



Difficult ‘By Design’: Viewpoints of Crown Attorneys and Defense Counsel Working With Youth With Intellectual and Developmental Disabilities in the Youth Justice System

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Abstract

Despite the overrepresentation of youth with intellectual and developmental disabilities (IDD) in the youth criminal justice system, little is known about their experiences. Drawing on interviews with defense counsel and crown attorneys, we examine how Canada’s Youth Criminal Justice Act (YCJA) guides the work of justice professionals and the extent to which this legislation responds to youth with IDD. Findings provide insight into some of the realities and challenges justice professionals face in their role. We consider how gaps between the YCJA and its application in practice may be addressed for youth with IDD in the youth criminal justice system.

Keywords

crown attorney, defense counsel, intellectual and developmental disabilities, justice professionals, youth, Youth Criminal Justice Act, youth criminal justice system

Introduction

Youth with intellectual and developmental disabilities (IDD) are vastly overrepresented within the criminal justice system internationally (Jones, 2007; Marinos et al., 2020; Matheson et al., 2022). In the Canadian context, little is known about their experiences when interacting with the system. While statistical evidence in the Canadian adult criminal justice system suggests that inmates with intellectual disabilities are more than double

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than those without, the Canadian Government has failed to gather relevant statistical data on youth with disabilities in all contexts including those who are involved with the justice system (Canadian Civil Society Parallel Report Group, 2017; Matheson et al., 2022). Introduced in 2003, Canada's Youth Criminal Justice Act (YCJA) is designed to be separate and distinct from the adult justice system and recognizes that young people are in a process of growth and brain development (Jones et al., 2019). Specifically, the YCJA is designed to (1) hold young people accountable through measures that are proportionate to the seriousness of the offense and the degree of responsibility of the young person; (2) promote rehabilitation and reintegration; and (3) address underlying causes of justice involvement and, 'respond to the needs of young persons with special requirements' (s. 3(c) Declaration of Principle). Despite these legislative provisions, research illustrates that young people in Canada experience inequalities within the youth criminal justice system, barriers to their rights and access to justice across various stages in the criminal process – arrest, diversion, bail, trial, and sentencing (Curling and McMurtry, 2007). Likewise, justice professionals report issues that include little guidance on how to offer special protections for justice-involved youth with IDD, a lack of effective training about IDD, and limited resources (Richards and Ellem, 2018).

People with IDD are oftentimes not easily identified as having challenges in comprehension or decision-making by justice professionals because they are overly compliant and suggestible, and they often seek to appear competent because of the stigma attached to disability (Marinos, 2017). Without appropriate responses to youth with IDD, these individuals are unable to access justice and participate meaningfully in their case, being further marginalized by a justice system meant to address the underlying cause of their justice involvement. Most seriously, youth with IDD are at risk of being wrongfully found guilty (Marinos, 2017; Marinos et al., 2008). As noted by McGillivray and Waterman (2003), while individuals with IDs may be more vulnerable to negative outcomes in the criminal justice system, the way they are treated within the system can exacerbate risks. Justice professionals, and in particular, defense lawyers and crown attorneys, are in positions to play a pivotal role in supporting youth with IDD. While some research draws on the viewpoints of justice professionals in understanding young people's lived experiences in the justice system (Cockram et al., 1998; Howard et al., 2019; Richards and Ellem, 2018), limited literature has focused on crown attorney and defense counsels' experiences and insights prosecuting and representing youth with IDD in Canada. As the youth justice system is distinct from the adult system, and working with youth requires unique knowledge and skill sets, the perspectives of justice professionals are critical.

It is important to acknowledge that the criminal justice system is not a substitute for community-based services and supports for youth with IDD. The challenges and needs of young people with IDD existed before they encountered the criminal justice system and will be with them after their criminal justice system involvement has been resolved. Although IDD may be part of the constellation of characteristics that brought a young person into conflict with the law, IDD is not criminogenic. Actors in the youth criminal justice system are cautioned against viewing the system as a place where young people with IDD can be 'saved' or rescued (which was the case under Canada's previous Juvenile Delinquents Act). The authors of this article understand that the youth criminal justice

system is to be used with restraint and as a last resort (e.g. Preamble, ss. 6(1), 28.1, 38(2) (e)(i) and (e.1) (iii), 39(5)). We acknowledge that efforts should be made to prevent youth with IDD from becoming engaged with the justice system and that community engagement with youth with IDD should be promoted to ensure that they receive appropriate accommodations and that neurodiversity is not criminalized (Preamble).

