

**Bridging the Conceptualization of Youth with Intellectual Disabilities to
Sentencing under the YCJA**

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Dedication

This thesis is dedicated to my mother Maria Jones, who challenges me to see people and the world in new ways. It is because of this that I am constantly learning and growing, for this I am sincerely grateful. Without your wisdom, encouragement, and support throughout my life and the thesis process, it is likely that I would be at home living in your basement... like your son.

Abstract

The current study examined how disability and the concepts of risk, need and responsibility are understood by criminal justice professionals and inform their perceptions of young offenders with ID at sentencing under the ‘different but equal’ philosophy. Semi-structured interviews were conducted with 11 lawyers and 8 mental health workers across 6 major urban areas in Ontario. Participants primarily perceived ID through a medical discourse, overlooking social and structural barriers that, in some cases, may hinder adherence to sentencing dispositions. Specifically, participants discussed balancing the reduced culpability of offenders (e.g., intent) – justifying lenient sentencing – with public safety concerns (i.e., ID viewed as a barrier to rehabilitation) – justifying increasing the severity of sentences. Participants assessed clients with ID and their risks, needs and responsibility within the context of other legal factors: criminal history, severity of the offence, and YCJA objectives. Participants articulated the importance of tailored courthouse identification programs, services/funding, and education/training.

Keywords: Intellectual Disabilities, Disability Discourse, Youth Criminal Justice Act (YCJA), Sentencing, Young Offenders

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CHAPTER 1: INTRODUCTION

The overrepresentation of individuals with intellectual disabilities in the justice system, with a focus on tailoring responses and equitable access to justice for this population has emerged as a major concern. Recent research in this area has drawn attention to the vulnerabilities that individuals with intellectual disabilities (ID) experience in terms of identification, rights violations, sentencing inequalities, and the availability and evaluation of treatment and intervention programs for offenders with an ID (Jones, 2007). Unfortunately, research in this area has been relatively inconsistent and primarily conducted with adult populations. These inconsistencies range from population studies which report that persons with intellectual disabilities make up anywhere from 2-40% of offenders (Cockram, Jackson, & Underwood, 1992; Cockram, Jackson, & Underwood, 1998; Hayes, 2002; Holland, 1991; Holland, 2004; Lindsay et al., 2010; Mallet, 2009) to differences in the identified risks and needs of this population. Such inconsistencies and gaps in the research have made it increasingly more difficult to evaluate the treatment of youth with intellectual disabilities in the justice system. Influenced by numerous factors including inconsistent research findings, shifts in public attitudes and beliefs, and resource availability, the experiences of this population in the justice system are influenced, to some extent, by how the primary legal players, including judges, crown attorneys, defence counsel, and mental health workers perceive this population's disability vis-à-vis offending. Research examining how perceptions of young offenders and intellectual disabilities as two broad categories are integrated to inform appropriate sentencing for youth with ID under the YCJA is both sparse and necessary.

CHAPTER 2: REVIEW OF THE LITERATURE

Youth Criminal Justice Policy; YOA to YCJA

Young offenders have long been considered inherently different than adults and in need of specialized treatment within the justice system. Tracing changes in legal doctrine and sentencing practices over time reflect and highlight how these perceived differences have evolved. The Juvenile Delinquents Act (JDA), in effect between 1908 and 1984, was based on a welfare principle and emerged from the belief that youth crime is a product of “socio-economic and cultural forces” (MaClure, Campbell, & Dufresne, 2003, p. 135). Sentencing dispositions rooted in this philosophy focused primarily on rehabilitation, but also included reform and control as a means of dealing with delinquent children (MaClure et al., 2003). In 1984, the *Young Offenders Act* (YOA) was enacted partly in response to rights violations in the application of the JDA as a result of broad discretionary power (MaClure et al., 2003). In this shift, children were recognized for the first time as autonomous individuals with inherent rights during the justice process (MaClure et al., 2003). The use of diversion programmes also emerged to minimize the negative effects of exposure to the justice system through alternative programming options outside of formal and traditional judicial sanctions (MaClure et al., 2003). Unfortunately, the principles outlined in this Act were often vague, contradictory, and inconsistently applied (Barnhorst, 2004). Thus, while this Act promoted rehabilitation and diversion, the YOA was criticized for resembling a crime control model in practice (Barnhorst, 2004). This model emphasized the seriousness of youth crime and moved away from the more lenient sentencing trends seen under the JDA (Barnhorst, 2004). As

a result, under the YOA, there was an increase in youth charged with violent crimes and youth receiving custodial sentences (Barnhorst, 2004).

The Youth Criminal Justice Act (YCJA) was adopted in 2003 to address, in part, the concerns surrounding vague and conflicting sentencing objectives, and disproportionate sentencing trends (Department of Justice, 2013). In doing so, this Act reasserted Canada's commitment to rehabilitation and the use of diversion or extrajudicial measures while extending its goals of sentencing to include proportionality and accountability (Barnhorst, 2004; MaClure et al., 2003). The key values and legislative framework of the YCJA (2002, p. 5-7), as they pertain to this study, are outlined in the Declaration of Principle below:

3. (1) The following principles apply in this Act:

- (a) the youth criminal justice system is intended to protect the public by
 - (i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
 - (ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
 - (iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;
- (b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral

blameworthiness or culpability and must emphasize the following:

- (i) rehabilitation and reintegration,
- (ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
- (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
- (iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
- (v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

- (i) reinforce respect for societal values,
- (ii) encourage the repair of harm done to victims and the community,
- (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements

The values of accountability, meaningful consequences, rehabilitation, proportionality, and individualization of responses extend to the sentencing principles outlined under the YCJA. In addition to the above principles, the YCJA proposed the following sentencing principles as guidance at sentencing: proportionality (within the same region) between offenders, offence type, and seriousness of the offence/degree of responsibility, consideration of all other reasonable sanctions prior to imposing a custodial sentence, and less punitive sentencing when compared to adults (YCJA, 2002, s.38).

Canadian courts have available a wide range of sentencing options and programs for youth to ensure the successful implementation of the YCJA principles. This corresponds with belief that holding young persons accountable while providing rehabilitative-focused sentencing requires that sentences are tailored to address both the crime and individual youth circumstances. Along with various sentencing options, the YCJA provides an outline for the use of youth justice committees and conferences to further assist in tailoring youth responses (section 18 & 19 YCJA, 2002). Youth justice committees support the administration of the Act by providing advice on key decisions within the judicial process (YCJA, 2002, s.18). Conferences may include judges, police officers, youth workers, and lawyers who are enlisted, among other objectives, to “give advice on appropriate extrajudicial measures, conditions for judicial interim release,

sentences, including the review of sentences, and reintegration plans” (YCJA, 2002, s.19.2).

The YCJA is relatively structured, and therefore criminal justice officials have direction and guidance about the goals of the YCJA. At the same time, there is considerable discretion to tailor individualized sentences within the context of the principles of proportionality, rehabilitation, meaningful consequences, and accountability. Some authors argue that the ways in which the principles are accomplished remain open for interpretation and are highly influenced by regional resources (Barnhorst, 2004; MaClure et al., 2003). As a result, there is potential for these goals to be applied inconsistently across offending populations, including youth with disabilities.

Conceptualizing Disability

In the past, ID was referred to as “mental retardation” with an IQ score of 70 or below as the primary diagnostic criteria, both within the Diagnostic and Statistical Manual of Mental Disorders (DSM) as determined by the American Psychiatric Association (APA) and society more generally. Currently, the American Psychiatric Association (2013) refers to an intellectual disability as general impairments in adaptive functioning across three primary areas: social, practical, and conceptual functioning, occurring during the developmental period. The social domain includes “empathy, social judgment, interpersonal communication skills, the ability to make and retain friendships, and similar capacities” (American Psychiatric Association, 2013, p. 1). The practical domain refers to “self-management in areas such as personal care, job responsibilities, money management, recreation, and organizing school and work tasks” (American

Psychiatric Association, 2013, p. 1). Conceptual impairments may include “skills in language, reading, writing, math, reasoning, knowledge, or memory” (American Psychiatric Association, 2013, p. 1). Diagnostic criteria were changed in the DSM-5 to emphasize functional ability as opposed to IQ, specifically in determining the severity of the disability (American Psychiatric Association, 2013). While given less focus and weight, IQ scores remain within the definition of intellectual disability and forms of IQ testing are still be used to identify the presence of an ID (American Psychiatric Association, 2013).

In addition to other recognizable terms used to refer to ID, such as ‘developmental disability,’ the World Health Organization (WHO) currently uses the term ‘intellectual developmental disorder.’ While recognizing the use of the term ‘ID’ as adopted within various westernized areas, the WHO describes ID as a disorder (as opposed to a disability) to utilize a multi-axial approach to identifying, evaluating, and implementing care to those with ID (Salvador-Carulla et al., 2011). Persons with ID are often further burdened by co-occurring health conditions, mental health concerns, or learning disabilities and often require a multifaceted approach to promoting positive health and development (Salvador-Carulla et al., 2011). Recognizing ID as a complex disorder ensures that persons with ID receive recognition and any necessary assistance worldwide (Salvador-Carulla et al., 2011).

These changes in the definition and diagnosis of ID reflect broader global changes in disability conception that begin to acknowledge the influence of one’s environment, including structural and social barriers and its effects on individual lived experiences. In general, persons with disabilities have historically been a marginalized population who

have been denied equal opportunities, respect, and support (Sabatello, 2005). It was not until 1985 that the *Charter of Rights and Freedoms* (1982) included disability equality, recognizing and protecting individuals with disabilities from discrimination and endowing them with the same protection and benefits under the law as other individuals (The Canadian Bar Association, 2012; Vanhala, 2010). In 2006, the rights of persons with disabilities were acknowledged on an international level by the *United Nations Convention of the Rights of Persons with Disabilities* (Vanhala, 2010). With respect to the justice system, Canada has continued to work towards advancing disability awareness and knowledge through various projects and an exploration of new ways to ensure equal access to justice for this population. The introduction of Ontario's first *Courts Disability Committee* in 2005, which developed a "practical action plan to remove barriers that persons with disabilities face when seeking to participate in Ontario's Courts," is just one example of Ontario's commitment to this cause (Ontario Bar Association, 2012, para. 8). Following the work of this committee, Ontario developed and implemented the *Courts Disability Accessibility Education Project*, which aimed to remove all barriers (attitudinal, communication, informational, physical, sensory) to ensure equitable access for this population and to make the court system "fully accessible to persons with disabilities" (Courts Disability Committee, 2006, para. 3).

While great strides have been made towards equality, many barriers and misconceptions remain. Reflection on past and current prevailing concepts of disability, notably the medical, social, and bio-psycho-social models of perceiving disability, is essential in understanding the lived experiences of those with disabilities and, specific to

this research, how equality laws are interpreted by justice officials and where conflicting discourses have gained power.

Medical model. Sabatello (2005) stated that “until the late twentieth-century, disability was viewed through a lens of a medical paradigm of individual pathology” (p. 739). Within this model, disability was thought to originate from within the individual and placed persons with ID outside of what is considered ‘normal’ and ‘healthy’ (Sabatello, 2005). According to Buser, Leone, and Bannon (as cited in Cockram, Jackson, & Underwood, 1992) cognitive differences associated with ID are often perceived to drive offending behaviour in this population, contributing to their overrepresentation in the justice system. Sentencing and treatment options rooted in this understanding focused on ‘curing’ or rehabilitating individuals with a disability (Sabatello, 2005; Vanhala, 2010). Recent research has shown that efforts to supervise and manage offenders with ID, when rehabilitative programming is not deemed appropriate, often result in restrictive sentencing or an imposition of jail that is not characteristic for other offenders (Cockram, 2005). Both of these sentencing trends, whether emphasizing rehabilitation or the need for increased supervision, give support to the medical model of perceiving disability by focusing on individual differences and a lack of recognition of social barriers that contribute to offending behaviour.

Social model. After years of advocacy, the social model of perceiving disability began to challenge traditional biological perceptions of disability. The social model proposed that intellectual disabilities are constructed through “barriers as well as prejudicial attitudes that limit the ability of disabled persons to participate fully in society” (Vanhala, 2010, p.30). For example, interviews with parents of youth with

intellectual disabilities identified the education system as a social barrier that negatively impacted their child's life (Cockram, Jackson, & Underwood, 1998). Parents viewed segregated education as making it difficult for their children to gain meaningful work, participate in day time activities, or hold community relationships, thus increasing their susceptibility and exposure to learning problem behaviours (Cockram et al., 1998).

According to the social model, equal treatment of this population in the justice system requires that intellectual disabilities are identified, differences valued, and treatment tailored to fit the specific needs of this population and/or individual (Sabatello, 2005; Vanhala, 2010). Furthermore, the justice system has a duty to accommodate for disabilities, specifically by removing social barriers and challenging prejudicial attitudes (Vanhala, 2010). The latter part is essential in 'different but equal' treatment of this population. Sabatello (2005) proposed that while "taking difference into account does justice to the reality of difference," it does so with the potential consequence of "perpetuating false assumptions about the *nature* of difference" (p. 742). Challenging prejudice, removing social barriers, and gaining a deeper understanding of what intellectual disability entails, is essential for equal and fair application of the law.

Bio-psycho-social model. New disability advocacy movements are shifting towards a bio-psycho-social model of perceiving disability. While the social model provided the platform for huge advances towards the inclusion of persons with disabilities, it has been criticized for overlooking biologically based differences (Lang, 2001; Shakespeare & Watson, 2002). Many authors of the social model (Lang, 2001; Morris, 1991; Shakespeare & Watson, 2002) have described the distinction between 'impairment' (relates to physical body) and 'disability' (socially constructed barriers) as

creating a dichotomy between the body and social experiences. Those advocating for a new shift in conceptualizing disability strongly propose a model that examines and reflects the interactions between individual differences (impairments) and social context/social barriers through consideration of individual lived experiences (Lang, 2001; Crow, 1996; Shakespeare & Watson, 2002). This extends to include individual differences between persons with disability across race, culture, and ethnicity.

Research that has focused on mental health suggests that minority populations may be burdened to a greater extent than others struggling with mental health concerns (Mental Health Commission of Canada, 2012; U.S. Department of Health and Human Services, 2001). In a summary report, The U.S Department of Health and Human Services (2001) indicated that persons belonging to a minority group may experience decreased access to relevant services or receive less effective care. These differences were shown to stem from a number of factors including the cost of treatment, lack of services, stigma, fear and a lack of trust, discrimination, and communication differences (U.S. Department of Health and Human Services, 2001). The Canadian Mental Health Commission (2012) has acknowledged similar barriers to appropriate mental health prevention and support services for minority groups in Canada. In attempt to tackle these barriers, the Canadian Mental Health Commission has developed a strategic plan tailored to address the unique challenges faced by youth, immigrants, refugees, ethno-cultural and radicalized groups, aboriginal persons, individuals living in rural or remote areas, and marginalized individuals based on gender or sexual orientation.

Youth with Intellectual Disabilities

While attention has been paid to both young offenders and intellectual disabilities, little research has focused on how youth with ID, who are in conflict with the law, are perceived by legal professionals given their interactions with them. It is possible that this gap in research is due to difficulties relating to identification and attempts to avoid labelling youth at a young age due to the associated stigmas. Research that does address this population has tackled the concepts of overrepresentation including pathways to offending behaviour, early identification, and proposes programming within the justice system to enhance detection (Hayes, 2007). However, current perceptions of both youth and intellectual disability, as highlighted above, might lead the justice system and professionals to view youth with intellectual disabilities as either particularly vulnerable or exceptionally risky, but regardless, in need of specialized attention. The perceived vulnerability, needs, and risks of this distinct group of individuals is potentially multiplied due to their current position and perceived status in society. Tyyska (2009) has described young people, as a social group, as risky because of their lack of maturity, dependency on adults, and their tendency to make mistakes. There may be compounding effects when a young person has a disability, and engages in crime. Treatment of this population in the justice system, in light of the multitude of contrasting and conflicting perceptions, highlights the potential for unequal treatment among youth with disabilities and between those youth with and without disabilities more generally.

Applying Youth Justice Policy

Laws and legal policies usually reflect social values and the acknowledgement of social problems, and aim, in theory, to provide the best or most appropriate solution (MaClure et al., 2003). The policies are often influenced by competing discourses, personal convictions, and the institutional and social environment/resources (MaClure et al., 2003). In particular, a few studies have explored the influence of these various factors on sentencing trends and found a noteworthy influence on the different treatment of this population (see Cant, 2007; Cockram et al., 1992; Cockram et al., 1998; Hayes, 2007). When working with a young offender who has an ID (or other extenuating circumstances), additional resources or assessments outside of the traditional scope of practice may be used to inform the appropriate court response. Psychological assessment, fitness tests, pre-sentence reports (PRS's), and the defence of mental disorder (s. 16, Canadian Criminal Code) (Verdict of Not Criminally Responsible (NCR) on account of mental disorder, s. 672.34, Canadian Criminal Code) all provide a venue for gathering detailed information about a young offender and their circumstances for the purpose of tailoring a response. Further, specialized mental health courts and diversion programs offer individuals with mental health conditions or intellectual disabilities alternative avenues through the justice system, typically with more tailored sentencing.

