 'do you remember' questions

- 'Do you remember?' questions require complex processing which may be difficult for individuals with FASD who struggle with working memory and time concepts (see Section 2.9).
- When combined with multi-part questions, 'Do you remember?' questions may be particularly confusing, e.g., do you remember you had a bruise near your left eye?' The answer 'No' may mean several things: 'No, I don't remember,' or 'Yes, I remember I had a bruise but no it was not near my left eye,' or 'No, I didn't have a bruise there.' It is more appropriate to ask, 'Did you have a bruise? Where was the bruise?'

Avoid 'repeat' questions

- Repeating questions may result in a person with FASD (who may be suggestible and eager to please those in authority) changing answers as they may feel their first answer was unsatisfactory.
- Where repetition of information or questions may be necessary – even with changed wording, signpost and explain that you want to check your understanding of what the person has said e.g., 'I didn't hear that. Can you say it again please?' A Registered Intermediary can be asked to repeat back what the person has said.

Avoid 'inconsistent' language use

- It is easier for a person to process questions when words used are consistent throughout. For example, always refer to a person by the same name, rather than 'your teacher', 'Mrs. Smith' or 'Jane Smith.'
- Avoid use of pronouns. For example, instead of 'Did you see her?' ask, 'Did you see Melissa?'
- Use the name that the witness/defendant uses to refer to the relevant person.

Non-Verbal Communication

118. Questions about the intentions, emotional states or behaviour of others can also be problematic as FASD impacts a person's ability to see things from another person's perspective. Social and emotional immaturity has also been reported in this population (see above: Difficulties with Adaptive Functioning).

119. A person with FASD may not understand facial expressions or intonations. For example, they may mistakenly think that the questioner has an 'upset' facial expression and this may affect their responses. Similarly, a statement that is accompanied by a particular facial expression (e.g., a disapproving expression with 'but you still followed her at the party') may affect the response as individuals with FASD can be suggestible and easily to please.

120. Advocates should be aware of their own facial expressions and body language, and use 'neutral' facial expressions and body language. They should avoid, for example, nodding or shaking their head as this may create conditions for compliance or acquiescence.

8. ACKNOWLEDGEMENTS AND REFERENCES

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TOOLKIT 6: Planning to Question a Child or Young Person

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TOOLKIT 8: Effective Participation of Young Defendants

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TOOLKIT 18: Working with traumatised witnesses, defendants and parties

TOOLKIT 19: Supporting Participation in Courts and Tribunals

TOOLKIT 20: Court of Protection

TOOLKIT 21: Planning to Question People who Stammer

Appendix 1 The D.E.A.R. Model

D.E.A.R model: guided approach to communication		
Description	**Rationale**	**Guidelines**
D - Direct Language	Individuals living with FASD endure communication deficits and have varying challenges with comprehension.	• Use direct communication • Avoid jargon • Avoid sarcasm • Allow additional pauses for processing • Keep communication simple and easy to follow • Avoid multi-step directions • Check for comprehension • Relying upon open-ended questions may produce more accurate and productive communication for persons suspected of living with FASD.
E - Engage Support Systems	Persons living with FASD may be suggestible under pressure or not fully understand their rights in a legal context.	• Ensure persons living with FASD feel safe with someone in the room • Ensure individuals living with FASD are provided with adequate representation • Ensure persons living with FASD have a familiar and trusted support nearby who may also explain processes and procedures
A - Accommodate Needs	Individuals living with FASD may have sensory differences, difficulties with attention, have impulse control issues, or physical factors which can exacerbate stress within an intimidating environment.	• Maintain sensory is limited in spaces where communication takes place • Interviewers should remain aware of signs of sleep deprivation or blood-sugar dysregulation and allow breaks or discontinue if executive functioning further declines • Remain at a safe distance and avoid physical contact to reduce stress.
R - Remain Calm	Regulating emotions may prove as more difficult for persons living with FASD. Additionally, those people living with FASD have been exposed to higher-than-average trauma experiences, making them more sensitive to stressors.	• Remain calm in tone and behaviour • Avoid showing frustration • Guide the conversation as a calm interview-style • Exercise patience and allow interviewee adequate time to respond

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