This article seeks to understand the experiences and perspectives of crown attorneys and defense counsel in prosecuting and representing justice-involved young people with IDD. The article is structured in four main areas. In the first section of the article, we provide a contextual overview for understanding and defining disabilities in Canada's youth criminal justice system. In the second section, we outline the design, methodology, and analysis procedures. Next, we present the main findings of the qualitative data which focus on inadequate training and education, conflation of mental health and IDD, and fetal alcohol spectrum disorder (FASD) and complexities navigating the justice system. Our final theme sheds light on how professionals describe the experience of the justice system for youth. Although youth are to be offered special protections, the system is described as being both overwhelming and stressful for young people. Indeed, these feelings may be perpetuated for young people with IDD. In order to further unpack these complexities, we turn to a discussion of how IDD is defined in the context of this article.

Defining Disabilities in the Context of the Youth Justice System

In the youth justice context, the term disability is oftentimes used interchangeably with other terms such as mental or intellectual disability or disorder. In the YCJA, the term disability is not specifically defined. Rather, the YCJA's Declaration of Principle broadly states that measures taken against youth should consider their 'special requirements' (Section 3(c)(iv)). For this reason, scholars have recently called for changes to the YCJA to consider the special circumstances of young people, especially those who have mental health issues, IDDs, and who are neurodiverse (McCleery, 2020). In addition, scholars have suggested that justice professionals should increase awareness about disabilities and how to effectively work with youth with disabilities (Hughes et al., 2020).

It is known that criminal justice-involved young persons with IDDs face greater challenges within the judicial system compared to their peers who do not identify as having a disability (Marinos et al., 2015; Richards and Ellem, 2018). One challenge is that youth with disabilities may not identify or may not be identified as having a disability throughout the court process. This invisibility has consequences for young people who may have concealed their disability for several reasons including to avoid negative attitudes and stigma associated with IDDs. Others may not have been identified formally and remain invisible in the court and other legal processes (Baker et al., 2020). Understanding disabilities and youth justice in the Canadian context is therefore complex since the term 'disability' encompasses a range of meanings and conceptualizations.

For the purpose of this article, and in line with the American Psychiatric Association (2022), we refer to IDD as cognitive and adaptive functioning impairments (meaning challenges with everyday living skills). Youth with an IDD may have difficulties in problem-solving, concentrating, and learning new things. IDDs may have a wide array of

origins or causes and may include many different diagnoses. Cognitive disabilities, organic brain injury (e.g. FASD), and traumatic brain injury (e.g. an accident in childhood) are a few examples. Intelligence or IQ is an important criterion in an intellectual disability. A young person can have a developmental disability *without* an intellectual disability (e.g. high-functioning autism spectrum disorder or cerebral palsy). In addition, IDD is characterized by adaptive functioning based on the following primary areas: conceptual, social, and practical. Likewise, we recognize that young people with IDD often experience multiple social disadvantages which contribute to justice involvement, including social and economic issues, early life experiences, and previous justice involvement. As noted by Kincaid (2017), a lack of support and services coupled with involvement in the justice system may further complicate life issues for youth with IDD. Likewise, we recognize that disabilities are intricately tied to the Legacy that has devastated Indigenous communities across Canada (Dowse et al., 2014).

While IDD is distinct from mental health concerns and mental illness, the lack of clarity in how disability is defined under the YCJA and the absence of training among justice professions creates a significant risk that IDD becomes conflated with issues of mental illness. A person with a mental illness is someone who has a health condition and experiences alterations in thoughts, mood, and behavior. A mental illness may also lead a person to experience distress in coping with everyday experiences. While a comorbidity may exist in terms of having an IDD and mental illness, the two terms should not be conflated. Most importantly, IQ is not implicated in the diagnosis of a mental illness. An example of mental illness would be depression, anxiety, or schizophrenia. A mental health issue, on the other hand, impacts one's state of well-being (American Psychiatric Association, 2022). In this article, we focus on youth with IDD and exclude those more traditionally defined as having mental illness, while also recognizing the prevalence of comorbidity.

Another term that conflates with IDD is neurodiversity and neurodivergence. Neurodiversity is a term that was first proposed by sociologist Judy Singer in 1998 and initially referred to 'natural variation in the human genome' (Chapman, 2020: 256). Since this time, the neurodiversity movement has shifted this meaning to focus more on the idea that individuals who are neurodiverse, learn, engage, and interact in different ways; differences are valued rather than perceived as deficits. This shift in meaning suggests that all individuals fall under the category of neurodiverse given that everyone learns, engages, and interacts in unique ways. Young people with IDD may therefore be considered neurodiverse, however; being neurodiverse differs from having an IDD as individuals with IDDs also have cognitive and adaptive functioning differences, such as challenges with everyday living skills. Comparably, neurodivergence refers to brain differences that are not considered 'typical'. As such, young people with IDD may also be considered neurodivergent given differences in their cognitive and adaptive functioning, however; neurodivergence encompasses a broad range of differences such as mental health issues or mental illness. As such, IDD differs from the term neurodivergent given its distinct association with cognitive and adaptive functioning differences.