'Different but equal' sentencing in practice. From initial contact with police to sentencing in formal court procedures, research has identified differential treatment of persons with intellectual disabilities throughout the system from police contact to detention (Hayes, 2002). Cockram (2005) looked closely at the dispositions imposed upon this population in a longitudinal study of the justice system in Australia and

identified differences in the types of penalties imposed at both the front and back end of the system, controlling for offence type and history. At the front end, this population was more likely to receive discharge, dismissal, or a withdrawal of charges (Cockram, 2005). However, those who were processed through the system were more likely to receive custody or restrictive community-based orders (equivalent to diversion in Canada) in comparison to individuals without disabilities (Cockram, 2005). Community-based orders, which in theory are a more lenient response than detention, were shown to be immensely different between offenders with and without disabilities in this study. Unlike community-based programming for offenders without disabilities, which include “fines, are finite, certain, unsupervised, and retributive” (p. 10), offenders with intellectual disabilities received orders that were “periodic, uncertain, supervised, and rehabilitative in conception” (Cockram, 2005, p. 10). Further, identification issues within the justice system have been shown to have a negative effect on the treatment of this population. In particular, Cant (2007) found that certain behaviours, if an ID goes unidentified, may be misinterpreted as a deliberate or obstructive response to the law. This misinterpretation was shown to elicit a negative response from judicial officials and was linked to both fewer opportunities for diversion or a withdrawal of charges and a heightened possibility of more restrictive sentencing (Cant, 2007).

Justifications behind differential treatment. While disparities in sentencing may be explained and validated via the ‘different but equal’ principle, fair and equal treatment rests on the ability of the justice system to accurately identify and respond to the needs of individuals with intellectual disabilities, while also ensuring a proportionate sentence. Unfortunately, the perceived characteristics and needs of individuals with intellectual

disabilities have been not only diverse among legal professionals, but embedded in misunderstanding. Marinos, Robinson, Gosse, Fergus, Stromski, Rondeau, and Griffiths (in progress) have found in an analysis of criminal justice professionals in Ontario that there was, a general lack of understanding of what an intellectual disability entails and how it may affect an individual's experience in the justice process. In fact, Cant's (2007) research, which focused on how justice officials perceive offenders with intellectual disabilities, who in the UK are referred to as having learning disabilities, suggested that there is an underlying bias or stigma that may affect the sentencing and treatment of this population. Cant identified a common and shared concern among legal professionals, as a systemic problem, for the placement of individuals with disabilities in community care. This concern by justice professionals was based on the belief that the nature of disabilities makes these offenders highly susceptible to social influence and increases their potential or risk for reoffending (Cant, 2007). Traynor (2002) proposed that similar perceptions of an increased risk to re-offend due to cognitive differences exist for offenders with mental health conditions. With some research to suggest that professionals view individuals with ID to be at an increase risk of re-offending due to cognitive differences, in combination with an overall lack of knowledge about ID, exploring how informal and formal risk/needs assessments of this population contribute to sentencing is invaluable.

Informal and formal risk/need assessments. Research has shown that the current sentencing phase of the criminal justice process for youth employs both informal and formal risk/need assessments to inform appropriate responses by the court (Hannah-Moffat & Maurutto, 2003). Often, formal assessment tools are used to present

recommendations that are based on a “systematic review and analysis of the areas of risk and need shown by research to be related to recidivism” (Hannah-Moffat and Maurutto, 2003, p. 13). Specifically, pre-sentence report’s (PSR’s), which are descriptive reports formatted to reflect current risk/needs assessment tools (to varying degrees), may be requested by a judge to help tailor an appropriate response (Hannah-Moffat & Maurutto, 2003). Recommendations based on formal assessment tool are seen as more credible and justifiable as they are thought to eliminate any bias or prejudice that may typically accompany decisions arising from professional judgments (Hannah-Moffat & Maurutto, 2003).

Research that has assessed the validity of the Youth Level of Service/Case Management Inventory (Y-LSI), a commonly used risk/need assessment tool in Ontario, show great support for its ability to predict future offending across offending groups (Flores, Travis, & Latessa, 2004; Olver, M., Stockdale, & Wong, 2012; Schwalbe, 2007; Schwalbe, 2008). Recent research has also demonstrated certain risk assessment tools to have some predictive reliability when used with individuals with intellectual disabilities (see Barbee, Seto, Langton, & Peacock, 2001; Camilleri & Quinsey, 2011; Gray, Fitzgerald, Taylor, MacCulloch, & Snowden, 2007). Unfortunately, risk/needs tools have not been constructed with consideration of the unique personal, interpersonal, or environmental factors/community experiences specific to persons with ID’s, nor are they used in isolation of professional judgment or in all cases (Hannah-Moffat & Maurutto, 2003).

Resource limitations prevent the use of formal risk/need tools in all cases. Subsequently, informal and subjective risk/need evaluations are conducted regularly by

professionals in the justice system. In a study by Hannah-Moffat & Maurutto (2003), professionals working in the justice system suggested that they are able to develop a “strong institutive sense” over time, reducing the need for formal assessment tools in tailoring appropriate responses (p. 13). Whether formally or informally introduced into sentencing practices, the concepts of risk and need are embedded within the justice system. Examining how and when these assessments are requested along with how these concepts are conceptualized and implemented in the absence of formal assessment tools is critical to understanding how youth with ID are perceived and sentenced.

Conceptualizing risk/needs. Risk/need assessment tools have been constructed with the assumption that certain forms of intervention are better suited for particular groups of offenders (Hannah-Moffat & Maurutto, 2003). In particular, one aspect of current assessment tools includes risk prediction focusing on static factors which are described as particular characteristics that are unchangeable over time (ex. a criminal record) (Hannah-Moffat & Maurutto, 2003). These factors have been commonly associated with security or supervision concerns and the protection of society (Hannah-Moffat & Maurutto, 2003). New tools have evolved to include an “analysis of risk factors [that are] linked to the identification of criminogenic needs factors that have a role in preventing, rather than simply predicting, offending” (Hannah-Moffat & Maurutto, 2003, p. 2). Criminogenic needs factors are commonly perceived to be those dynamic risk factors that are responsive or susceptible to change over time and which can be targeted through rehabilitation and treatment programs (Hannah-Moffat & Maurutto, 2003). Quite often, however, risk and needs are conceptualized as overlapping concepts and legal professionals (police officers, crown attorneys, probation officers, prison guards, and

academics) often see an “unsatisfied need [as a] potential risk factor” (Hannah-Moffat & Maurutto, 2003, p. 16). For example, issues around anger management could be perceived as a need and warrant counselling while simultaneously be viewed as a public safety risk, particularly if there is evidence that anger management was offered as part of a past sentence and regardless of its successful completion.

The blending of these two unique concepts for young people can create potential problems for the proper application of the law, which requires imposition of meaningful consequences that are fair, just, proportionate, and promote rehabilitation. Specifically, Hannah-Moffat and Maurutto (2003) proposed that the blending of these concepts can “result in increased surveillance of youth” (p. 16). This problem is further convoluted when taking into account the most recent shift in risk-needs assessments, which is to integrate and explore responsivity factors. These factors take into account sociological, biological/cognitive and personality characteristics to determine how treatment should be tailored so as to facilitate and maximize effective treatment/learning (Bonta & Andrews, 2007). These factors may include the “motivation, abilities, and strengths of the offenders” (Bonta & Andrews, 2007, p. 1). With knowledge of the misconceptions surrounding the unique experiences and challenges faced by individuals with intellectual disabilities, the processes of identifying risk, need, and responsivity factors for this population and individual offenders may be extremely challenging.

Psychological assessments, fitness, NCR. According to section 38.1 of the YCJA (2002), psychological assessments can be requested at any stage of the legal proceedings. This can occur with “consent of the young person and the prosecutor” (YCJA, 2002, s.34.1.a), or “on its own motion or on application of the young person or

the prosecutor” (YCJA, 2002, s.34.1.b). According to section 38.1.b.i of the YCJA (2002), the use of a psychological assessment is appropriate if “the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability.” These assessments may be used to inform youth sentences including continuation of custody, releasing youth from custody, ordering conditional supervision, and setting conditions of a conditional supervision order among others (YCJA, 2002, s.34.2).

Fitness tests and NCR findings provide an avenue to exclude individuals from the justice system due to a lack of intent or understanding of one’s participation in a crime or the justice system (Department of Justice, 2013). If a defendant is unable to instruct counsel or understand the process generally, they may be found unfit to stand trial. According to the YCJA, if a person is found unfit they will be placed in a youth hospital or treatment center until he/she has been ‘treated’ and is able to stand trial (Department of Justice, 2013). In some cases youth can be released with conditions. These cases typically remain in the jurisdiction of the Ontario Review Board until the defendant either becomes fit or charges are withdrawn or stayed (Department of Justice, 2013). Intellectual and cognitive differences pose a unique challenge. While the judicial process can be explained to individuals with ID, biologically based differences may continue to present a barrier to being declared ‘fit.’

NCR refers to decisions around the culpability of defendants. Under the Criminal Code of Canada, Persons found to be NCR are not convicted of an offence and may receive an absolute discharge but will be placed in a treatment facility (Ontario Review

Board, 2011). The Ontario Review Board oversee these cases and do not authorize an absolute discharge or the release of these persons from treatment facilities until they are no longer deemed to be a public safety risk (Ontario Review Board, 2011). This can result in indeterminate periods of supervised treatment.

Importance of informed tailored sentencing. The value of ‘different but equal’ sentencing, which is supported by the proper identification of an individual’s risks and needs, is validated by current research. For example, McNiel and Binder (2007) compared persons with mental health conditions who had been referred to a mental health court, with similar offenders who were being processed normally within the justice system. This study found evidence that tailored intervention programs provided by specialized mental health courts are successful in reducing involvement in the justice system (McNeil & Binder, 2007). This study included offenders charged with both felonies and violent offences, suggesting that it is possible for mental health courts to properly intervene across different offence types and not solely with less serious offenders (McNeil & Binder, 2007). This coincides with research that has linked the proper marrying of service allocation and criminogenic risk level to a positive intervention outcome or reduced recidivism rates (Andrew, Bonta, & Hoge, 1990; Gendreau, Goggin, Cullen, & Andrews, 2000).

Studies have also indicated that the improper marrying of risk/need factors and intervention programs can have negative or harmful effects. In a meta-analysis, Gendreau, Goggin, Cullen and Andrews (2000) suggested that Intensive Support Programs (ISP’s), which were designed to provide an alternative to custody for ‘risky’ offenders, are extending their use to low-risk offenders. As proposed by Gendreau et al.

(2000), providing intensive services to low-risk offenders can be harmful by increasing administration of justice charges and resulting in higher rates of incarceration.

Alternatively, where individual need factors were addressed through specific treatment interventions, as opposed to a sole emphasis on supervision concerns, recidivism were reduced (Gendreau et al., 2000).

The importance of accurately tailoring an individual response to an offender's risks and needs extends to youth with ID. Traynor (2002) has found that offenders with mental health conditions may face specific barriers when trying to adhere to sentencing dispositions. In particular, cognitive differences alongside environmental and social barriers were described as making it more challenging, in some cases, for this population to comply with sentencing terms (Traynor, 2002). As an extension, this may apply to youth with ID. When combined with administration of justice charges, accurately identifying the risks and needs of individual offenders with ID has emerged as a significant legal concern.

In Canada, administration of justice offences (i.e., breach of probation) have been shown to be a major driving force behind pre-trial detention and custodial sentences. Notably, while the use of custodial sentences has dropped significantly under the YCJA, “more than half of all custody sentences have been imposed in cases involving relatively less serious offences” (Department of Justice, 2014, p. 13). These charges include but are not limited to theft, mischief, or administration of justice offences (Department of Justice, 2014). The data suggest that half of the cases where youth are sentenced to custody are influenced significantly by either administration of justice charges or serious charges where aggravating circumstances are present. Similarly, the Department of Justice (2014)

indicated that the most common offences leading to pre-trial detention in non-violent offences are administration of justice charges (i.e., breach of pre-trial detention). When combined with data that suggest persons who spend more time incarcerated than other similar offenders (matched on risk level) are more likely to recidivate (Gendreau et al., 2000), it becomes apparent that the courts need to properly tailor sentencing to an individual's risk and need factors.

Recognizing Difference

Knowledge and understanding are essential to challenging prejudices and breaking down social barriers faced by individuals (Mental Health Commission of Canada, 2013). This extends to persons with intellectual disabilities and the ability for the justice system to provide meaningful and rehabilitative sentences to all youth.

Researchers have made great strides towards understanding and recognizing the differences and challenges faced by this population in the justice system. Particularly, risk/need research specific to persons with ID has extended to include a wide range of externalizing and internalizing behaviours, including both criminogenic and non-criminogenic needs (see De Ruiter, Dekker, Verhulst, & Koot, 2007; Dekker, Koot, Van der Ende, & Verhulst, 2002). Unfortunately, research addressing the criminogenic risk/needs of individuals with an ID has been sparse and contradictory.

Some research has established that risk/need factors found to be associated with recidivism in general population studies are more reliable than clinic variables in predicting recidivism amongst individuals with ID or mental health conditions (Bonta, Law, & Hanson, 1998; Fitzgerald, Gray, Taylor, Robert, & Snowden, 2011; Zhang, Hsu,

Katsiyannis, Barrett, & Ju, 2011). Additionally, as discussed previously, a few studies have demonstrated the predictive validity of risk/need assessment tools when used with offenders with ID (see Barbee et al., 2001; Camilleri & Quinsey, 2011; Gray et al., 2007). However, this population's high prevalence rate in the justice system in combination with research suggesting that this population often receives less restrictive sentencing options would suggest that cognitive differences associated with ID place these individuals at an increased risk to offend.

Non-criminogenic needs are “dynamic and changeable, but...not necessarily associated with the probability of recidivism” (Hannah-Moffat & Maurutto, 2003, p. 17). Research addressing the needs of individuals with ID more generally, have pointed to important differences in the developmental trajectory of ‘problem behaviours’ or psychopathology, specific to the severity or type of disability (De Ruiter et al, 2007; Dekker et al., 2002). Further, research in this area has highlighted the importance of considering how social and environmental factors interact with individual differences to create problematic behaviours such as disobedience (Bierbaum, Henrich, & Zigler, 2005) or reinforce an external locus of control which has been linked to maladaptive outcomes (Shorgren, Bovaird, Palmer, & Wehmeyer, 2010). Consideration of both criminogenic and non-criminogenic need factors, which together address a bio-psycho-social interaction, may allow for interventions to target the conditions that reinforce offending behaviour. Expanding on Griffiths and Gardner (2002), who have suggested that a bio-psycho-social approach to intervention is necessary to minimize a number of challenging behaviors, this approach may prove beneficial in minimizing recidivism.

Developmental trajectory. De Ruiter et al. (2007) examined the trajectory of both internalizing (depression, anxiety etc.) and externalizing (verbal/physical aggression, smoking gambling etc.) problems between individuals with and without disabilities over time. The results suggested that the developmental trajectory is subject to the form or type of problem behaviour and does differ between groups. Specifically, the developmental trajectory of internalizing behaviours (depression, anxiety etc.) in children with ID showed no noticeable differences in comparison to other youth (De Ruiter et al., 2007). Conversely, some externalizing behaviours, most notably aggressiveness, decreased at a faster rate for children with ID overtime (De Ruiter et al., 2007). These results have significant implications for professionals in the justice system as they highlight the potential for individuals with ID to move out of these stages naturally and without formal sanctions over time. Additionally and of equal importance, is the implication that ID should not necessarily denote a 'risk' in itself (unchangeable or stable over time) as psychopathology and related 'problem behaviours' were not themselves stable over time without intervention (De Ruiter et al, 2007). Thus, as with the general public, problem behaviours are subject to change over time and are impacted by environmental factors.

Severity of disability. Recent research has added to this understanding through investigating the prevalence of emotional and behavioural problems across different levels or severity of disability. In a comparative study between individuals with ID and varying IQ scores and the general population, Dekker et al. (2002) found evidence supporting differences in maladaptive outcomes across severity of disability. Specifically, when compared to the general population, children, with an IQ between 60-80, showed

prominently more social problems, attention problems, and aggressive behaviours (Dekker et al., 2002). Further, higher IQ levels among children with ID were shown to increase the likelihood of depression, anxiety, and antisocial behaviours (Dekker et al., 2002). Children with an IQ between 30-60 showed similar levels of heightened risk to develop social and attention problems, but no additional potential to develop aggressive behaviours (Dekker et al., 2002). However, these children demonstrated a heightened risk for withdrawn behaviours (appear socially isolated and emotionally unattached) (Dekker et al., 2002).

A study by Hove and Havik (2010) further addressed the developmental trajectory of emotional and behavioural problems across different forms and severity of disability in adults. Researchers determined the severity of an individual's disability, for the purpose of this study, based on observation of their participants everyday functioning rather than IQ scores. In this particular study, 'problem behaviour' was a composite term that included "verbal, physical, self-injury, destructive, sexual, obsession, demanding [or] vagrancy" concerns (Hove & Havik, 2010, p. 107). Adults with mild intellectual disabilities had the highest prevalence of psychosis, while moderate intellectual disabilities were associated with a higher prevalence of depression, and severe disability was linked to anxiety, obsessive-compulsive disorder (OCD), mania, and 'problem behaviours' (Hove & Havik, 2010). Profound intellectual disabilities had low prevalence rates across all symptoms aside from 'problem behaviours' (Hove & Havik, 2010). Notably, depression, anxiety, OCD, and 'problem behaviours' exhibited a curvilinear relationship with severity of disability "peaking at the severe/moderate level of intellectual disability (Hove & Havik, 2010, p. 110). While these results highlight the

importance of identifying the severity and type of disability when evaluating 'risk,' the participants within this study also presented with mental health conditions. As such, these types of behaviours may not be typically present in adults with ID and highlight the importance of proper identification and evaluation of relevant co-morbid diagnosis.

Social/environmental factors. While studies have indicated differences in the developmental trajectory of problem behaviors and prevalence of other mental health or cognitive concerns based on individual factors such as the severity or type of disability, environmental factors have been shown to play an equally important role in the emergence of these differences. In conjunction with individual differences, environmental factors may create difficult and challenging barriers that are felt individually by persons with ID. For example, Bierbaum et al. (2005) suggested that disobedience may be a response to frustration arising out of repeated failure at tasks that are above the ability level of the child. In their study, comparisons were drawn between children with ID and two other groups of children without ID, matched on mental age and chronological age across tasks of varying difficulty. Results indicated that children with ID only display disobedient behaviours when presented with tasks above their ability level or mental age (Bierbaum et al., 2005). However, while children with ID and those matched on mental age performed equally low on the difficult task, children with ID expressed higher levels of disobedience (Bierbaum et al., 2005). Bierbaum et al. proposed that these differences arise from repeated failure and reinforced awareness of their intellectual differences and limitations. Unlike the group of children matched on mental age, children with ID may often be presented with tasks in their daily lives that are directly related to their chronological age as opposed to mental age and experience and therefore continually face

disappointment (Bierbaum et al., 2005). These results may connect with prior studies that focus on the developmental trajectory of problem behaviours in this population. With repeated failure over time and as children age, they may become less tolerant of failure and more aware of their intellectual differences. Thus, while often conceptualized as risks associated with ID, the observable differences in prevalence of offending behaviour could be attributed to environmental factors and social barriers including limited opportunity to be autonomous, to succeed in traditional settings (educational institutions, job market etc.), or awareness of being labelled and stigmatized as disabled (Shogren et al., 2010).

Locus of control. While research has provided evidence of a link between problem behaviours such as disobedience and external environmental factors, conflicting evidence has pointed to an interaction between individual and environmental factors as major predictors of variability in individuals' behaviours. Originating from a growing concern about social learning, Rotter began placing emphasis on individual psychological factors in numerous studies and subsequently developed the concept of 'locus of control' (Rotter, 1989). Locus of control refers to the degree to which an individual believes the outcome of a given behaviour is dependent on internal characteristics (their behaviour or personality traits) or to external factors (luck, fate, others, or that they are simply unpredictable) (Rotter, 1989). These studies provided evidence that locus of control orientation has the ability to predict individual differences in behaviour (Rotter, 1989). Further, Rotter's (1989) studies suggested that locus of control orientation is relatively stable over time meaning that individuals, regardless of the situation, continue to view the outcomes of their behaviours as either dependent on external or internal factors.

Research studies that have examined the relationship between locus of control and at-risk youth more generally, suggest that youth who exhibit problem behaviours or have been diagnosed with a behaviour disorder generally show high levels of external locus of control (Jackson, Frick, & Dravage-Bush, 2000; Miller, Fitch, & Marshall, 2003). Miller et al. (2003) compared locus of control orientations between youth in traditional education settings and those who had been placed in alternative programs due to chronic behaviour problems, peer relationship issues, and low attendance. Specifically, this study connected problem behaviours to external locus of control orientations (Miller et al., 2003). Jackson et al. (2000) examined behaviour disorders (conduct disorder, oppositional defiant disorder, and hyperactivity) and locus of control orientations and found differences across context, which suggests that children may have different locus of control orientations depending on the situation to which they are exposed. This connects with other research that has linked locus of control to self-determined behaviour, which encourages people to be empowered and take control of their own lives (Shogren et al., 2010).

Shogren et al. (2010) described self-determined behaviours as developing over time as new skills and positive attitudes are acquired through successful experiences within one's environment. An internal locus of control would be linked to positive attitudes and agency in one's life (Shogren et al., 2010). Some researchers have proposed an inherent connection, however, between individual personality characteristics and environmental factors in the development of either an external or internal locus of control. It is hypothesized that early exposure to agency and success within one's

environment would lead to higher general levels of internal locus of control (Shogren et al., 2010).

Unfortunately, children with ID have been shown to have higher external locus of control orientations which have been commonly linked to maladaptive outcomes including difficulties with impulsivity and decision making (Shogren et al., 2010). Shogren et al. (2010) examined the developmental trajectory of locus of control in a comparative study of children without ID, children with ID, and children with learning disabilities (LD). Both participants without ID and those with LD started with similarly low negative perceptions of internal control (high external LOC) when compared to children with ID (Shogren et al., 2010). However, as children with LD and without ID demonstrated vast and positive changes in how they conceptualized their ability to direct and control their own lives as they aged (Shogren et al., 2010). Unfortunately, children with ID were shown to demonstrate a relatively stable external locus of control orientation as they aged (Shogren et al., 2010).

These results suggested that children without ID and children with LD generally develop a more positive perception of their ability to control or have agency within their own lives, while those with LD show little improvement over time. Further, these results challenged other studies that have posited that external locus of control orientations may actually increase as children with ID age (Shogren et al., 2010). Regardless of whether locus of control is a stable or situational construct, research has linked this concept to the challenges that children with ID face in the maintenance of a positive perception of both themselves and their external environment. Individuals with ID may either have a very stable locus of control orientation, or environmental factors such as opportunities to

succeed play an extremely important role in how these individuals not only perceive events in their lives but how they react or behave, Together, both individual and environmental factors have been shown to present individuals with ID with additional challenges in both self-perception and social information processing.

In summary, growing knowledge of criminogenic and non-criminogenic risk/need factors specific to individuals with intellectual disabilities across numerous domains and levels of disability will aid in the development of tailored support programs to assist the needs of this population. These support programs would further benefit from knowledge of protective factors specific to this population, which could potentially buffer against the negative effects of risk factors and promote positive growth and development.

Knowledge of what intellectual disabilities truly entail, from risk/need factors or general characteristics associated with this disability is essential to challenging misinformation, promoting equality and respect for difference. Negative or misinformed perceptions of intellectual disabilities may further foster unequal treatment, feelings of alienation or frustration, or impact how individuals with ID feel about themselves and their abilities.

Purpose of Present Study, Rational, & Theoretical Framework

Youth with ID have been shown to be disproportionately involved in conflict with the law when compared to their peers. Thus, this population is of special concern given the focus of the YCJA on tailoring responses to youth and fair and equitable access to justice. Where attention has been paid to the needs of minority groups represented in the justice system, the focus has often been directed predominately towards ethnic minority groups or mental health issues more broadly. The little research that does focus on

intellectual disabilities tends to lend itself primarily towards studies on adults in countries other than Canada. Consequently, the treatment of youth with intellectual disabilities in Canada within the justice system is relatively unknown and in need of critical reflection and analysis. Given the overall lack of research in this field, the current study was exploratory in nature and began to uncover the unique experiences of youth with ID in the justice system vis-à-vis criminal justice professionals' interactions with them.

This study examined the lack of unity between current predominant theoretical perspectives of disability, the medical and social models, and the principle of equal application of the law via the 'different but equal' philosophy. The interaction between these elements acted as a broad context for the study and more specifically as its theoretical framework. The 'different but equal' philosophy gives support to differential treatment seen across offending groups, as different court responses are necessary to adequately address the unique needs of each individual. The biological and social models of perceiving disability were considered separately to allow for analysis of the different assumptions that influence or permeate how justice officials think about youth with ID. In theory, the social model of perceiving disability is compatible with the 'different but equal' philosophy. This model requires that differences are not only identified but considered and used to tailor treatment options to fit the needs of this population or individual (Sabatello, 2005; Vanhala, 2010). However, the social model proposes that equal and fair application of the law is contingent on removing social barriers and accurately identifying difference, which research indicates is not always the case. Examining current conflicting perceptions of youth with intellectual disabilities with specific attention to this population's perceived risks and needs begins to explore this

relationship and its lack of unity. It is important to understand how the concepts of risk, need, and responsivity, within formal and informal assessments, inform sentencing approaches and practices involving youth from the perspective of justice professionals.

Research Questions: This study aimed to address the following questions:

1. How are youth with intellectual disabilities perceived and conceptualized by professionals working directly with this population in the justice system?
2. What are the perceived needs, risks, and responsivity factors associated with this population with consideration of both static and dynamic factors from the perspective of criminal justice professionals? Is this population more likely to be interpreted as risky and in need of restrictive responses (i.e., curfew, non-association orders) or needy and therefore professionals are more likely to request or advocate for them to receive rehabilitative conditions (i.e. counselling, fines, community service).
3. How do these beliefs manifest themselves in the application of the law, from the perspective of justice officials, when an intellectual disability is suspected or previously detected, specifically in probation conditions placed on these young offenders?

CHAPTER 3: METHODS

Participants

A convenience sample of 11 defence lawyers (7 male and 4 female) and 8 mental health workers (1 male and 7 female) were recruited and interviewed for the purpose of this study. All participants encountered young offenders with intellectual disabilities

throughout the justice system. The lawyers in the sample serviced 5 major urban areas regularly in Southern Ontario but their work extended to at least 10 other cities across Central Ontario and the Greater Golden Horse Shoe region. Their combined legal experience included duty counsel work, legal aid services, and private practice across different youth initiatives and legislation over time (Juvenile Delinquents Act (1908), Young Offenders Act (1984), and Youth Criminal Justice Act (2003)). The lawyers' experiences over the course of their careers included criminal law, as well as personal injury and family court work.

Likewise, the 8 participating Mental Health professionals represented 5 different locations across Southwestern and Central Ontario. While their catchment areas did not lend themselves to other centers, they remained highly connected to various other courts, workers, and services through workshops, liaising, and referrals to outside services across Ontario. Participants in this area included psychologists, mental health court workers, and supervisors of custody facilities. Combined, their expertises included but were not limited to making referrals from court to facilitate mental health diversion programs, providing counselling and mental health services, preparing mental health assessments and documents for court use, and working in both closed and open custody facilities. Participants were drawn from both specialized therapeutic and traditional courthouses to ensure a breadth of information concerning the conceptualization of this population and current sentencing practices.

In total, the participants were relatively heterogeneous, reflecting a wide range of jurisdictions and work history within Ontario. The sample was appropriate given the purposes of the study: to understand the experiences and perspectives of legal

professionals and mental health professionals within the province with respect to their work with youth with intellectual disabilities.

Procedure

Participants were recruited via a snowball sampling method with confidentiality and anonymity amongst them. While most participants recommended and offered contact information for other potential participants, there was never reporting back to the original individual about whether an interviewee was contacted or accepted. Potential participants were emailed a letter of invitation outlining the purpose of the study and the procedure (See Appendix A). Interview dates and times were set up at the convenience of interested participants. Prior to the interviews, participants were presented with detailed information about the study and were provided with a copy of the questionnaire when requested. All participants were required to read, understand, and sign a consent form prior to the interview (See Appendix B). This form outlined their rights and responsibilities as they pertain to their participation in this research and ensured that they were fully aware of the purpose of the study, including the potential risks and benefits of participation. This form reassured participants that questions would not be asked about specific cases or specific youth and that they would be guaranteed confidentiality and anonymity. This included protecting the names of affiliated law firms, mental health associations, or courthouses. Participants were verbally reminded prior to the interview to avoid the use of personal identifiers. However, where identifiers were used during the interview process, pseudonyms were used in their transcription and they were not used within the final paper.

Semi-structured qualitative interviews were conducted with participants and took approximately thirty minutes to one hour. The sample size was determined by the number of interviews necessary to obtain saturation of information, namely a lack of newly emerging ideas or themes (Marshall, 1996). Saturation of information for this particular study was attained when data accurately, fairly, and fully represented a breadth of experiences of legal professional and mental health workers within the province of Ontario. This is further connected to a data collection and analysis process that interacts and occurs simultaneously (Marshall, 1996). The interview data was digitally-recorded for accuracy and transcribed by the researcher throughout the research process. Rapport was built between researcher and participant prior to the interview through email correspondence and directly prior to the interview. Most interviews occurred in the offices of participants while others were held in private interview rooms throughout the courthouse.

The interviews from criminal justice professionals focused on the experiences that young offenders with ID have in the justice system in relation to resources, sentencing options, and what concepts and factors (risks/needs) are taken into consideration by all major players in the courtroom: judges, lawyers, mental health workers (see Appendix C). Given the traceable changes in how youth and individuals with ID have been conceptualized over time, interviews were examined for shared underlying beliefs about ID and current sentencing practices in the justice system.

In addition to open-ended question, each participant was presented with one of two hypothetical court case scenarios, which differed in regard to the presence or absence of a moderate ID. The purpose was to build in an experiment within the interview in

order to compare answers. Participants were asked to offer a suggested sentence and place weight on various personal and crime related factors on a five point scale. Frequencies were used to compare these two case scenarios. Mental health court workers were reluctant to participate in the case scenario as sentencing is not typically a role they fulfill. As such, the case study was adapted for each mental health worker to accommodate for this reluctance and differences between their jobs. As a result, mental health workers only discussed hypothetical court case 2, which looked at a youth with an ID. They were asked to offer suggestions as to how they would propose to intervene if this youth was in fact referred to their services. Only 3 out of 8 mental health participants weighted personal and crime related factors.

All steps of design were completed by one researcher with experience working both in youth probation and as a courtroom clerk. This allows personal beliefs and experiences to bias the processes of data collection, analysis, and interpretation. In this particular case, past experience within the justice field proved to be a strength allowing the researcher general knowledge of judicial sentencing practices and courtroom procedures which were necessary to providing context to participant's narrations of youth experiences. A personal connection to the justice system also proved beneficial in recruiting participants. Potential bias was offset by the presence of a hypothetical court case scenario used to quantify participants' descriptions of sentencing practices for youth both with and without ID.

Data Analysis

The process of data collection, analysis, and interpretation occurred simultaneously and interacted, which is necessary to ensure data saturation (Marshall, 1996). Grounded theory supported the analysis of data gathered throughout the interview process. This allowed for unanswered questions or the emergence of new concepts uncovered during an interview or the coding process to be explored in subsequent interviews with other participants. Grounded theory aims to generate a set of ideas that explain or describe an academic question through a process of cyclical reflection and comparisons which are both inductive and deductive (Corbin & Strauss, 2008). As such, the analysis was open and axial and occurred throughout the interview process continually building and adding to knowledge of emerging concepts and themes. The analysis took into consideration cultural and contextual factors and uncovered the various meaning of words, including but not limited to ‘risk,’ ‘need,’ and ‘responsivity.’

As grounded theory is rooted in interactionism and pragmatism, Corbin and Strauss (2008) provided a detailed summary of these philosophies. Briefly, interactionism proposes that exchanges between people are not simply reactive, but involve a process of self-reflection whereby meaning is assigned and acted upon (Corbin & Strauss, 2008). These meanings, derived from social interactions, are continually adapted by the individual through interpretation and reflection (Corbin & Strauss, 2008). Similarly, pragmatism suggests that knowledge is generated through action, interaction, and reflection (Corbin & Strauss, 2008). In cyclical and ongoing fashion “[k]nowledge leads to useful action, and action sets problems to be thought about, resolved, and thus is converted into new knowledge” (Corbin and Strauss, 2008, p. 7). Knowledge, then,

cannot escape culture and context but is in fact an accumulation of collective ideas and is the “basis for the evolution of thought and society” (Corbin and Strauss, 2008, p. 7).

These two theoretical underpinnings lent themselves well to this particular study as perceptions about youth with intellectual disabilities and their influence on sentencing practices are fluid, contextual, and dynamic.

CHAPTER 4: RESULTS

The qualitative interviews allowed for the examination of dynamic contextual and cultural factors that shape the experiences of youth with ID’s in the justice system. While largely absent from current literature, an analysis of these factors adds significantly to the understanding of how beliefs and attitudes about young offenders with ID may contribute to sentencing decisions. While highly interrelated, emerging concepts were organized into five main themes.

1. The value of education: Appreciating difference, removing social barriers, and superior Intellectual Disability identification
2. Application of the YCJA in practice: Contextual factors shifting the emphasis between sentencing goals
3. Sentencing inconsistencies: Jurisdictional resources and discretion
4. Sentencing trends related to youth with ID: Justifications behind flawed differential treatment
5. The Anti-therapeutic impact of resource limitations.

The main interactions between themes are illustrated in the flowchart below (see Figure 1). The five emerging themes outline the major influential factors that interviewees

discussed in the sentencing and rehabilitative options available for providing fair and equitable justice to this population. The themes described above are presented with contextual definitions and descriptions of related language, courthouse procedures, and resources in order to accurately capture and explain the current experiences of these youth within the Ontario justice system.