While some literature has focused on 'neurodevelopmental disorders' in a youth justice context, most of this research has been conducted in New Zealand, the United States, and Britain (e.g. Kincaid, 2017). Even within these contexts, scholars have noted the lack of

research focusing on neurodevelopmental disorders and the underlying causes of over-representation in the justice system (Kincaid, 2020). This scholarship focuses primarily on assessing how youth with disabilities are treated, and what improvements can be made to the system. Our article differs in that it focuses specifically on the viewpoints and experiences of crown attorney and defense counsel working with youth with IDD in Canada.

Design, Methodology, and Analysis

Non-probability sampling, particularly purposeful and snowball sampling, was employed to recruit justice professionals. Through the use of non-probability, purposive sampling, participants were carefully selected based on similar characteristics: their profession and focus on justice-involved youth with IDD (Etikan et al., 2016). Collectively, 26 legal professionals employed within the area of youth criminal justice in Ontario were recruited (9 crown attorneys and 17 defense counsel were interviewed). The sample was specific to those whose work was directed by the YCJA in order to gain valuable insights on the project's main objective. The research adopted a phenomenological approach and engaged in semi-structured interviews with the participants.¹ By engaging in a phenomenological approach, researchers are able to unpack the experiences of this demographic in an attempt to discover potential commonalities (Creswell et al., 2007). A phenomenological approach was chosen as it enabled the researchers to analyze how legal professionals interpret and interact with a particular phenomenon (their experiences working with justice-involved youth with IDD). This approach is useful as it provides researchers the ability to gain an expressive viewpoint of the participants' experiences and an opportunity to interpret participants' insights at a structural level (Creswell et al., 2007).

Twenty-six in-depth semi-structured interviews were conducted from May 2021 to April 2022. The interviews ranged in length from 60 to 90 minutes, while some interviews exceeded this time frame. As interviews were being conducted during the COVID-19 global pandemic, interviews were facilitated through the online platform *Zoom*. The interviewer utilized a semi-structured interview guide, asking participants open-ended questions regarding their experiences of working within the youth criminal justice system. In particular, the questions were grouped by the following themes: the role of justice professionals, understandings of IDDs, the YCJA and youth rights, and experiences working with youth with IDDs. These themes were developed to accurately respond to the key research aims/objectives. Researchers obtained multi-dimensional responses as the interview was divided into specific themes relevant to the study objective, ranging from participants' professional background to one's application of the YCJA. Moreover, in utilizing a semi-structured interview guide, interviewers are able to capture participants' lived experiences as well as the theoretical nature of the phenomenon under study (Galletta and Cross, 2013). All interviews were audio recorded and transcribed by the research team. Names and personal information were omitted and pseudonyms were used during transcription.

Transcripts were analyzed according to thematic derivation procedures: description and analysis, as outlined by Wolcott (1994). The description phase involved defining and describing justice professionals' viewpoints on working in the youth criminal justice

system. Analysis involved a deeper exploration of the data as the researchers identified common patterns in the data and analyzed similarities to produce themes. Color coding techniques were used to identify patterns and turned into themes based on recurring commonalities. In identifying patterns within the data, an in-depth narrative of the phenomenon was produced through the thematic statements (Lochmiller, 2021). Two research assistants completed this process independently and engaged in discussion to assess the validity of the themes generated. This procedure led to an understanding of the experiences and perspectives of crown attorneys and defense counsel in representing justice-involved young people with IDD.

Inadequate Training and Education: Working With Youth With IDD

Participants pointed out that their role as justice professionals is to act within the best interests of their client. To help accomplish this, the Law Society of Ontario (2022) requires legal professionals to complete 12 continuing professional development (CPD) hours annually, with a minimum of three CPD hours focusing on areas related to ethics and responsibility (The Law Society of Ontario, 2022). Between 2018 and 2020, justice professionals were required to complete a total of three CPD hours on Equality, Diversity and Inclusion (EDI). After the completion of this EDI requirement, lawyers are required to complete one EDI CPD hour per year. This highlights that training in relation to disabilities, and in particular IDD, is limited or non-existent. In addition, within the collective CPD training requirements, education pertaining to youth is minimal. Unsurprisingly, a consistent theme found within our participant interviews was the lack of adequate training and education on working with youth with IDD. The following interview expert highlights these viewpoints:

Interviewer:

Now you've kind of been speaking about the experiences of youth in general, but have you ever obtained any professional training about vulnerable populations, or vulnerable youth groups, in particular?

John (Defense Lawyer):

You more or less learn that as you go . . . we have to do a certain amount of continuing professional education. But extensive training, no. And I don't think you will find very many criminal defense lawyers who have had extensive training in that regard.

As many participants highlight, formal training on working with vulnerable populations, and with youth with IDD in particular, stems mostly from lived experiences working with youth and with other professionals/community organizations. The potential for greater injustices due to misrepresentation may potentially stem from the lack of formal training in working with youth with IDD, as crown attorneys and defense counsel may not identify the implications associated with their client's disabilities.

- Interviewer:* What is your personal knowledge or your understanding of intellectual and developmental disabilities?
- Carol (Crown Attorney):* Most of my understanding comes from just looking into it, I haven't been formally trained . . . my mom happens to be a social worker and then now she's a teacher. So, I would say most of my knowledge comes from informal access to a relative who happens to be in the field and knows a bit more about it . . .
- Mark (Defense Lawyer):* I pretty much Google or look up every single time I get a formal diagnosis, or one of my clients are formally diagnosed because I'm not that familiar with disabilities . . . some lawyers always say that we have clients who present very well, but underneath the surface, they're struggling very hard. And they're ones that would pass, you know, fitness hearings or fitness tests.

Participants discussed personal strategies used to understand and identify clients who may live with IDD. The troubling nature of this practice is that participants are oftentimes not educated on this topic and therefore rely on external resources to support their clients' needs. However, as indicated in the excerpt above, disabilities/impairments can at times be invisible and therefore go undetected. Lack of knowledge or awareness about IDD means that justice system actors may not understand how IDD impacts behavior and how to meaningfully understand what consequences or responses would be useful or meaningful for rehabilitation and reintegration. They may seek to impose criminal justice consequences and responses when the behavior comes from an entirely different reality (e.g. fear or inability to understand the consequences of behavior; Asscher et al., 2012). Although the YCJA seeks to provide effective 'rehabilitation and reintegration' (Government of Canada, 2002), the participants' experiences seeking out external resources or self-engaged research highlight issues surrounding the validity and reliability of these sources. Consistent with previous research (McGillivray and Waterman, 2003; Richards and Ellem, 2018), which stresses the importance of justice professionals being knowledgeable about disabilities, many participants highlighted the importance of receiving formal training on working with vulnerable groups of young people (such as youth with IDD), and/or connecting with specialists. These insights are evidenced below:

- Lori (Crown Attorney):* One of the things I think would be helpful for justice professionals is to have informed education sessions with specialists. I think it'd be very helpful to have psychiatrists and psychologists who do cognitive and academic testing and explain what that testing is . . . A lot of crowns don't know any of those things.
- Cindy (Defense Lawyer):* I hate to say this, it really is dependent on the Crown, the defense, the court . . . anyone involved with dealing with the young person. Again, if they don't have

information or an appreciation of that particular disability, then they can't be treating the child properly.

Participants demonstrate how knowledge impacts practice in the context of their role as justice professionals representing young people with IDD. Beyond this, they speak to the perceptions that crown attorneys and defense counsel hold about disabilities and about their responsibilities or role in working with justice-involved youth with IDD. They further outline the importance of bringing various service-delivery systems together to provide support to young people and to educate justice professionals on important areas that fall outside the traditional legal realm.

Conflation of Mental Health and IDD

Throughout our interviews, participants made remarks conflating mental health and IDD, which was evident in the participant transcripts as they discussed mental health and IDD interchangeably. Within the YCJA, disability is briefly discussed and is not explicitly defined. However, as mentioned, the YCJA does vaguely highlight in the Declaration of Principle that measures taken against youth should consider one's 'special requirements' (Section 3 (c)(iv)). In addition, the YCJA also conforms to aspects of the traditional medical model surrounding disability. The traditional medical model particularly examines disability at the individual level, focused primarily on generating an accurate diagnosis as well as subsequent treatments to improve one's impairment (Marks, 1997: 87). Notably in Section 34 of the YCJA, 'a youth justice court may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person who is required to report the results in writing to the court' (Section 34 (1)). However, in reviewing the YCJA and particularly Section 34, defining and working with an individual with a disability is limited in scope. This may reinforce why participants so often treat mental illness and IDD as interchangeable. Consider the following interview excerpts:

Interviewer:

Simran (Crown Attorney):

Do you distinguish IDD's from mental illness?