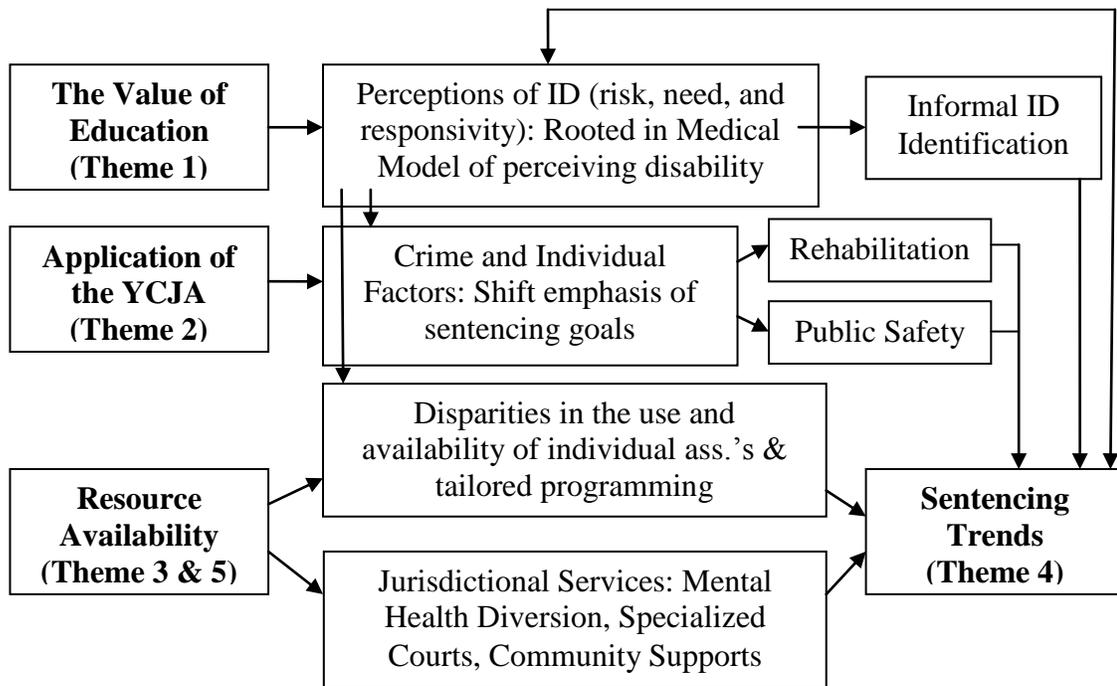


Figure 1. Main interactions between themes 1-5. This flowchart acts to provide a general overview of the main interactions between all emerging themes via a brief outline of the condensed results of each section. Perceptions of disability rooted in the medical model (theme 1) permeated all other themes within this study. Sentencing trends (theme 4) based on misinformed beliefs about ID, in combination with resource limitations, was shown to reaffirm those beliefs.

Results of a hypothetical case scenario are discussed, when relevant, throughout these five themes. As part of the interview process, each participant was presented with one of two court case scenarios. An in depth analysis of the court case scenario is provided within the fourth theme, sentencing trends related to youth with ID. These

scenarios differed only in the presence or absence of a moderate intellectual disability, with difficulties in memory, attention, and language skills. Below is the hypothetical court case scenario with the two potential adaptations:

A 15 year old boy plead guilty to the offence of assault. Although he is not particularly remorseful for the offence, he has plead guilty early in the process. The offence occurred at approximately 10pm Saturday night and the youth and co-accused were found to be intoxicated. This offence constitutes the third time this youth has been in trouble with the law. Previous offences have included theft and assault to which the youth received diversion and a sentence of 1 year probation, respectively.

Case 1: However, the previous sentence of probation had been completed successfully, without any breaches. This youth's school attendance is satisfactory. He lives at home with his parents and brother.

Case 2: However, the previous sentence of probation had been completed successfully, without any breaches. He lives at home with his parents and brother. This youth's school attendance is satisfactory however reports from the school suggest that he has an identified moderate intellectual disability that affects his attention, memory, and language skills.

Discussion of this court case scenario provided insight into general court procedures and sentencing practices.

Theme 1: The Value of Education: Appreciating Difference, Removing Social Barriers, and Superior Intellectual Disability Identification.

Interview findings from justice officials revealed resource limitations in regards to specific training as well as misconceptions about what ID's are, including perceptions of associated risk/need factors and this population's ability to be rehabilitated. The misconceptions about ID were rooted in the medical model of perceiving disability and demonstrated a lack of appreciation for social barriers. Results further suggested a link between a lack of education specific to ID, the appreciation of differences, and both the identification process and perceived risk/need factors.

Educational resources. When participants were asked about accessible or acquired ID training/education they reported limits in both in-house and external services. Participants suggested that what little training is provided to lawyers focuses on mental health concerns leaving intellectual disabilities completely overlooked (L1, L2, L4, L5, L6, L8, L9, L11). There are also jurisdictional differences in training relating to availability within courthouses. Some participants recalled specialized FASD training (L1, L2, L6) where others noted that this type of training is only made available to judges. For example, when Lawyer 6 was asked if he had received FASD training, he stated "I know the judges are provided with training on it but we don't get copies of any of that stuff." Participants working in mental health suggested that they may be provided with more educational opportunities in this area but that the primary focus continues to be on mental health and FASD (MH3, MH4). When Mental Health Worker 3 was asked if she had been provided any type of specialized ID training she stated:

No not really, not specific, um... you know I feel like when I have gone to maybe

trainings in the past they have touched on you know what it might look like for an intellectual, like someone with intellectual disabilities or just like they would just then make reference to someone with FASD that type of thing.

While limited educational services are provided, both Mental Health Workers and Lawyers expressed interest in accessing further training. Unfortunately, participants suggested that programming costs make what limited courses are available, less appealing and accessible. Lawyer 2 stated:

The specialized programs for instance for Intellectual Disabilities or for aboriginal, those courses are so expensive in comparison to other courses so it really inhibits your ability to become knowledgeable about different areas because it's really, there is a limited obligation to get a certain number of hours done but like the hours required are a total of 12 and I would say that I probably do 30 40 50 hours plus in a year so if those courses were offered for like next to nothing or you know then it would be something I think that a lot of people would take.

As a result of a lack of training, Lawyers and Mental Health Workers reported relying heavily on their university/college educations to sustain their knowledge in this area (L6, MH3, MH6, MH5). Mental Health Workers further described their various job experiences, many outside of the justice system, as a major source of their training and education in this area (MH3, MH6, MH5). Mental Health Worker 5 described her training in this field in the following way:

This job is a Masters level job so I guess to some extent you come with training...I mean I've worked a lot with young people well young and adults umm with various developmental disabilities, so I think, you know, I have had

different, various trainings but not specific in this role.

In addition to this knowledge and experience, all participants mentioned taking additional measures to educate themselves when deliberating on how to best understand and handle matters where a youth with an ID is involved. When asked about acquired training and education, Mental Health Worker 3 elaborated about her personal attainment of knowledge in this area:

Obviously schooling, bachelors BSW I have, bachelor of social work so you know I remember talking about stuff there but really it would just be doing my own education. I guess as they come up case by case trying to educate myself to best be able to best provide a service or support... but it's really case by case and trying to educate yourself, obviously in house we have people in house who are more educated about certain things that you just get a feel for so and like I would know who to go to in our agency that I would know to go to if I came across someone with an intellectual disability or if I was really stumped or what to do just to say hey, what would you do about this or like if I had someone with FASD we have some people specialized in certain areas.

Together, participants discussed a variety of resources they use to attain knowledge on a case by case basis including liaising with other professionals and contacting external specialized support services. Unfortunately, the results identified a general misunderstanding of what ID's are amongst participants.

Defining intellectual disability. Many participants were reluctant to define ID and some participants even opted out of providing a definition. FASD, being a primary focus of training provided to mental health workers and lawyers, was easier for

participants to discuss than ID more generally. Participants particularly noted advancements in how the unique needs of youth with FASD are understood. Definitions for FASD included impulse control issues (L1), poor decision making abilities (L6), inability to connect consequences to actions (L1), and memory deficits (MH4) alongside other more general cognitive limitations (L6). Given less focus, there was a more varied understanding amongst participants regarding what ID's entail. Most participants had at least a minimal understanding, however, of what an ID is and how this could potentially impact an individual's life. Definitions included identifying a diagnostic cut off of a score below 70 IQ (MH6) and low adaptive functioning skills (MH6, MH1). Others included limitations in comprehension, intelligence, and processing abilities (L1). Some participants defined individuals with ID as having concrete thinking abilities (L1, L5) or a learning disability (L2, L3).

With a lack of specialized education/training provided to professionals in the justice system about disabilities, ID also runs that risk of being overlooked and blended with other labels. When asked how youth with ID are identified in the Justice System, Lawyer 6 suggested that these youth typically fall under the mental health umbrella without truly having mental health concerns. Lawyer 6 further stated that this is problematic as there may be "a confusion about whether an intellectual disability is a mental health issue" (L6). ID is also blended with ADHD and other learning disabilities more broadly (L2). When asked to define ID, Lawyer 4 stated, "primarily I would think it's an academic learning disability, um issues with respect to focusing attention issues, um primarily I would say ability to sit down in class and absorb what's presented to them in the school setting that sort of thing." This definition connected with very basic

descriptions of ADHD found on the National Institute of Mental Health webpage (2012) and on the Children's Mental Health Ontario webpage (2014). Theoretically, this is problematic as many Lawyers did not give much consideration to ADHD and its impact on youth in the Justice System. In fact, some Lawyers saw such diagnosis as a "crutch" that youth use to garner more lenient sentencing (L10).

Fortunately, some Mental Health Workers who reported undergoing specialized education, training, and work experiences acknowledged that ID is a broad term encompassing a variety of definitions and differences (MH3, MH2). These participants argued that impairments can go beyond cognition to include anything from social and emotional functioning (MH3, MH7) to daily life skills (MH2, MH7) and can have a multi-faceted impact on an individual's life (MH7, MH2). When asked to describe an ID, Mental Health Worker 2 suggested that every youth may be impacted differently due to "how theirs falls in terms of their strength versus their weakness then the severity of those weaknesses, and how they impact on their daily living." She further emphasised that there is no all-encompassing definition for youth with ID nor do these differences uniformly impact the lives of those with ID.

Defining intellectual disability 'in context.' While many participants were reluctant to define ID generally, they were able to discuss ID within the context of the justice system. Through discussing risk, need, and responsivity both generally and in relation to ID, respondents were able to identify further characteristics, behaviours, and cognitive differences they associate with ID's. These perceptions, similarly rooted in the medical model, were discussed as driving sentencing decisions.

Risk, need, and responsivity defined. A consideration of both risk and needs is an

integral aspect of the justice system, particularly within the sentencing stage. When participants were asked if they consider the needs or risks specific to youth with ID during sentencing and whether both are given equal consideration, most respondents discussed the court process and individual professional roles more generally. Specifically, Lawyer 11 said that defence counsel is responsible for addressing the needs of youth by demonstrating how they can be adequately met by the sentence or by discussing how they will be dealt with by the individual. For example, defence counsel might discuss any foreseeable barriers to adhering to probation conditions and/or new job opportunities or counselling sought by the young offender.

In contrast, Lawyer 5 stated that crown attorneys focus on risk to the public. Judges were described as maintaining the balance of these two concepts in an effort to “match the needs of an individual to the risks to the general public” (L5). However, almost all participants perceived risk and need to be either interrelated or dependent factors (MH4, L9, L4, L3, L1, L5). In discussing this topic Lawyer 5 stated, “I mean if you don’t have the needs I don’t think you’d have many risks so I think they are dependent on each other.” Lawyer 1 elaborated, “I’d say an unfulfilled need is a risk factor, yes, that’s cause, uh you know if they’re needing uh education in certain areas like if they can’t understand it or don’t get it that’s when they increase the risk of uh certain crimes.” As such, when participants were asked to define risk and need they pointed to factors relating to recidivism more generally including, offence history, the seriousness of the crime, advocacy/support persons, mindset/attitude, housing, counselling, alcohol/addictions training, leisure activities, anger issues, poverty, and education. Lawyer 6 discussed some of these factors:

Um a risk is, would be whether they're at risk to reoffend and that often depends not so much on well it does depend on themselves but also depends on their circumstances. If you put them right back to where they were with no supervision or without a lot of support they are likely to uh repeat offend but if there's support in the community and they're doing some counselling they're doing some other thing they are addressing their substance issues then that will be helpful, um but in terms of arguing about risks I don't agree with arguing about risks cause...

Participants discussed these above risk/need factors as universal for youth and did not make distinctions between youth with and without ID.

Primarily where participants noted a shift from need to risk when working with young offenders was when there was either a heightened concern for public safety or a perception that an offender's ability to be rehabilitated was limited. While responsivity was challenging for most participants to outwardly define and describe, many discussed individual characteristics that they perceive to be important indicators for the possibility of successful rehabilitation. These included an offender's motivation to make changes and the presence of a substantial criminal history or a particularly serious crime. Lawyer 10 articulated this balance:

That's how you protect the public, I think judges are reluctant to throw a young offender into jail unless they just keep doing it and they don't get the message and it is more likely to happen when they are repeat offenders over and over again, and where the, more likely the crime is one of violence to others.

An inability to change one's behaviour after the first or second court experience would suggest that a youth is either non-responsive to treatment or lacks the motivation to make

a change. Some participants saw motivation as a leading factor contributing to either the success or failure of rehabilitative programming. When asked to define responsivity, Lawyer 4 stated, “Um responsivity factors? I’m not sure what that means.” When prompted with “it relates to how well an individual is going to respond to rehabilitation programs” by the interviewee, Lawyer 4 elaborated:

Ok um I think in terms of the factors that might go into that it would be I would say that I would make that determination based on my communication and interaction with the client in terms of recognizing any sort of willingness or commitment to making himself or herself better and wanting to take those steps through counselling or any other type programs.

While motivation, criminal history, and the severity of the offence certainly contribute to an individual’s perceived responsivity, both criminal history and the severity of the current offence double as a risk factor (as identified by all participants). This suggested that all three factors -- risk, need, and responsivity -- are perceived by most participants to be dependent factors. In addition, these responsivity definitions do not include consideration of social and physical barriers that prevent participation in rehabilitative programming.

Perceived risk/needs associated with intellectual disabilities. Participants were asked to list any risk/need factors specific to ID’s that would increase the risk of offending or reoffending. These factors were discussed as both an additional risk and need in accordance with how these terms are conceptualized (outlined above). Many participants perceived youth with ID as having additional needs/risks including a vulnerability to peer influence and an emphasized need for external supports. In

discussing the particular risks, Lawyer 1 stated, “they’re vulnerable um and can be lead astray so easily or taken advantage of.” Lawyer 3 addressed a need for youth with ID to be provided extra support:

I think that that umm youth in general, particularly youth with intellectual disabilities would need more supervision whether it is community supervision whether it’s through a probation officer, or through parental supervision... I think that would be the most significant factor in recidivism is whether or not they have community supports or not.

Further, cognitive differences were also discussed as creating an additional risk for youth with ID. Mental Health Worker 2 offered insight by describing her concerns for two youth she was working with at the time of the interview. She noted “red flags” around their “judgement, their decision making ability, problem solving ability, their perspective taking... aggression [caused by] maladaptive coping, [a lack of] adaptive coping strategies to regulate emotion.” She further linked ID to “offending or high risk behaviour” (MH2).

Data suggested however, that the heightened risk/need factors perceived to be associated with ID are influenced by individual and crime related factors. Participants commented on the importance of taking into consideration how cognitive differences are “contributing to criminogenic needs and risk” (MH2) as they may not always be driving offending behaviour. In Particular, in discussing the court case scenario and how much consideration should be given to the presence of an ID, Lawyer 11 suggested that not all disabilities should be given much consideration or weight during the sentencing stage. Specifically, Lawyer 11 stated,

You are describing a moderate disability affecting attention, language and memory skills. From my perspective that doesn't affect someone knowing right from wrong, and or like punching somebody. But if you said that he had a moderate intellectual disability that affected impulse control, judgement, that sometimes when he became excited the short circuit is thinking... Then I would give the disability a higher kind of focus because it would be saying, this is not all within his control, these are problems that he has in his DNA and so then the intellectual disability focus would go up.

When cognitive differences are viewed to be the catalyst behind offending behaviour, however, ID may be viewed as either a need or risk factor given other case related factors. Lawyer 11 outlined this issue:

It is a two way sword if a person is compromised, if the compromise means that they are less able to make judgements of right and wrong and if they are more likely to repeat their behaviour then that becomes an aggravating circumstance opposed to a mitigating circumstance.

Together, interview data suggested that the perceived risk/need factors of this population are emphasized or discussed in a divergent manner across disability and offence types.

Social construction of intellectual disability risk factors. While participants could identify cognitive differences associated with ID that may increase the risk of offending, social barriers were relatively overlooked. Mental Health Worker 7 explained that general misconceptions about ID negatively influence how this population is educated and treated more generally. More importantly, she discussed these particular differences as contributing to offending behaviour. She stated:

A lot of young people with developmental disabilities or intellectual disabilities we tend not to teach them the same things... So for example things like management of emotions, anger management, sexual health, we tend to think they aren't going to go through those things but what happens is they go through these types of things but don't know how to address it, so in terms of anger for example they maybe get so angry that they do something that might put other people at risk ... but we never actually teach them emotional regulation or the anger management or things like that. Sometimes when you have kids with intellectual disabilities they come through court and say if they have a charge of a sexual assault, a lot of the time you know we tend not to teach umm... kids with disabilities things around sexual health, healthy relationships, sex, things like that. We don't tend to talk to them about them because we just kind of assume they are asexual, they don't have sex, they don't think about this kind of thing, but no they do, they do think about these things but what happens because they don't know what to do with these feelings they act out. (MH7)

By acknowledging the social barriers that youth with ID face, such as how their social interactions may prevent proper sex education, emotional regulation, or anger management skills, this participant presented the idea that there are other explanations behind offending behaviour for youth with ID. These explanations focused on environmental factors and did not emerge from within the individual or cognitive differences. The data suggested that acknowledgment of environmental factors rather than an isolated emphasis on cognitive differences, as they relate to offending behaviour,

may increase the perceived 'need' factor and have a positive impact on the rehabilitative outlook of this population.

Perceived responsivity of offenders with intellectual disabilities. Participants gave equal weight to a youth's ID as a need and therefore as a viable candidate for treatment within the community, and also as having static criminogenic risk factors that may tip the balance towards a restrictive sentence. In discussing this population's likelihood to rehabilitate, Lawyer 2 stated "sometimes when, um you can counsel a kid to death and it's not gonna change because of the particular disability that they have." Lawyer 1 connected this to cognitive differences when she stated that the presence of an ID,

...makes it harder to follow probation or instructions or can if they don't understand that consequences of breaching their probation order and that's something one of the things you run into with Fetal Alcohol Syndrome in particular is no impulse control and uh, so some things aren't going to work for a child with those limitations because they don't see the consequences that will not stop them from doing something.

In contrast, Mental Health Worker 2 stated, "I think you can do some sort of intervention, these kids despite their intellectual disability still have shown a huge progress as you are improving around those behaviours." As a mental health worker this participant has focused on skill based coaching, problem solving skills, breaking down skills with many clients (MH2).

Notably, Mental Health Worker 2 shaped her understanding of responsivity in consideration of resource limitations as opposed to cognitive limitations. She stated:

Responsivity is ensuring that you are adapting any interventions to make sure you are reacting to um the individual needs, a reading difficulty, or learning difficulty and individuals, maybe individual characteristics, that could I guess could create barriers for or create difficulty for the intervention to be successful, for to ensure the individual is able to engage appropriately. (MH2)

Overall, most mental health respondents communicated that when differences are appreciated and social barriers recognized and removed, it is possible for these youth to garner the benefits of rehabilitative programming.

The identification process. Participants reported an increase in individuals being diagnosed with mental health conditions and disabilities, most notably FASD, in the justice system (L9, L6, MH5). This increase in identification has sparked a growing interest in addressing the needs of this population. When respondents were asked if they had any particular interest in working with youth with ID, Lawyer 6 stated:

Yes...I have an interest because we tend to run into a lot of them actually in the last little while we have had more being sent for assessments um because we're finding there are there's often more going on behind the scenes than we see with the offence itself.

Mental Health Worker 5 elaborated on the increase in diagnosis by stating, "I don't know if it's an increase but I have noticed a number of young kids in the system being identified as having FASD," suggesting that the system may be more open to addressing and uncovering prior diagnosis than in the past. While there is "no actual legal responsibility in terms of confirming that one way or the other for the outcome of the matter" (L4) most defence counsel felt consideration of their clients' ID to be an

important part of their role (L1, L2, L4, L6). When solicited, all Mental Health Workers reported feeling responsible for addressing the needs of these youth through rehabilitative and individually-based programming through a community-based sanction.

All participants indicated a number of opportunities within the justice process for youth with an ID to be identified. Many participants explained that a young person's first encounter with a justice official, and therefore the first time they can be identified, is with the police. The youth can self-identify or be recognized by the officer, to which a note will be made in the police report (L9, L3, L6, L8, L9). If not identified by an officer, first appearance court offers the second opportunity for ID to be identified. If identified youth have already been involved with the justice system, then a crown attorney may have this indicated in a brief and bring it to the attention of the courts (L1, L11). If this youth is a first time offender, however, and has not been identified by police nor has a distinguishable ID, the crown attorney will likely be unaware of a diagnosis as their interactions with youth are limited (L8, L9).

As most participants explained, the most common players identifying ID in the courthouse come from the individual offender, parents, external support workers (mental health, social worker etc.), and defence counsel. If previously identified by a parent, individual, school or external services, any number of individuals may attend court to support the youth. For example, some youth attend court with mental health workers with whom they are already connected to. Unfortunately, participants suggested that youth may not be properly diagnosed or identified and therefore may not be connected to external services prior to a first appearance. In fact, most participants working in mental health suggested that they have worked with at least one youth who was undiagnosed

prior to being connected with their services. Further, many youth do not have the support of their parents (L8), leaving the sole responsibility of identification to the individual youth and defence counsel.

While self-identification is preferable as it is quick, easy, and reliable, Lawyer 9 suggested that without external services or parental support that the “whole picture” is not typically revealed. In fact, defence counsel often plays a major role in uncovering a prior diagnosis from their clients through creative interview questions. Participants proposed that questions regarding whether the young person has learning accommodations or is involved in special classes at school or is in community-based programs would all signal a potential issue or diagnosis. Where an individual has not previously been diagnosed, participants suggested that an individual’s defence counsel is the last foreseeable line of protection.

Unfortunately, as most participants revealed, there has been no specialized training or implementation of identification tools to assist these professionals in the identification process. Defence counsel explained that they are left to screen for ID by relying on intuition (L11), informal screening procedures (L9), and limited knowledge of particular characteristics or behaviours to watch for. Participants reported using their initial interactions to explore how well clients communicate, how they present themselves in terms of their maturity, and their ability to comprehend information (L4, L6). One Lawyer in particular noted that youth with an ID may have “difficulty expressing what happened or describing what happened. (L6).” Some Lawyers reported that they are confident in the system’s ability to identify these youth due to their exposure to many different professionals in the justice system and an innate or trained ability to distinguish

these youth (L11). Lawyer 11 stated, “everybody has some kind of either instinctive or at least training through time, we have interviewed people, I can’t think in 35 years where I haven’t been able to identify over the course of some interviews that there is an issue.”

Other participants drew a less romantic view of the justice system’s ability to identify all youth with ID. When asked how accurate and useful current identification procedures are in the justice system, Mental Health Worker 5 described a lack of “visible” differences in combination with a lack of training as making it challenging for youth to be identified. Mental Health Worker 5 stated:

I think FASD is a really challenging one to work with because young people, you know like if you think about other developmental disabilities like Down syndrome, it is visible, a really visible disability, FASD, it’s considered a brain disorder, like a brain injury, but like you look at those people and there is no visible disability, so we expect them to be able to react, and behave and perform.

Lawyer 9 further identified the severity of the crime and disability as a major driving force behind identification. When asked how youth with ID are identified in the justice system, Lawyer 9 stated, “it kind of depends on how severe it is...Usually being the first time unless it’s so severe that we notice... it’s somewhat hard to find and recognize.”

Mental Health Worker 7 added to this by suggesting that youth with less severe disabilities or particular coping strategies are more likely to be missed. She stated:

I am sure some of them are missed, you maybe have say for example a 17 year old who may have a mild disability but he may also have... what we call like splinter skills, so, for example, you may get kids that can’t read very well but they are always carrying around books and you kind of assume they are ok but he does

have an issue with reading...Or he has really great verbal skills he could have a conversation with you about anything but, but he can't read so he has a you know great character, he shows appropriate emotions or those kind of things but he can't read or write, so umm I would assume some of those kids get missed.

(MH7)

Mental health professionals revealed that some youth may be identified at the back end of the system by probation officers or various workers in custody facilities. In fact, participants who were working in mental health custody facilities at the time of their interview suggested that they often get referrals for transfers from other facilities when youth are identified as having either a mental health condition or an ID after being sentenced. While certain youth are at risk of being overlooked, Mental Health Worker 7 discussed quick techniques, both research and experience-based, that assist her in identifying the presence of an ID and which may be beneficial in the identification process. For instance, a youth with an ID may answer yes repeatedly, be unable to repeat back sentences, and show any range of emotions from “crying” to anger, to a lack of emotion (MH7). Specifically, Mental Health Worker 7 stated:

When you get somebody with a developmental disability in court and if you don't know what is going on you can become upset or angry or frustrated or what have you usually you kind of just sit there and let people talk over you so sometimes I don't really expect much emotions to be shown in court especially if the young people don't really understand what is going on.

This worker also reinforced that asking youth if they have an ID will not be “fruitful” and suggests very specific questions for uncovering a previous diagnosis including “do you

struggle in school, how big is your classroom, how many kids are in your class, is there more teachers in the class or is there just one teacher in your class?” The presence of extra supports points to the likelihood of other issues (MH7). These techniques, acquired through direct experience, knowledge, and training with this population provide very specific ways to identify ID in the justice system without the presence of a screening tool.

Theme 2: Application of the YCJA in Practice: Contextual Factors Shifting the Emphasis between Sentencing Goals

The YCJA sentencing goals are based on a number of assumptions about youth in conflict with the law and the role of the court in supporting the public interest. In practice, however, these goals are often influenced by conflicting perceptions of youth, case specific information, public attitudes, and resources limitations. Respondents discussed these factors as interacting in a cyclical relationship. Contradictions within and between participant responses highlighted the potential for disparities among youth with ID in the application of the YCJA.

Age. The YCJA is intended to “reflect the fact that young persons’ lack the maturity of adults” through the implementation of measures that are consistent with age related differences (Department of Justice, 2013). In line with the YCJA sentencing goals, all participants asserted that the justice system takes a more lenient approach towards youth, offering more opportunities for diversion, less restrictive sentencing, and rehabilitative-focused sentencing options. When asked how age influences the sentencing goals of the YCJA, participants discussed various driving factors, including the view that youth need guidance and support, that youth are more malleable as they are in a process

of developing cognitively, and that measured treatment benefits the youth, families, society and the justice system long term. Participants suggested that this trend holds true when comparing youth and adult offenders with intellectual disabilities. As Lawyer 5 stated:

Well I think that my perception is that youthful offenders are treated lighter than the adults. Um many of the enforcement officers although they may catch a youth doing an activity which if it was an adult they'd charge them, quite often they would use their own form of what I call diversion, they might take the youthful offender home to his parents or his custodial parents and um have a discussion with them whereas more often if it was an adult with a intellectual problem um they would more than likely end up being charged and the enforcement officers would leave it with the system to deal with them.

This passage highlights both the differential treatment of youth through a more lenient response at the beginning stages of the justice system, and the perceived need to support and provide external guidance to them. Lawyer 3 further emphasised the need for external guidance for youth more specifically:

Certainly having parents involved is so much better just in regards to the levels of responsibilities...they tell the kid to go follow up with your probation officer or tell the kid to go follow up with your psychiatrist, like just because they are kids, doesn't have anything to do with whether they have intellectual disability or not, they are kids.

From this position, participants suggested that youth are somewhat expected to make more mistakes than their older counterparts or, at least, are not seen as having the

capability of making fully informed decisions and therefore are more likely to breach sentences such as probation (L4, L11). These limitations in cognitive development and maturity were viewed by participants as ‘need’ factors for which they stressed the importance of external supports (L4, L11). Lawyer 1 stressed this concern when stating “one of our problems with youth and probation is you could set them up for a lifetime of breaches.” Rather than emphasizing the risk to reoffend due to age related factors, many participants identified catching youth during this developmental stage as an opportunity for rehabilitation or a window for the prevention of a criminogenic lifestyle (L1, MH3). Participants also stated that that the benefits of early intervention and rehabilitation extends to the community as offenders are less likely to cycle through the court system (L5). This frees up services, funding, and protects society from a certain amount of criminal behaviour.

Unfortunately, as suggested earlier, age can also act as an aggravating factor, particularly when youth are repeat offenders or commit a serious offence. In discussing the hypothetical court case scenario that involved a repeat offender, all participants suggested that a substantial criminal history shifts emphasis towards ‘risk’ factors as their past behaviours become a public safety concern. The relationship between age and number of offences however, is complex in relation to the YCJA principles. The interviews suggested that repeat youth offenders may be interpreted as lacking the will or motivation to change (L10). These offenders, along with those who commit serious offences, may not be given the same rehabilitative consideration as other youth as they are perceived to be ‘risky’ instead of ‘needy.’ In discussing the case study, all but one participant out of 19 suggested that more serious measures were necessary for this youth

given his past criminal history. When discussing the case scenario, Lawyer 10 is conflicted with these contradictory beliefs about youth and youth crime. He stated:

15 years old they're still more malleable in the hands of others and I'd probably be more discretionary in what I would impose as restrictions on him but having said that, if they're manifesting this sort of activity at the age of 15 um you know what's he gonna do when he's 17...so I would say age is a factor but it's certainly not as important to me as the previous offence that sends to me a serious signal.

(L10)

This juggling act is not uncommon to the adult system however, and first time adult offenders may be similarly impacted by the relationship between age and criminal history. Lawyer 10 stated, "there's a similar leeway given to adults ...well you've lead a blame-free life well at least a criminal record free life so were gonna give you the benefits...you get credit for just by the passage of time".

When participants were asked about information that is obtained to inform sentencing procedures, they suggested that lawyers and judges use various external resources and specific case information to expose the "whole picture" for all individuals convicted of offences. Where youth are concerned, all participants agreed that the system as a whole and judges particularly, are more reluctant to shift emphasis from rehabilitation to the protection of society. While external services can be very useful tools in the sentencing process, they too have limitations that can impact sentencing, treatment options, and even how youth are conceptualized.

Youth services: Age, grey areas, challenges. Services for youth tend to be age specific, creating a distinction between youth ages 12-15 and 16-18 (excluding those past

their 18th birthday). Although such categorizations continue to be based on a historical structure prior to the YCJA in dual-Ministry provision, many services are not accessible by the 16-18 age group and others are reluctant to assist youth approaching their 18th birthday. Mental Health Participant 8 discussed age-related barriers when accessing CAS services past one's 16th birthday. On more than one occasion she has witnessed youth without family support or youth with an ID whose family is no longer able to care for them, released to shelters after returning to court numerous times awaiting a bail plan. This may allow youth ages 16-18, who lack a stable family environment, to be held in custody (awaiting bail) longer than youth who have direct access to certain services (MH8). Mental Health Worker 1 discussed this challenge when describing a particular offender who was about to age out of the youth system. She stated:

For one youth in particular he's 17 so he's not an adult yet but his family um really has disowned him. He's not able to take part in any adult developmental services he's not able to apply for ODSP yet, um the youth program are saying you know you're almost 18 we don't really want to get you started in a youth program, um when we know that you are going to be moving to adult programming in a month or two, um so he has kinda fallen into a gap where the youth services are willing to help him but are very reluctant and the adult services are saying we can't touch him yet um so I think for adults it may be a little bit easier to get connected to some services. (MH1)

Other participants discussed 17 year old youth as falling within a service gap or "grey area" (MH3). For these youth, participants suggest that connecting to services may be a great challenge not only initially but also for the completion of full therapeutic

programs or in developing strong working relationships with service providers (MH8, MH1, MH3). It was reported that while many organizations lack or have limited transitional programming, some have developed strong working relationships with adult service providers (in particular regions) such as the Canadian Mental Health Association (CMHA) and should be commended for their ability to provide seamless transitions for youth in their care (MH3). Unfortunately, by comparing participants' interview responses about accessible services within their jurisdiction, it is clear that one's location plays a large role in which services they may be able to access and subsequently the response directed by the justice system.

For persons in their 17th year, the distinct line between youth and adult offenders, both by service providers and the justice system may directly influence how they are perceived. In fact, Lawyer 10 suggested that the focus of sentencing may shift when working with these youths. He stated:

The purpose of the young offenders act is to recognize that children are children at 15. If this were a 17 year old you might be more inclined to say that umm we're getting close to locking the door...there's a difference between a 15 year old and a 17 year old, 17 year old doing this I would say hey kid you need to understand this is not acceptable, you're about to become an adult. You come back a year from now at the age of 18 you're gonna be sentenced as an adult and you're not gonna get the benefit of being a youth, uh so I would put more emphasis on individual deterrence i.e. what do I think is gonna be the message that they're getting through that you don't do this. (L10)

The extent to which this shift in thought is based on distinct cognitive differences between 15 and 17 years old youth, or structurally-imposed limits between youth and adults is not clearly addressed within the interviews. However, it can be inferred from the data that the distinct line and lack of service availability for these transitioning youth allow for more discretionary judgement in terms of how to conceptualize and juggle their risks/needs and sentencing options.

Factoring in intellectual disabilities in the application of the YCJA. One area that is important to examine is the extent to which the courts make discretionary decisions to accommodate youth with ID at sentencing. It was reported in all interviews that the courts, including all practitioners, are considerably willing to make rehabilitative sentencing accommodations for youth, precluding those aggravating/special circumstances noted above. This extends to youth with ID, who participants agreed may be given greater consideration and opportunities by the court to rehabilitate than their peers. When asked to discuss how the presence of an ID may shift the sentencing goals of the YCJA, Mental Health Worker 7 stated:

Say he's 14 years old 6 foot five, solid build you have a particular sense of what a young person is capable of when they are that tall that solid what have you... when you realize you know he can't do particular things, there is no intent...he didn't mean to hurt that person...it makes a huge difference in terms of sentencing.

This “huge difference” in terms of sentencing refers to a shift in focus towards rehabilitation or away from other sentencing principles (i.e., accountability or deterrence leading to restrictive sentences), which may even extend to some extenuating

circumstances. However, the ability to address the needs of individuals with ID is clearly based on the ability to correctly identify these youth and appreciate their disability. Unfortunately, youth identification may pose to be more challenging than with adult offenders. Lawyer 9 stated that discrepancies between mental and chronological age make it easier to identify, emphasize, and defend adults with ID. Further, as previously discussed, the lack of identification programs within courthouses make it more likely for younger persons to go unidentified when compared to adults. While benefitted by identification, adults with ID may face the perception that they are more at risk to reoffend as their chronological and mental age diverge (L7). For adults, the relationship between age-related factors and a perception of cognitive limitations associated with ID are not clearly outlined in this study. However, the data suggests that the blending of these factors plays a very unique role when tailoring sentencing for youth under the YCJA.