I think I don't to a certain extent because I think of mental illness as an inability to regulate your mood, a lack of self awareness of your mood and your feelings, you can't intervene. And that has to do with your ability to exhibit metacognition and behaviors that you may participate in because your mood is low and you don't realize that has to do often with impulsiveness. You're not able to inhibit certain impulses that you feel to make yourself feel better or to act on feelings of aggression. So I don't, I mean, yes they are distinguishable certainly in an adult context where you would have an actual mental health diagnosis. But in the youth context we tend to, (I tend to) and I find the courts as well, we don't distinguish between

- the two because mental health illness factors tend to sit comfortably within the intellectual disability context that we are mostly focusing on, in terms of mood regulation and self awareness.
- Interviewer:* Okay, so youth with intellectual and developmental disabilities and youth with mental illness/mental health issues within your practice are treated synonymously, together?
- Vanessa (Defense Lawyer):* If a young person has a mental health issue or a learning disability . . . sometimes they give me permission to disclose it, sometimes I can go to the Crown and use that as a diversion, but I'm still taking instructions from the youth. So it could help me with . . . negotiations with the Crown, but if they say no, I want to trial or I didn't do this, then I follow those instructions.
- Interviewer:* What is your personal knowledge or understanding of Intellectual and Developmental Disabilities?
- Vanessa (Defense Lawyer):* So, someone who's suffering with a learning disability or, I shouldn't say suffering, that's the wrong word, someone who's living with a learning disability . . . there could be brain injuries like FASD, concussions . . . and then PTSD can interfere with intellectual development . . . my understanding is that if there's a . . . like depending on what diagnosis, there may or may not be, it can affect intellectual functioning.

Notably, in Section 34 (b)(ii) of the YCJA, discussion surrounding youth 'suffering' from psychological disorders as well as IDD are lumped as one category whereby the court may consider requiring a court ordered medical or psychological assessment. This may be a contributing factor as to why justice professionals' dialogue and engagements with their clients experiencing IDD are treated synonymously with discussions of mental illness/mental health. The YCJA by design requires those experiencing mental illness/mental health issues (psychological disorders) and IDD to follow a similar referral process in obtaining a Section 34 assessment. Although there may be benefits in the ordering of medical and psychological assessments for aspects of rehabilitation and reintegration, the lack of distinction in procedural processes may impact a justice professional's ability to represent their client based on their individual needs. For example, it becomes difficult for professionals to connect youth to appropriate services without an understanding of their diagnosis. Having said this, as stated in our introduction, it is also important that the justice system is not seen as a space where youth with IDD can be 'rescued', and neurodiversity inevitably, criminalized.

Our participants also presented mental health and IDD as co-occurring, revealing how the lack of formal education/training, as well as structural definitions of IDD and mental

health, is performed in everyday practice. The following insights highlight these complexities:

- Interviewer:* How do you distinguish them [IDD] typically in your practice?
- Joelle (Defense Lawyer):* . . . Maybe 10% of the youth I dealt with, had some type of cognitive intellectual impairment, but more like majority of the clients had mental health issues. And the ones who had intellectual cognitive issues, usually had some type of mental health issue as well.
- Interviewer:* So do you distinguish IDD from mental illness, and if so, how?
- Simran (Crown Attorney):* So, in the youth context, psychiatrists typically will not diagnose youths with something like schizophrenia. So, when I'm dealing with youths in court . . . when we're looking at the challenges they face they are usually cognitive challenges that fall under more of the first category we discussed [IDD]. But I think that what I've seen in the literature and in the reports that we're getting from these psychiatrists is that emotional regulation tends to sort of sit within each group, so with intellectual disabilities but also mental health issues.

In exploring participants' experiences in working with youth with IDD, narratives surrounding co-occurring disorders with that of mental illness are evident. This may be beneficial in some circumstances for justice-involved youth as Munir (2016) highlights that 'the prevalence of ID/IDD is around 1–3% and co-occurring mental ill-health is around 40%, with persistent mental ill-health around 30%'. As Section 34 addresses both medical and psychological assessments, there is an opportunity for justice professionals to gain knowledge about their clients' comorbidities. On the other hand, the pitfalls to this approach are that conflating mental illness with IDD may lead to overlooking cognitive and adaptive functioning problems. When this happens, it is difficult to understand what caused the criminal behavior, what responses would help to prevent this behavior, and what criminal justice responses or consequences would be useful for meaningful rehabilitation and reintegration. In turn, these issues may contribute to obstacles in offering effective legal representation and adhering to YCJA provisions. Although the Canadian justice system is an adversarial one, youth justice cases offer the opportunity for Crown and Defence to work together to agree on a reasonable outcome that reflects YCJA goals such as rehabilitation, addressing underlying needs, and promoting community-based dispositions and alternatives to formal prosecution (Jones et al., 2019). However, complying with these goals becomes challenging if legal professionals lack an understanding of a young person's specific diagnosis and needs.