Participants agreed that the courts take a more rehabilitative approach when working with this population due to the cognitive limitations that are perceived to be associated with ID. These cognitive differences were discussed by many participants as barriers for the fulfillment of some YCJA principles. Specifically, this population was discussed by respondents as having limited insight into their actions or an inability to connect consequences with their actions. When asked how the principles of sentencing are shifted when working with youth with ID, Lawyer 6 outlined the challenge of reaching all YCJA sentencing goals:

I think some of the difficulties with again people with intellectual disabilities is they may not appreciate the consequences they may not be able to internalize

what's happening and what they need to do or how they need to change in order to stay away out of trouble.

According to many of the Lawyers interviewed, the perceived inability to appreciate one's circumstance makes it seemingly more challenging to fulfill the principles of accountability, deterrence, and the crafting of meaningful sentences (L1, L2, L6, L7).

Lawyer 1 elaborated:

I think they uh it can be more challenging to find a sentence that is meaningful to the client that there are consequences cause if they don't understand that a probation order is punishment or is a consequence you know they may not they may not, uh understand the restrictions they are on or even acknowledge them.

Mental Health Worker 4, who works in an open custody facility, similarly expressed difficulties in working with youth with FASD. This worker stated,

To hold them accountable for their charges and that because again, and sometimes they don't totally even remember or, or don't remember the scenario of why they came...but to try to talk to them about... how were you feeling at that time, you know you aren't going to get any information out of them because that maybe was a month ago and they are like I have no idea...tome, it's not about getting them in here and talking about the charges or nature but it's... about finding their history, to me, then finding out how we can help them. (MH4)

Fortunately, mental health court workers and associated supports are becoming a reliable service that lawyers are using to craft rehabilitative diversion programs or provide therapeutic conditions as part of sentences to clients. These participants had a different understanding of their role in fulfilment of the YCJA principles. Specifically,

Mental Health Workers reported that their programs are designed to address the needs of youth with ID through a more rehabilitative-focused approach while also fulfilling the other YCJA sentencing goals. In fact, participants noted that their ability to fulfill the other YCJA sentencing goals is essential to their credibility as a support program. When asked how participation in mental health programming impacts sentencing, Mental Health Worker 3 stated that the courts “need to be satisfied if they are withdrawing a charge that there is some sort of accountability or impact that’s happening.” She suggested that mental health programming offers that opportunity through meaningful intervention.

While it may be more challenging to fulfill these sentencing goals when working with youth with ID, most Mental Health Workers agreed that it is possible given tailored sentencing options. However, the perceived difficulty of this task varied across mental health participants. When discussing how treatment can be tailored for youth with ID, Mental Health Worker 3 stated:

Sometimes the impact looks a lot different for a young person with an intellectual disability than someone who doesn’t have it, sometimes we make those treatment plans maybe a little bit less in terms of you know, instead of doing four things, four goals they are going to have two goals instead of doing it in six months we are going to do it in three months so we tailor it that way, umm you know because you know I think sometimes the impact for them to have three months would be the same or wouldn’t be any different than if it was six months for them.

Through creative sentencing practices, Mental Health Worker participants in this study argued that community-based programs are equipped to address the individual needs of

youth and subsequently the goals of the YCJA of accountability, meaningful consequences, rehabilitation, and proportionality.

Theme 3: Sentencing Inconsistencies: Jurisdictional Resources and Discretion

Participants were asked to list and describe the use of external resources used to inform appropriate sentencing dispositions for youth with ID. Specific questions were asked about the use and impact of fitness tests, NCR defences (not criminally responsible), psychological assessments, and PSR's (Pre-sentence reports). Results from the interviews indicated that while external resources provide detailed information about youth they are used with discretion during court proceeding as they can have a negative influence on the legal outcome of a case. Specifically, pre-sentence reports and psychological assessments for the purpose of section 34 reports, fitness tests, and determining criminal responsibility were all described as having the ability to emphasize information that can be perceived as either mitigating or aggravating (with the fear of it being viewed as aggravating and garnering a more severe sentence), given other case related factors. Further, participants alluded to funding and resource limitations that leave particular offenders more vulnerable to discretion while simultaneously creating differential sentencing practices through the discretionary use of external resources. Access to mental health diversion, alternatives to closed custody, and specialized mental health courts are shown to further divert sentencing for youth with ID across Ontario. These services are jurisdictionally based and most have their own distinct referral and intervention practices.

Pre-sentence reports. Pre-sentence reports (PSR's) are drafted by probation officers and provide a detailed account of a youth's situation for the purpose of tailoring sentencing to individual circumstances. This report can include institutional information, education, medication, diagnosis, involvement in clubs/church, family and friend relationships, and critical life events (L10, MH4). Unfortunately, these reports cannot be crafted for every offender due to funding and resource limitations. As such, some participants suggested that they are not typically requested for first time offenders and are used more often when there is a noticeable "pattern of behaviour" (L10) or when a case is particularly serious resulting in the possibility of detention (L11). Alternatively, other participants suggested that the identification of an extenuating circumstance such as the presence of an ID or mental health concern would garner the use of a PSR. When asked when or in what circumstances a PSR would be requested, Lawyer 4 explained:

Depending on the severity of the charge uh the judge or the crown as well the defence lawyer might come to the agreement that a presentence report would be beneficial to obtain more details about the client's present circumstances, background, and future plans and um that's usually done if the charges tend to be more on the serious side of things and that's done prior to sentencing that will assist the court defence lawyer and crown counsel to come up with the appropriate way to dispose of the matter in the best interest of the youth.

While these reports are generally perceived to be helpful, some Lawyers participating in this study suggested that they are not without limitations and should be used with discretion.

PSR's typically require about 1 month to complete which allows for probation officers to collect the necessary information to construct the document (L8). If a client is in custody, defence lawyers may be reluctant to remand the case (L8). Lawyer 8 stated, "I don't want to wait a month for a PSR report with my client in custody." Further, participants noted the importance of using discretion when asking for or presenting sensitive information in court. Mental Health Worker 5 stated that these reports along with other external resources may cause "feelings of shame...you know lack of motivation, if they are being identified as [having a] mental health or intellectually disability." Fortunately, participants suggested that they are able to exercise discretion when deciding whether to ask for a pre-sentence report. Lawyers 8 and 10 specifically stated that in many cases the information gathered through PSR reports can be uncovered through doctor reports, parents, or the CMHA when available, negating the absolute need for a PSR. In discussing the appropriate use of a PSR report, Lawyer 10 stated:

It depends on the particular case and it depends on the um the seriousness I think of the offence if there is enough information um sometimes you don't need a pre-sentence report if there's a joint submission the Crown and defence have agreed on something and the kid's going to get probation I wouldn't order a PSR.

These results point to inconsistencies regarding when PSR's are requested for individuals with intellectual disabilities, particularly when their case does not meet the other criteria for a PSR report (serious crime, possibility of jail time, non-court sanctioned resources).

Psychological assessments. Psychological assessments are requested as needed but are not often ordered (L1). Typically they occur prior to the sentencing stage (L6) and are asked for when there appears to be extenuating circumstances that need further

investigation (MH2, MH4). While this report is being created, the court case will be remanded for a month and a youth could find him/herself under supervision in a mental health custody facility (MH2, MH4). These assessments are completed by psychiatrists or psychologists and are considered by the judge to craft appropriate sentences and treatment options for particular youth (MH4). These assessments may indicate “whether that person has a learning disability and where that falls um you know they give you that percentile in terms of what um where the person is in terms of their reading or writing or comprehension” (L6).

While judges and lawyers can both recommend a remand for the purpose of a psychological assessment, participants suggested that defence lawyers typically use their discretion in these situations. In some ways, participants discussed these assessments as “positive” because they “sort out what is going on with the young person and in the end they will often give a number of recommendations in terms for treatment providers or service providers that they think the young person can benefit from” (MH5.) However, when participants were asked when or in what circumstances a psychological assessment would be requested, Mental Health Worker 5 was quick to stress that they become part of the court record. She argued that discretion around the use of this tool is necessary because what is being reported in these documents is “not naturally going to help the young person’s legal outcome” (MH5). She elaborated, “I wouldn’t want to advocate to have that something become part of the court record... I would try to work within my, to work with the family to get it done privately, so they can have it, and they can use it to the best, to help them, but not have it become part of the court record.”

Lawyer 10 similarly stressed the importance of having these assessments outsourced privately:

It could be really terrible for them, could turn out to be awful, you could have someone charged with a really minor offense and then you go get an assessment done and somehow it turns out they got a major issue that turns out to be a major or substantial risk, you know, that well gosh, you know, you sort of just shot yourself in the foot there. I would try to do private whenever possible.

External resources such as a psychological assessment are extremely costly and difficult to access independently. When requested by a court, offenders are not required to pay out of pocket (MH2). Further, youth who are in custody are provided transportation to psychiatric services which, because they are limited, may be located a fair distance away (L6, MH2). Subsequently, not all offenders have the resources to obtain independent assessments and between those youth the discretionary process may look different with consideration of their disability and offence. Results suggested that the discretionary process evoked when requesting a psychological assessment must be consistent with consideration of the severity of an individual's disability, the offence, and family means.

NCR/unfit to stand trial. Fitness tests and NCR findings (not criminally responsible) provide information about an offender's culpability in a crime and their ability to understand the legal system. The results of these tools/assessments may suggest that an offender would be better dealt with outside of the justice system. Defendants can be found either NCR or unfit from "meeting the criteria for an intellectual disability" (MH2). In fact, Mental Health Worker 2 discussed two current cases she is working on

where youth have been found NCR due to their “cognitive limitations.” When fitness is in question, lawyers must first determine competence. They ask,

Are they competent to give instructions and to understand generally how the process works, they don't have to know it perfectly but they have to have an understanding about that they are in jeopardy that there is an allegation that they have done something wrong, this is a criminal procedure there are sanctions, they have rights, and they have to get some, get some assistance to understand the process. (L11)

If a defendant is unable to instruct counsel or understand the process generally, they may be found unfit to stand trial and sent to a treatment facility until deemed fit by the Ontario Review Board.

A NCR defence “gives way to mending sections...not guilty by reason of mental disorder or not criminally responsible” and involves the ability to “understand right from wrong or understand the nature of the consequences of their action” (L11), Regardless of the amending section, youth deemed NCR are held under the Ontario Review Board and not released until they are no longer viewed as a public safety risk (Ontario Review Board, 2011).

Biologically based differences may present actual and/or perceived barriers to ‘treating’ youth with ID. Participants described the use of fitness tests and NCR defences as sparse both because most clients do not fit the requirements (L8) and because they often result in indeterminate periods of supervision (L8, L11). In discussing NCR findings, Mental Health Worker 2 elaborated,

If they are ORB they would stay at that home until they got an absolute discharge because it would be one of the restrictions that they have to live in that supervised accommodation, so until the board lifts that condition or they got an absolute discharge, so they could be there forever.

In consideration of these indeterminate sentences, Lawyer 1 expressed his reluctant use of fitness tests when he stated, “you would try everything you can to avoid that.” This participant further explained that lawyers have “a legal obligation not to plead someone who doesn’t understand what’s going on” and that the appropriateness of fitness tests become more of a concern in the presence of serious charges (L1). Lawyer 3 expressed a similar reluctance for a NCR defence stating, if a mental illness (or ID) was the “absolute cause you can find yourself into a not criminal responsible scenario in which you generally want to avoid” (L3).

Mental Health participant 2 however, emphasized the importance and benefits of supervised treatment facilities. This participant reasserted that the ORB’s primary concerns are “significant threat to the community” and threat to oneself (MH2). While these sentences are undetermined, the respondent explained that they are rehabilitative in focus and attempt to reintegrate individuals back into the community with supports. Reporting psychiatrists will include in their reports disposition recommendations that are reviewed annually (MH2). For example, these might include suggestions for a detention order with privileges if they are considered “safe for the community” or a “detention order with community living” (MH2). Individuals held under the ORB may not initially be placed in the community but “transition” into the community during the year “once they are psychiatrically stable and...[and] their risk is managed” (MH2).

Recommendations may also be made around treatment and include psychiatric supports and a monthly check in at a hospital to follow up with medication and risk assessment (MH2).

Youth mental health diversion and court support. Youth mental health court diversion is a growing service expected to be available in all jurisdictions in the near future (MH8). These services are voluntary and offered to youth who take accountability for their actions and who wish to obtain treatment (MH8). Referrals can be made at any stage of the justice process and often occur at the bail stage (MH8) or at first appearance if the person is identified at this stage as having mental health concerns or an ID (MH8). Typically these programs work to identify a youth's unique needs and to connect them to or provide them with the appropriate services (MH5). Treatment plans usually focus on three main areas for intervention and can range from anger management, conflict resolution, and strengthening relationships (MH8) to psychiatry, counselling, educational needs, and medication reviews (MH7). Program length is based on the individual and the amount of time deemed necessary to adequately address their needs (MH8). If successful, the worker can advocate for the youth and suggest either withdrawal or "some type of lower end sentence" (MH5). Mental Health Workers participating in this study indicated that their programs have very high success rates. In discussing the benefits of mental health diversion, Mental Health Worker 8 stated, "every single youth with an intellectual disability that I have worked with have been able to successfully have their charges withdrawn."

The interviews suggested that these programs are diverse across jurisdictions as they are moulded to fit within particular jurisdictional courthouse procedures and in

conjunction with local service providers (MH8). Through comparison of program descriptions, courthouse referral practices, knowledge/appreciation for mental health diversion services, and the breadth of services available in the community were shown to create disparities between youth mental health diversion services. Mental Health Diversion Workers pointed to the importance of making their presence known and “selling” their services to both the court and the community (MH3). While all Mental Health Court Diversion Workers reported being well accepted and supported by their local Crowns, through liaising with other jurisdictions they noted that others face barriers within their own regions. Mental Health Worker 3 stated:

There are people that flat out, there are Crowns or judges that have said flat out I will not approve diversion, and you know we had went to a forum in November so a lot of the programs have been up and running about a year, a little under a year and they had yet to receive a referral. They had done like tried to do so many things like lunch and learns, buying judges and crowns and lawyers lunches and trying to get to them that way but just not really open to this type of program.

Even where courts have fully “bought-into” diversion programs, referrals practices differ across jurisdictions.

Most mental health services offer support and services to all youth in the system. However, as some reported, not all services have diversion programs that directly link to sentencing outcomes. Mental Health Worker 7 described her diversion program below:

So what happens is a young person may come to the court and if the charges aren't that serious or if there are say for example mental health issues, or developmental delay, things like that depending on the charge they could be given

what is known as a mental health diversion and that is pre-trial option, it is voluntary and it is treatment based.

While youth who commit more serious crimes are not referred to this program, they can access other voluntary programs and assistance (MH7). Within this specific program, youth who are receiving assistance but not eligible for the diversion program were reported to “still have the trial or they maybe still sentenced for probation and what we would do is, at that point we would let probation, oh look they are doing this, they are going here for counselling and you know there is that transitional piece there” (MH7). Evidently, there is no direct connection between sentencing and this type of voluntary rehabilitation.

In comparison, Mental Health Worker 8 described her program in ways that are distinctly different. In discussing the stages she took to create and launch a new tailored mental health diversion/support program for her jurisdiction, Mental Health Worker 8 stated:

They wanted the program here to be different...because most other Mental Health Youth Court Workers, I believe are strictly diversion but my program is not. So I am able to work with both minor offences, that yeah probably will be withdrawn, all the way up to like I had an attempted murder case and obviously that kid's not going to get or didn't have his charges diverted.

This program she suggested is directly connected to sentencing practices. When asked how participation in her program influences sentencing for youth who would not normally be eligible for diversion services (serious crimes/repeat offenders), Mental Health Worker 8 stated:

Yeah, a lot of the time if you look at the Crown's screening form, so when I get the youth, the Crown's screening form would say, you know if you would were to plead guilty today we would give you a 12 month probation order. So if youth worked with me and was engaged in the program for three or four months, or whatever it was, at the end of that I would say this youth was successful, they have done this and that, they would say, so now what we are willing to consider is a 12 month conditional discharge. So instead of a 12 month probation order and having a youth record, after those 12 months after that they are done, so those records are wiped.

Referral practices are further influenced by perceptions of what is considered a 'serious' crime. Results suggest that different referral practices exist across jurisdictions on this basis. Specifically, the diversion of assault cases (usually more minor cases) was reported to be particularly discretionary. Most Mental Health participants said that their diversion programs typically only service non-violent offenders. In describing typical offences suitable for diversion Mental Health Worker 3 stated, "typically class I and class II usually non-violent could be eligible for a mental health diversion." In discussing her work with youth with ID, Mental Health Worker 8 made the contrasting statement, "all of the [charges] that I can remember were actually assaults; one was assault with a weapon." She proposed that these offences would be considered "middle of the road" but were all withdrawn after participation in the diversion service (MH8). Together, the experiences a youth with ID has in accessing or connecting with mental health diversion services is jurisdictionally dependent.

Close custody alternatives. There are programs in some jurisdictions that offer alternatives to custody. These programs offer youth the opportunity to live within the community but with intensive support, supervision, and all the benefits of therapeutic services (MH6). These services are typically open to youth who are being held in detention whether it is awaiting trial or a psychological assessment (MH6). Youth from across Ontario are able to access these programs, but at the expense of being removed from their support systems (MH6).

Mental health court. Participants who service Mental Health Courts were asked to describe the benefits of these specialized courts. These participants indicated that specialized courts have undoubtedly enhanced the experiences of youth with ID. In discussing their benefits Mental Health Worker 5 stated that the lawyers who work within these courts typically have “more of an understanding of [ID], or more sensitive to it, you know in their approaches.” Further, these professionals may be provided with special training which teaches them how to “make bails and probation orders that makes sense for that young person,” how to connect them to appropriate resources, or properly identify ID (MH5). Additionally, there is typically one judge and a few lawyers who work within these courts. Participants suggested that this makes it “easier to get to know the kids and kind of have that continued relationship with them and understood where they were coming from” (MH5). Finally, these courts may limit the negative exposure these youth may experience when personal information is divulged (MH7).

However, not all jurisdictions have the funding or numbers to run specialized courts, and the experience between youth who are able or unable to access these services may be diverse. The criminal justice professionals explained the structure of these

specialized courts. For example, one professional explained that after admitting responsibility, youth who are processed through a mental health court can be placed on a community treatment contract which is crafted with input from lawyers and mental health/support workers (L8). Typically they would indicate 3-5 goals to be achieved within 6 months (L8). Lawyer 8 further described the process:

They are deliberately set up so it's not overwhelming but it's got some meat, so it could be regular, you know with attendance from your family, your psychiatrist at least once a month, take medications as prescribed, abstain from alcohol... You know, as opposed to just getting a probation order they feel like they have accomplished something, although we sometimes wonder how different it is, like maybe they get two years or this time they get eighteen months, but I find many people do feel like they actually get a direction to have and maybe makes out better in life.

Additionally, because these courts see all offence types, sentences can range from diversion to community treatment, probation, or custody.

Theme 4: Sentencing Trends Related to Youth with ID: Justifications behind Flawed Differential Treatment

The data indicated that lawyers are influenced both by the law including legal minimums and sentencing principles and by courthouse practices and procedures that have developed overtime. Lawyer 10 stated that “the practice of sentencing is something that has evolved over the years.” He connected this with an analogy about impaired driving stating that “when I first started practicing a \$300 fine was what you got for

impaired driving now it's a minimum of 1000 bucks it goes up on the scale depending upon your readings and severity of the incident" (L10).

In discussing the hypothetical court case scenario, many Lawyers alluded to sentencing trends and the various confinements to which they must argue for the best interests of their clients. Lawyer 1 stated, "I'm usually trying to get as little as possible for my client but you know to maintain credibility you have to be reasonable. I can't ask for a reprimand when the Crown's looking for two years jail or something but uh trying to set them up that they don't fail is important." This Lawyer's proposed sentence for the court case scenario was one year of probation as he reported it was the 'standard' in this type of case (L1).

Again, in discussing the court case scenario and relevant sentencing options, many participants felt obliged to increase the restrictiveness of previous sanctions by either type or probationary conditions. Lawyer 8 stated, "As far as the length of the probation, well part of that is gonna depend on how long was the previous probation." In discussing potential probationary conditions Lawyer 2 stated, "probably would be...give him more probation but I would make the terms stricter than the last time." However, prior successful probationary periods were noted as a major mitigating factor (L9, L8, L6, L2) as it demonstrates that an offender "can comply with probationary terms" (L2).

To the extent that these sentencing practices influence public behaviour, public perceptions similarly impact the justice system. The role the courts play in intervening in youths' lives have been shaped by the public. While discussing sentencing trends in relation to ID, Lawyer 3 stated "you know you read in papers people in the community expect judges and courts to be social workers." Notably, participants reported having

noticed major shifts in perceptions over the past decade towards rehabilitation and ‘social work’ roles (L3). Courts are now attempting to sentence both the crime and the offender, taking into consideration their personal circumstances. Most participants noted positive changes towards appreciating the need for differential treatment for young offenders with ID. When describing how the sentencing of youth with ID has changed since the implementation of a mental health diversion program in her region, Mental Health Worker 8 stated:

On the positive note that, when I first came in they were treating youth with intellectual disabilities the same as youth without, and now they’re recognizing the need for differential response I guess, for differential planning you know for what’s gonna work for them.

While it was reported that the perceived role of mental health workers has changed and the courts are more willing to make accommodations for these youth, participants suggested that service limitations and structural barriers prevent the justice system from the ability to truly fulfill this role (L2, L3). Lawyer 3 described the impasse when he stated, “they do try to understand, they do try to tailor it, lots of structural limits, lots of practical limits.”

Sentencing youth with intellectual disabilities. All participants initially indicated that the presence of an ID is considered a mitigating factor resulting in more lenient sentencing or a more rehabilitative focus. This is connected to the belief that some offences are the result of cognitive limitations or mental health conditions that would be better dealt without outside of the justice system or a non-custodial sentence. In line with current literature in this area, first time offenders with ID or for less serious crimes are

more likely to be diverted either through an extrajudicial measure/sanction, to a mental health court, or via a withdrawal/dismissal of charges. Where offenders are not candidates for these sentencing approaches, participants suggested that they may receive probation or custodial sentences that are shorter or a conditional custodial sentence which is served in the community and can be revoked (serve remainder of sentence in custody). However, only a few participants made this suggestion and none indicated that this practice is commonplace. Further, others suggested that this approach may only be offered when the driving force behind offending behaviour can be connected to cognitive differences associated with the individual's ID. The case study revealed that when an offender's ID is not considered to influence offending behaviour, that sentencing for this population is not different from other offenders. Additionally, while general accommodations are made to probation conditions for a number of individual needs and characteristics, such accommodations are not made for individuals with ID. These distinctions and sentencing practices are described in detail in the succeeding sections.

Mental health diversion. Participants asserted that mental health diversion has evolved out of a desire to allow persons with ID or mental health conditions alternative sentencing options outside of formal court proceedings. In describing its role Lawyer 2 stated:

Mental health diversion...generally it is recognition of the fact that some people don't belong in the criminal justice system, some people are only in the Criminal Justice System because of the mental health issue and once the mental health is addressed, there is no further concern for, or no need for the courts to interfere with the person's life.

However, the interviewees also suggested that the severity of the offence, criminal history, and the severity of a disability may eliminate the potential for diversion as the courts cannot overlook public safety. If a crime is considered too serious or a major public risk by the courts, then the offender will not be considered for diversion (MH1). This is consistent with other diversion programs for youth without an identified ID. The interviews revealed that the severity of an ID can also preclude someone from the benefits of a diversion program. When asked what information is typically gathered about an individual's ID and whether there are benefits or disadvantages to presenting this information formally in court, Lawyer 9 stated, "on one hand you...you want to talk about [ID] because at some point you want them to be empathetic but it gets to a point, some point, there is a fine balance where if they are so severely disabled that they're not going to learn from it or something along those lines." In the case where an ID is perceived to be severe, its presence may no longer be considered mitigating. In fact, its presence may become a compounding or aggravating factor when perceived to be a barrier to successful rehabilitation. Jointly, the interviewees suggested that mental health diversion and other forms of lenient sentencing, such as withdrawal/dismissal may be available only for less serious offences, first time offenders, or persons with modest disabilities. Diversion programs are similarly offered to youth without an identified ID based on individual and case related factors, but, they may differ in referral practices and programming.

Along with the benefit of having charges withdrawn after a successful diversion program, participants' discourse around the case study outlined other major distinctions between diversion programs and probation orders. Mental Health Workers were reluctant

to participate in the case study as sentencing is not typically a role they fulfill. These participants suggested that this youth, being his third time in trouble with the law, would not likely be connected to mental health diversion despite the presence of an ID. However, in adapting the case study to accommodate for this, participants agreed to offer rehabilitative programming suggestions for this offender (with an identified ID). Specifically, these participants proposed a treatment/rehabilitation plan tailored for this youth under the assumption that he was referred to their program. When compared to the proposed probation sentences for the same court case scenario (youth with an identified ID), major differences between the conditions placed on diversion and probation orders were highlighted. Diversion programs ran on average for 6 months, ranging anywhere from 3 to 12, lasting about half the time of the average probation order. Because programs are developed or tailored to fit individual needs, participants suggested that program length would be determined/shifted after conducting intensive risk/needs assessments. These assessments would include gathering information from various external sources. Participants stated that the courts are willing to push back sentencing dates to allow for a longer intervention period to ensure needs are significantly addressed.

On average, treatment recommendations focused on 2 main areas of intervention, but ranged from 1-3 across participants. This differed from the probation orders proposed by Lawyers, which included double the number of conditions. Further, interventions focused on school/educational support, anger management/conflict resolution, victim empathy, substance abuse issues, referral to ID specific programming, and peer influence issues. Most Mental Health Workers proposed an intervention focused around school and/or peer support which were areas that probation orders typically glossed over with a

broad counselling term in anticipation that a probation officer would identify the appropriate counselling. These programs seemed to have more flexibility and a greater ability to be creative with programming and treatment options. Only three Mental Health Workers placed importance on personal and case-related factors, however, all considered the presence of an ID to be the most important factor when tailoring an appropriate response, a distinct difference when compared to Lawyers (See Table 1 below).

Probation and custody orders. Participants suggested that the justice system works within the confines of ensuring public safety to provide differential/tailored treatment for youth with ID who are not diverted from the system. Specifically, respondents argued that the strong rehabilitative focus for youth with ID can extend to probation and custody sentences. When asked if restrictive sentencing options could be tailored for youth with ID, Lawyer 1 said:

If their crimes are more serious um then you have to um see what supports they have and uh you know figure out what the risks are and address how they're gonna be dealt with cause it's uh custody isn't the answer for adults with intellectual disabilities either but occasionally it's the only option uh ya and um what we try to do there is just reduce the custody as much as possible cause it doesn't have the effect they want as far as preventing further offences it uh just protects the public while they're in custody.

While participants argued that it is possible for the focus of sentencing to remain therapeutic for youth with ID across sentencing types, results indicated that not all persons with ID would be considered appropriate candidates for such differential treatment. Particularly, differential treatment with a focus on rehabilitation or lenient

sentencing options may be dependent on how a disability manifests itself for an individual.

Court case scenario. In the case study, involving repeat offenders and what could be considered a moderately severe charge, a youth with an ID was not treated significantly different from other young offenders in terms of sentence type or length. All but two Lawyers proposed a term of probation for an average length of 14.4 months, consistent between youth with and without an ID. On average, probation orders contained 4-5 conditions, including counselling, alcohol/drug prohibition, non-communication orders, community service work, and curfews. Some differences were noted in the type of conditions on the probation orders. Specifically, youth with an ID were more likely to receive a condition to complete community service work (83%) over other youth (40%) and Defence Lawyers were less likely to discuss a non-communication order for youth with ID (25%) than other youth (80%). However, Lawyers suggested that non-communication orders are expected and naturally imposed by crown attorneys and Judges in most assault cases and thus may be equally as likely to be found on all youth's probation orders despite the case study results. Most Lawyers left the counselling term general or as directed by a probation officer. For those who had specified counselling, two youth without ID were directed to alcohol counselling, one youth with an ID was directed to anger management counselling, and another to academic/learning services.

The two Lawyers who proposed sentences outside of a probationary term were sentencing youth with an ID. This created greater disparity in sentencing amongst this group of offenders. Particularly, one Lawyer proposed a 6 month diversion and the other a custody sentence of 30 days followed by a probationary period. While it is possible for

these youth, regardless of the absence or presence of an ID, to obtain a custody sentence, this participant's answer on this question appeared to be an outlier in this data. This particular participant has previously worked as a crown attorney and may be more inclined to consider "risk" factors for all cases when compared to other participants. However, because this participant's answers on all other relevant questions were not considered outlying, he was not removed from the study and relevant case study answers were not excluded from analysis.

Participants were also asked to evaluate the weight they placed personal and crime-related factors in determining the appropriate sentence and conditions for the case scenario on a 5 point scale¹. These factors included offence type, criminal history, age, an early plea, lack of remorse, school attendance, time of day, and the presence and severity of an ID. The weight Lawyers placed on these factors did not differ noticeably between youth with and without an identified ID (see table 1 below)². The table shows the mean weight Lawyers and Mental Health professionals placed on 6 personal and crime related factors for both youth with and without an identified ID. Mental Health professionals only responded to case scenario 2, where the youth was described as having an ID. Past and current offences played a slightly stronger role in crafting a sentence for youth without an ID while past, current, age, case-specific factors, and ID-related factors all were given similar consideration for youth with an ID. The presence of an ID and the

¹ Participants were asked to weigh personal and crime related factors twice; once when proposing a sentence type (diversion, probation, custody) and again when recommending the types of conditions placed on the diversion or probation order. Almost all participants weighed these factors identically in both circumstances. In fact, many participants did not weigh these factors a second time and simply suggested that their answers would remain the same. Subsequently, these items were collapsed. For the few participants who weighted these factors differently, their results were averaged.

²Statistic analysis could not be run due to the small sample size and issues around statistical power. Power refers to the probability of rejecting the null hypothesis when it is false (Glinger, Morgan, & Leech, 2009). Sufficient power is critical to the reliability of statistical results (Glinger et al., 2009).

severity of that disability played the least significant role in sentencing on average but were rated just slightly under past offences by Lawyers. Mental Health Workers rated the weight they gave to the presence and severity of an ID as the most significant factor in determining appropriate sentencing, far exceeding the weight Lawyers placed on ID.

Table 1

Mean Weight of Personal and Crime Related Factors Across Case Type

	Lawyers		Mental Health Workers
	No ID (n=5)	ID (n=6)	ID(n=3)
Previous Offence	4.1	3.08	2.8
Current Offence	3.9	3.5	4
Age	3.3	3.83	3.1
Other Factors	3	3.65	3.2
Presence of ID		2.9	4.4
Severity of ID		2.7	4

Notes: Participants weighted these factors on a 5 point scale using both whole numbers and fractions when necessary. Mental Health participants did not receive the hypothetical court case scenario involving a youth without an ID. Further only 3 of 8 Mental Health participants felt comfortable representing the weight they place on personal and crime-related numerical fashion.

Discussions around tailoring sentencing for this youth highlighted the distinctions lawyers may make between disabilities. Results suggest that when a mental health condition or cognitive limitation is strongly connected to the offence, participants agree that a differential approach is appropriate. This could materialize as more lenient sentencing option or more rehabilitative-focused conditions as part of probation. When asked if sentencing could be tailored for an individual with ID with difficulties in memory, attention, and language barriers, Lawyer 9 emphasized the importance of connecting the offender’s cognitive differences to the offence for sentencing purposes.

He stated:

I don't know how much that would necessarily factor into the assault situation, so if I got a report like that back from a doctor, umm I would probably try to get a little bit more detail from there as to how it just, the defects and attention or the memory may affect him that would lead to an assault, cause really you are just trying to provide an explanation as to how it would happen but something it's not an excuse, but something that puts the court into the situation so that they can be a little bit empathetic. (L9)

Lawyer 2 further emphasized the connection between sentencing and linking ID to offending behaviours. She stated:

If there is a learning disability and they have trouble in school that may not have anything to do whatsoever with the behaviour that brought them in before the court and in which case it would probably have little to no impact and wouldn't be tailored because we are not social workers. (L2)

Lawyer 9 provided an example of where and ID both would and wouldn't impact sentencing, stating,

Probably depends on the offence, like you see a lot of, a lot of people with FAS, end up being, like as pons, in drug schemes and the court ends up being empathetic because they don't understand what they are getting themselves into, that other people are targeting them for that purpose and in that situation, the court is empathetic, if you are really violent and aggressive it is a bit different because there's the concern, like because it's likely going to happen again and they probably will end up in a security place.

As the quotes illustrate, the perceived motivation behind offending behaviour emerges as a major driving factor behind rehabilitative-focused sentencing options. Youth with ID who commit offences that cannot be seen as strongly linked to the offence are considered to be fully accountable for their behaviour. According to the interviewees, depending on other court-related factors these youth may not receive differential treatment within the justice system. Differences noted in their treatment may be rooted in the severity of the crime and other perceived risk/need factors.

Appreciating difference. Results suggested that consideration of individual needs in crafting probationary terms is a well-practiced sentencing trend. In discussing how sentences are tailored to appreciate individual differences, participants discussed special accommodations given to a number of different circumstances including alcohol/drug addiction, aboriginal needs, and income among others. Lawyer 10 addressed the needs of students who lack substantial income:

We gotta make allowance for the fact that if we impose an economic penalty that they're a student or they're on disability or welfare or they're a single mom you know so why impose a big fine because all your doing is inviting breach it's not gonna be good.

Lawyer 8 discussed accommodations for persons with substance abuse issues:

It's like when I am representing hard core alcoholics, and I am speaking more of adults, sometimes my submission will be don't put a condition not to consume alcohol because you are just setting this guy up to fail.

Lawyer 1 elaborated on appropriate sentencing dispositions for aboriginal youth:

Um ya and this, as I mentioned can be used because you don't want the judge to set you up, don't wanna set somebody up for failure. You have you know if the person cannot do what terms the judge wants to impose like argue against curfew and uh well especially with native populations because, not sure if the judge buys it or not, but you know there does seem to be a different concept of meaning of time or appointments and that as probation, you likely run into that and I've argued you know that the Gladue even applies to that because why put somebody on a curfew if they are really, if it's impossible for them to abide by those restrictions.

These accommodations represent some of the special considerations that participants discussed in relation to appropriate sentencing. The desire to make sentencing accommodations or tailor sentencing to unique circumstances extends to persons with ID. All Lawyers and Mental Health Workers discussed a willingness and interest in addressing the needs of these individuals. Unfortunately, the sentencing accommodations or lack thereof made for this population do not consistently reflect their particular needs.