Ultimately, these pitfalls may implicate justice-involved youth with IDD's experiences throughout the criminal justice process.

FASD: Complexities Navigating the Youth Justice System

FASD is a condition that occurs in an individual who is exposed to alcohol prior to birth and is therefore exposed to fetal alcohol effects (FAEs) (CAMH, 2022). There are different FASD diagnoses that range in presentation of symptomatology, including fetal alcohol syndrome (FAS), alcohol-related neurodevelopmental disorder (ARND), alcohol-related birth defects (ARBD), and neurobehavioral disorder associated with prenatal alcohol exposure (ND-PAE) (Centers for Disease Control and Prevention, 2022). Individuals who have FASD may experience physical, behavioral, and cognitive impairments which range in mild to severe forms, ultimately impacting one's executive functioning skills (Passmore et al., 2018). Although FASD ranges in diagnosis, an individual who has FASD may experience learning disabilities, poor reasoning/judgment, difficulty in maintaining attention, language processing, and poor memory (Centers for Disease Control and Prevention, 2022). In addition, those who have FASD are also likely to encounter secondary conditions which may include mental health challenges, alcohol and drug-related problems, and disruption in overall school experiences (Streissguth et al., 1996). Through understanding the primary and secondary conditions associated with that of an FASD diagnosis, one can come to understand the complexity of a young person's experience with FASD navigating the youth criminal justice system.

In exploring justice professionals' experiences of working with clients who have IDD in the youth criminal justice system, FASD was oftentimes addressed as a separate entity. The gradual shift between clients with IDD and clients who have FASD is apparent in how justice professionals approach the court process and engage in sentencing/bail practices. The following viewpoints highlight these shifts:

Shengrui (Crown Attorney): General deterrence doesn't apply to intellectually, developmentally delayed individuals, and it doesn't apply to FASD . . . Those people cannot put, like, in terms of their comprehension, say if I get into a fight, I'm going to get charged, if I get charged I'm going to go to jail, I went to jail last time, I'm going to go to jail for more this time. Like, but the entire sentencing principles are based on this premise, it doesn't apply to them . . . That's a huge issue for the criminal justice system and trying to deal with people who are neuro-not-typical or atypical, you know, as we would call them.

Anthony (Crown Attorney): Well, for that one it's extremely helpful because you know we're so – fetal alcohol kids there's no point trying to really punish them they just don't get it . . . I'm not gonna waste my time . . . Um so there's, like,

intellectual disabilities like, I mean, it starts with dyslexia or not being able to read well and then the more – it goes to the range of the more severe ones which would be FASD I think, I think FASD is probably the most severe one that I've seen in terms of not being able to interact with the criminal system in any meaningful way . . .

Alina (Defense Lawyer):

when I'm talking to the crown and when I'm having a crown pre-trial on their matter, it's definitely something that I focus on . . . If this person is suffering from something very seriously, like I keep bringing up FASD . . . So, if I'm dealing with a client like that and their behavior is almost always very similar, like they get very frustrated in the situation and they can't control their behavior . . . and are very destructive, like physically destructive. And, you know, the crown is like 'oh my god, this is crazy behavior' and I'm like 'yeah well you, you need to understand that this is complex'.

Discussions with justice professionals revealed that individuals who have FASD are oftentimes unable to fully grasp the intention of the YCJA. It follows then, that the youth criminal justice system does not sufficiently fulfill its aim when engaging with an individual who has FASD, moreover, generating a discrepancy in being able to 'hold young people accountable through measures that are proportionate to the seriousness of the offense and the degree of responsibility of the young person' (YCJA, Section 3(a)(i)). This is also evident in the way that justice professionals discuss how individuals with FASD are unable to meaningfully engage within the system itself, as they may require different sentencing/bail conditions. As executive functioning is impacted for those with FASD (Streissguth, 1997), it can also be understood that the ability to understand and learn from one's actions is not a reality or seamless model. Brown et al. (2015) highlight that youth with FASD do not effortlessly understand that a repeated (negative) action will lead to similar consequences, therefore requiring alternative learning strategies to be engaged. This is supported through justice professionals' experiences when interacting with youth with FASD in the courtroom. Consider the following vignettes:

Vanessa (Defense Lawyer):

The sentence has to fit with where the youth is . . . I had one client for example with FASD, diagnosed, where the judge sentenced her to having to write a journal entry every day, which is ridiculous . . . the probation officer was in the courtroom, and I just turned around and I said 'are you going to breach her because she's not going to do this' and the probation officers like '100%, I'm not'. I'm like, 'Okay fine,

leave it'. But if I had, if I had a probation officer that said 'oh yeah I'm going to breach' then I would have probably appealed that, you know. So that judge didn't get it . . .

Nicole (Defense Lawyer):

. . . I had a client with FASD who just had a really hard time following bail conditions. He was supposed to not have contact with the complainant and he just kept doing it. And, his mom was pulling her hair out, and she kept saying, 'You can't do this. You can't contact her'. But, his brain was not connecting that first of all, he needed to stop that and there was going to be a ramification if he didn't. But, also just like, *I need to do this so I gotta do it*. So that comes into more . . . again, less of a defense. That's not a legal defense. But, it does give some more context. And perhaps sort of a mitigating factor in sentencing . . . FASD is a striking example of that, where you have difficulties with impulse control, or managing emotions, or other things that get expressed in explosive behavior, conflict, rash decision-making. So, again, that makes it hard to follow bail conditions which are probably not tailored to somebody who has an intellectual disability.

As justice professionals navigate the YCJA, they have to also interpret the capabilities of their clients. A discrepancy can be found in how the system is designed and further enacted through bail conditions and sentencing, as youth with FASD oftentimes struggle to adhere to a system that is designed for neurotypical youth. Notably, this places youth with FASD at a disadvantage, as they may be prone to higher rates of recidivism and may experience difficulties receiving bail. Although the YCJA does allow for medical and psychological reports/assessments (Section 34), the transference of said information for individuals with FASD may be inadequately tailored within court proceedings. The Canadian Bar Association (2010) acknowledges that there is a greater need for varying levels of government to allocate alternative resources to those with FASD within the criminal justice system as well as amend sentencing methods to accommodate young people with FASD. As FASD consists of primary and secondary conditions, implications associated with judicial proceedings may impact progress toward upholding the YCJA's Declaration of Principle (Government of Canada, 2002). Through our participants' viewpoints, it is clear that FASD is justifiably treated as a separate entity in comparison to other IDD's based on the complexities associated with FASD. It is therefore evident that the YCJA should include specific guidelines/practices focusing on FASD/IDD's in order for justice professionals to improve their ability to advocate for clients. Collectively, it is the policies and practices that justice professionals engage which have the ability to impact outcomes for youth with FASD.

An ‘Overwhelming’ Experience for Youth With IDD: By Design

In exploring the experiences and perspectives of crown attorneys and defense counsel in prosecuting and representing justice-involved young people with IDD, many participants described how young people with IDD define their interactions with the justice system. Part of their experiences and perspectives centered on their interactions with their clients (youth with IDD). Our participants used terms such as ‘overwhelming’ and ‘stressful’ when they described what many youth with IDD experience throughout the youth justice system. In particular, these emotions/experiences are heightened within two components of the court system: the use of legalize by justice professionals and lengthy court proceedings. The following excerpts from crown and defense counsel highlight these viewpoints:

Interviewer:

How would you describe the experiences of youth with IDD in the criminal justice system?

Nicole (Defense Lawyer):

I think it’s overwhelming. I think it feels like there’s a lot going on without them having much agency in what is happening. It can be difficult to understand some of the interplay between the Crowns, and the court, and defense. And, frankly, it’s hard for adults without IDD . . . I think ‘overwhelming’ would be my primary response that I get from clients.

Joelle (Defense Lawyer):

The entire thing is stressful . . . I can tell you that almost every single kid I had who had a trial coming up or even just a set date coming up, court caused so much stress to them that I, I just, I don’t know, they would always . . . oddly, you could predict it, they would get new charges, just before their trial because they’d go and get overly stressed, and then go out and breach their bail, and then it’s like, for ‘goodness sakes kiddo’. Yeah, so it happened, and then I learned through that, that because there was this pattern with these kids, not just one kid, I mean like this was a frequent thing.

Many of the participants highlight that the justice system is stressful for neuro-typical adults and explain that for youth with IDD, stress and overwhelming feelings are heightened as many of their clients with IDD may not understand the process or have appropriate support to navigate the system. Participants revealed that it is the system itself that often perpetuates these feelings *by design*. Consider the following insight:

Lori (Crown Attorney):

I would think they [youth with IDD] would be complaining about the system because there are very few jurisdictions that have specialists dealing with youth

who then have a specialty in mental health, cognitive, and other issues . . . being charged and arrested and coming into court for all young people is incredibly stressful. And for those young people who have challenges in understanding the process or dealing with their own anxiety, it can be very very difficult for them . . . It was designed to be difficult.

The fact that youth are fundamentally different from adults and require special protections is an underlying premise of the YCJA (Jones et al., 2019). Nevertheless, the systemic, opaque structure of the justice system is designed in ways that overwhelm young people, and in turn, some youth with IDD may engage in behaviors that enhance stress and anxiety. Legal professionals play an important role in supporting youth with IDD and helping them understand the process. Some participants highlighted that they often draw depictions of a courtroom in an attempt to simplify the experience for youth. Nevertheless, many professionals felt that they lacked the expertise to effectively support youth with IDD. For instance, justice professionals may use language that youth may not understand, such as specific legal terms. Foucault's idea of *discourse* describes language and the social meaning placed upon any given word as a part of a community's social structure and a site of power (Malpas and Wake, 2013). Legalize gives justice professionals power because their use of legal-related language reflects their education and role in society. Although it may be unintentional, by using language that youth do not understand, the legal system becomes exclusionary and hinders their ability to be a part of their own legal process.

Interviewer:

What do youth with intellectual and developmental disabilities find stressful about the overall process?

Marcus (Crown Attorney):

I'm sure it can be very frustrating and simplifying procedures . . . is always a goal, but it's just a constant challenge for us because unfortunately the law is simply complex and the procedures we have in place, which are intended to help protect people's rights and give them the opportunity to defend themselves, at the same time, are very time consuming and create hurdles and don't lead to quick outcomes, a lot of the time, which I'm sure for any youth and particularly one with IDD is confusing, and they simply cannot grasp.

Nicole (Defense Lawyer):

I try in my role to explain everything . . . And I like draw a note – how the courtroom looks . . . But, again . . . I dealt with a grown adult man who has no development disabilities last week who was like, '*I'm really nervous about going to court, it gives me anxiety*'.

Sergio (Crown Attorney): The length it takes. It is really difficult when the youth has got either an intellectual, you know, disability, where timing does not mean the same thing to them.

Another component of the legal system identified as frustrating by our participants was the length of time a young person may be involved with the legal process. Section 11(b) of the Canadian Charter of Rights and Freedoms (1982) states that Canadian citizens, including youth, have the right to a timely trial. Likewise, the YCJA's Declaration of Principle emphasizes timely interventions (Section 3(b)(iv), especially given the fact that youth perceive time differently than adults (Section 3(b)(v)). However, the length of time that youth are involved with the system was acknowledged as problematic. The system, *by design*, is not prompt enough to adapt to the perception of time of justice-involved young people with IDD. Likewise, as crown attorneys and defense counsel reveal, the system perpetuates stress, anxiety, confusion, and inequitable access to accommodations and support required to navigate the justice system. This raises questions about the extent to which youth with IDD have proper access to justice. In addition, this also raises concerns about the possibility that some young people with IDD may re-engage in behavior that can lead to additional charges before their matter is concluded.

Conclusion

Canada's crown attorneys and defense lawyers are social actors within a system whose structures impact the way they operate in their professional roles (Hatch, 2018; Shafritz et al., 2011). Therefore, their viewpoints offer valuable information into the functionality of the Canadian justice system. Our research demonstrates that the current Canadian youth criminal justice system fails justice-involved young people living with IDD(s) and needs to be overhauled in two main areas: (1) the way it addresses the unique needs of neurodiverse or neuro-atypical individuals and (2) professional development and education for justice professionals. The vague terminology of the *YCJA* generates a system in which professionals cannot properly support young people with IDD(s), despite their overrepresentation within the Canadian judicial system (Cockram et al., 1998; Jones, 2007; Marinos et al., 2020). While the *YCJA* mandates an appropriate response to the needs of youth with special requirements, the *YCJA* and existing caselaw lacks clear instructions on how to apply this to practice. This ambiguous approach to neurodiversity produces an environment where justice professionals are uninformed on how to best support justice-involved young people living with IDDs. In turn, young people with IDDs may experience a difficult and overwhelming process where they may not be properly supported. This is particularly highlighted when participants discussed that youth with FASD did not always receive sentences or bail conditions that reflected their cognitive capabilities.

Many participants felt that they lacked comprehensive education pertaining to disabilities and were forced to rely on self-study and personal experience. These strategies can be problematic for two reasons: they assume that disabilities are visible and identifiable; and they force justice professionals to work outside their scope of practice and training. This

study also reveals that due to the lack of IDD education, justice professionals often conflate mental health concerns and IDD. While comorbidity should be acknowledged, conflating mental illness with IDD may lead to overlooking cognitive and adaptive functioning problems, and may lead to inadequate rehabilitative supports that complement young people's needs. The lack of acknowledgment of disability within the *YCJA* and educational courses offered to justice professionals reflects an ableist justice system that requires change. It is our hope that these findings can be used in comparison with the perspectives of young people with IDD(s) to further offer suggestions on rehabilitating the Canadian youth criminal justice system so that it better reflects an equitable experience for all youth.

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