While participants discussed an interest in tailoring responses to youth with ID's, the interviews revealed an overall lack of understanding and appreciation for the challenges these youth face in fulfilling probationary terms. For example, in discussing the court case scenario and tailoring sentencing with consideration of deficits in memory, attention, and language skills, Lawyer 11 stated that these particular deficits would not warrant differential treatment or tailored probationary conditions. He elaborated to say:

[It's] maybe not appropriate because staying in school is easy, Ok obey house rules, do what your mom and dad say are easy, right, do 20 hours of community

service is easy so it would be only if there was something of a tough task, that challenged the area in which he was disabled or she was disabled that you might then say that would apply. (L11)

In discussing a lenient sentence for a current adult client with ID, Lawyer 10 stated:

I've got a guy who's come up to court in a couple of weeks, doesn't matter what the circumstances are but he's done community service he's supposed to come in and write a letter of apology. He's illiterate but the [outside service] has said look come on in we'll help you write it and what it's going to be is gee, I'm sorry for what I did, it isn't a treatise on you know forgiveness or atonement and I can't get him to get in there to do this and they're gonna withdraw the charge.

Respectfully, this is a lenient sentence, one which may result in withdrawal and to which the offender has the opportunity to access services to assist him with fulfilling the diversion requirements. However, his disability has not been given the same consideration as other's individual needs and characteristics such as alcoholism, aboriginal heritage, or income. In fact, compliance with his sentence is directly inhibited by his cognitive abilities and is in no way connected to any necessary rehabilitative function. Through creative sentencing it is likely that this individual could express remorse through another mode of communication. While this individual is clearly motivated to atone for his mistakes as highlighted by his completion of community service hours, Lawyer 10 suggested that his inability to produce an apology letter will make him ineligible for diversion.

In contrast, other participants acknowledged that general cognitive differences associated with ID may make it more challenging for these youth to satisfy probationary

terms. When asked to identify barriers that inhibit this population from complying with sentencing terms, Lawyer 8 stated, “I mean someone with intellectual disabilities obviously has, there’s other challenges, one of them being referred and just keeping the appointment, follow the rules, so in that sense that person on probation has a greater chance of breaching a probation order.” Mental Health Worker 7 elaborated:

...if you had a young person who had learning disabilities or development delay and you gave them a piece of paper that says this is where you need to report to, this is what you need to do, number one they will likely lose the paper and number two they will likely not be able to read it and number three they maybe can’t even understand it.

These participants suggested that while following probation conditions may appear easy, it can be very hard work on an ongoing basis (MH3). When asked how sentences could be tailored to support the general needs of this population, participants emphasized addressing the barriers that inhibit youth with ID from adhering to probationary terms. For example, this might include lifestyle management tools (L3), teaching them how to use a day planner (L3), working with the school to identify learning strategies (MH7), or providing them with very specific examples and descriptions of what their conditions mean (MH1). This last recommendation arises from the belief that current probation forms are themselves a barrier to the successful adherence of their terms. Mental Health Worker 1 described the importance of detailed probationary conditions/explanations:

If they are released on bail with specific conditions um I have to be very specific with them for instance if I have a youth and they have a condition that says no weapons I have to explain to them what that means that means no gun, no knife,

no nothing and they are a few of my youth... they can't make the general concept to a specific detail.

Together, the interview findings suggested that when sentences are not tailored to individual differences, youth with ID may be more likely to breach their conditions.

Theme 5: The Anti-Therapeutic Impact of Resource Limitations

Participants were asked to discuss the barriers that would prevent youth with ID from benefiting in rehabilitative programming. These discussions communicated the importance of individual assessments, program accessibility, and adequate program funding in both community programs and custody facilities in facilitating successful rehabilitative programming. Participants' dialogue around the impact of an imperfect identification process suggested that some youth may be discounted from rehabilitative sentencing options altogether. For those fortunate enough to be properly identified, results further communicate that limited tailored sentencing options and community services for youth with ID may also translate into missed rehabilitative opportunities. Beyond these missed opportunities, resource limitations were discussed as creating anti-therapeutic environments, discouraging youth from engaging in rehabilitative programming, and promoting damaging misconceptions about this population.

Assessment and program accessibility. Results indicated that service availability has a direct influence not simply on training and the length of waiting lists but has a widespread and long lasting impact on sentencing trends/procedures and youth rehabilitation more broadly. Mental Health Worker 5 suggested that engaging and finding the motivation to participate in programming may be difficult for some youth. She stated,

“It often takes young people some encouragement or time to engage or to be ready to be engaged or participate in programming” (MH5). Both Mental Health Worker 5 and Lawyer 6 discussed the current length of wait lists for programming and assessments not simply as a barrier to accessing services quickly, but as a barrier to accessing services more generally. The challenge to motivate and engage youth in programming may be intensified when coupled with a diagnosis. Mental Health Worker 5 elaborated on this topic, “there can be feelings of shame, you know lack of motivation, if they are being identified as mental health or intellectually disability, or any of those things, like it’s hard enough to get them engaged and then you say well you are going to have to wait six months.” When you factor in that some facilities require a psychological assessment before offering treatment and that these assessments do not come without their own wait, youth with ID are particularly vulnerable to missing rehabilitative opportunities (MH5). Additionally, some Lawyers identified youth with ID as needing immediate consequences in order to connect it with the behaviour that brought them before the court. For example Lawyer 6 stated, “I mean people with intellectual disabilities if there’s not an immediate consequence...they won’t make the connection with what they did” (L6).

A lack of community-based supervisory programming can also have a devastating impact on a youth’s sentence and reintegration into the community. In some situations, participants noted that youth have been held in custody due to a lack of family support and services. When asked if this happens “often or in rare cases” Mental Health Worker 6 stated:

I know that everyone kind of, doesn’t takes it lightly because we can’t abuse the justice system to take over. I don’t know like social welfare or mental health but

at the same time people don't want to release these kids to dangerous situations, it's somewhere in the middle, I guess sometimes, no rarely not often, but sometimes.

For youth who are released into the community, this participant suggested that housing options diverge across cities but are often limited to shelters, group home settings, and some independent living (MH6).

Social barriers and service limitations in the community. Participants also communicated that social barriers and service limitations make it increasingly more challenging for some youth to participate fully in society and more specifically to follow sentencing dispositions. Even when connected to various programs, Mental Health Worker 1 suggested that their needs are not always being met. When questioned about the barriers that inhibit full participation in programming she responded:

Um I have one youth in particular who I think he grew he grew up being told that he couldn't do things the same way his friends could so for instance I got him connected to a job program and even though he got accepted he refused to go because he didn't think he'd be able to do the job. Um that's a huge barrier I think, just his self-confidence is really restricting him from even opening the door to those opportunities. For others some of the programs are located in an area of the city that they're not familiar with um and they're not willing to try to do that on their own and so I have gone to appointments with kids. I've left court and met with them and taken them to appointments um but I can't always do that. So I know that's also a barrier, as well the fact that they have to go there um a lot of the programs won't meet them geographically where they are. (MH1)

This explanation reflects how service limitations may negatively influence participation in programming. However, when subsequently asked how the courts would view the “responsivity factor” of this population, Mental Health Worker 1 stated:

I think in general from what I've seen it's, I think it's less um for instance I was working with a youth we referred him to programming for counselling and um he went once and the court said you know what, based on his circumstances the fact that he went one time is good enough. Let's withdraw his charge um whereas with any other youth they may not do that. I think they understand that he was maybe a little less responsive um but I don't know.

In contrast, this excerpt places little emphasis on service limitations and alternatively views a lack of participation in programming as a direct reflection of this population's ability to be rehabilitated. These contrasting beliefs allude to misconceptions about responsivity as failed rehabilitative attempts for youth with ID on an individual level. As discussed previously, offenders who are viewed to have a limited capacity for rehabilitation are often viewed as ‘risky’ and may receive more restrictive sentencing options.

Program funding and service limitations in custodial institutions. Participants suggested that custody facilities can be a therapeutic environment for youth as they offer a wide range of programs and remove youth from the social environments that breed criminal conduct (MH4, MH5, MH2). However, when asked about the risks and needs specific to this population, Mental Health Worker 4, who works at a custody facility, indicated that the experience of being sentenced to custody can be very distressing for a youth with ID or mental health concerns. He stated,

I think that youth...that have mental health or have intellectual disabilities we already believe that they are already at a lot higher risk for self harm and suicidal thought, so we are really, we keep that in the back of our mind, so when you are coming into a new facility, new people, you are going through this event in your life, you know that can be traumatic you know if you haven't been through it before, that to us really heightens a possibility of them having those thoughts.

(MH4)

This participant suggested that these issues are compounded when combined with funding issues and service limitations. Specifically, he suggested that even youth who are participating and engaged in rehabilitative programming may be negatively influenced by the anti-therapeutic environment created from these limitations.

Mental Health Worker 4 noted that the custody facility in which he works often gets recommendations for one on-one-support or close supervision from psychologists and psychiatrists to which they do not have the financial backing to support. This, he said, can create anti-therapeutic environments within the facility that not only negate therapy but can be harmful to the youth. He stated:

You also have to be able to fund the facility better...so they are given the opportunity to do a lot more one to one work, because that's what it is, it's the one to one, you know even now when you know they are about to trip out of group, or they are have having a bad day, you are able to say, hey you know what, tonight, you and I, we are going to go out to play basketball, or do our group on our own, or do some chatting about whatever group we are doing that night, and keep them

away from that group. But if we shove them in the group when they are already having a bad day you know that things aren't going to go well. (MH4)

This scenario highlights both the possibility for missed rehabilitative programming and the potential for an anti-therapeutic impact on youth. While custody facilities have the potential for providing therapeutic services to youth, their ability to do so is hindered by funding limitations.

Results Summary: Addressing the Research Questions

1. How are youth with intellectual disabilities perceived and conceptualized by professionals working directly with this population in the justice system?

As a result of limited education and training, youth with ID are primarily conceptualized via the medical model of perceiving disability. While there was a varied understanding amongst participants regarding what an intellectual disability entails, including a blending with other labels, overall, participants emphasized the cognitive differences and limitations of an individual that may present with an ID. For example, definitions included an IQ score below 70, low adaptive functioning and concrete thinking, deficits in comprehension and processing abilities, and a learning disability. Little appreciation was given to the social and structural barriers that youth with ID may face on a daily basis or differences in the lived experiences amongst those with ID arising from a bio-psycho-social relationship.

2. What are the perceived needs, risks, and responsivity factors associated with this population with consideration of both static and dynamic factors from the perspective of

criminal justice professionals? Is this population more likely to be interpreted as risky and in need of restrictive responses (i.e., curfew, non-association orders) or needy and therefore professionals are more likely to request or advocate for them to receive rehabilitative conditions (i.e. counselling, fines, community service).

To provide context, participants viewed risk, need, and responsivity as dependent factors, whereby an unfulfilled need is a risk factor and additional responsivity considerations were seen as a risk for reoffending. Individual and crime related factors, namely a lengthy criminal history or a serious crime, were shown to shift emphasis from viewing these combined factors as either a need or a risk. Consistent with perceptions based in the medical model, ID was described as an accumulating or additional risk, need, and responsivity factor. Additional risk/needs included a vulnerability to peer influence, emphasized need for external supports, deficits in judgment, decision making, problem solving, perspective taking, aggressive, maladaptive coping strategies, and cognitive differences that make it challenging to rehabilitate. When combined with other individual or case specific information, youth with ID can appear to be either increasingly needy or increasingly risky. Regardless of the offence type however, ID was primarily described as a static factor, with little knowledge or appreciation for how interventions can be tailored to support rehabilitation or to deter youth with ID from criminal behaviour. Severe disabilities were described as creating the greatest barrier to rehabilitation. Thus, while participants emphasized the presence of additional ‘needs’ in less severe cases, they viewed the fulfillment of the YCJA sentencing goals as particularly challenging for this population regardless of the offence.

3. How do these beliefs manifest themselves in the application of the law, from the perspective of justice officials, when an intellectual disability is suspected or previously detected, specifically in probation conditions placed on these young offenders?

Beliefs about ID rooted in a medical model of perceiving disability have broad but direct implications for sentencing. First, the lack of training and education around ID leaves professionals to rely solely on uninformed beliefs and misunderstanding when informally identifying youth with ID. The lack of practical knowledge relating to the identification of persons with ID places particular youth (those with less severe disabilities) at a greater risk of not being identified and thus not receiving tailored support, services, or sentencing (e.g. mental health diversion). These gaps cause sentencing disparities amongst youth with ID in Canada and create concern about proportionate responses and sentencing.

Next, viewing ID primarily as a pathology influences the use of formal assessments. Participants described using their discretion when requesting formal assessments in fear that these documents will emphasise the presence of additional risk factors and have a negative impact by prompting the use of unnecessary restrictive sentencing. As a result, assessments are requested in more serious cases or when a disability is particularly severe. This suggests that misconceptions about ID may be more strongly felt by serious offenders or those with more noticeable disabilities.

As a direct result of current misconceptions about ID, the judicial system stresses the importance of balancing the reduced culpability of persons with ID with the perceived increased risk to public safety during sentencing. This results in specific differences in sentencing trends and service allocation for youth with ID in Ontario, across offence type

and disability. In less serious offences, emphasis is placed on the diminished moral culpability of offenders with ID, leading to more lenient sentencing (withdrawal, diversion, etc.). In more serious cases, where there is either a lengthy criminal history or a serious crime, ID is viewed as a static risk factor that makes rehabilitation challenging and increases the concern for public safety. Participants were reluctant however, to directly connect this to more structured sentencing.

For moderate offences, participants suggested that diminished culpability may result in shorter custody sentences or suspended custodial sentences. These types of accommodations were not described by all participants or as a particularly noteworthy trend. In fact, such accommodations or tailored sentencing options may be restricted to cases where the type of disability can be directly linked to the offending behaviour. Emphasis on the culpability of individuals with ID overlooked the importance of tailoring responses to individual needs for this population. While participants described current types of accommodations made in consideration of aboriginal needs, drug and alcohol dependency, and income among others, tailored probation conditions were not extended to youth with an ID.

CHAPTER 5: DISCUSSION AND CONCLUSION

The Ontario government alongside countless hardworking professionals have made huge advances towards providing fair and equitable justice to all youth within the justice system. Under the current YCJA framework, the justice system has the dual responsibility of recognizing the reduced moral culpability of young offenders while protecting the public. In line with these goals, the YCJA promotes rehabilitation and

reintegration, accountability via proportionate sentencing (service response connected to the seriousness of the offense and degree of responsibility), and by imposing meaningful sentences with respect to individual needs and level of development (Within limits of accountability and proportionality) (YCJA, 2002, s.3.1). The implementation of mental health education/training and services supports professionals in their interactions with youth who require additional consideration in the justice process. Mental health diversion programs, specialized courts, mental health court workers, PRS reports, and psychological assessments are all ways in which sentencing can be tailored in relation to the 'different but equal' philosophy, within the context of legal factors such as the offence, the individual's offence history, and any other requirements under the YCJA. These tools assist the courts in developing a more complete understanding of the complex issues that impact youth crime and can be used to ensure youth accountability, rehabilitation, meaningful consequences and proportionate sentences. By examining the individual causes of crime, professionals are further able to ensure the latter of these sentencing goals; proportionality. The proportionality principle requires that sentences are consistent with an offender's moral blameworthiness and the seriousness of the offence (YCJA, 2002, s.3.b). This is of particular importance when assessing the culpability of youth with ID's whose cognitive abilities may be compromised, resulting in diminished responsibility or intent.

In line with Canada's push to recognize and protect the rights of individuals with disabilities and provide fair and equitable access to justice (Accessibility for Ontarians with Disabilities Act, 2005), this study reasserts the importance of education and training around mental health issues, intellectual disabilities, and disability more generally. The

Mental Health Commission of Canada (2013) upholds knowledge exchange of evidence-based research as a primary catalyst behind changing Canadian attitudes towards mental health. Such knowledge exchange “forges connections and fosters mutual learning that transforms information and ideas into innovation and action – that elevates and accelerates the work of all mental health stakeholders across Canada” (Mental Health Commission of Canada, 2013, p. 15). Within theme 1, education and training are linked specifically to the appreciation of differences, removal of social barriers, and disability identification within the Ontario court system. Participants communicated that within Ontario, education and resources have been primarily focused on FASD and mental health and results show that identification patterns have changed and that more youth in the system are being identified with these diagnoses and referred to specialized programming. Of equal importance, this change in identification patterns has elevated professional interest in addressing the needs of these youth and their appreciation for the importance of further training in this area and tailored community programming. Further, these advancements allowed participants to feel comfortable and knowledgeable discussing youth with mental health conditions or FASD.

Unfortunately, the results also show that ID has been widely overlooked both in service and education availability within the Ontario criminal justice system, which may account for participants’ reluctance to discuss ID. While there have been many improvements, a broad and more in-depth understanding of ID, supported by education, training and resources, would similarly allow for better identification, increased awareness, appreciation, and comfort in working with these youth to address their unique needs. In particular, theme 1 answered the first research question by identifying many

misconceptions about what intellectual disabilities include, how they may impact youth within the justice system, and associated risks, need, and responsivity to treatment and programs. Results suggest that the current perceptions of this population within the Ontario court system remain primarily based in the medical model which views ID as a pathology. Perceived risk, need, and responsivity were similarly viewed within the biological framework of perceiving disability.

Specifically, the results show that cognitive differences are considered to be either an additional risk or need factor, depending on the severity of the offence and the youth's criminal history. This dependence on individual and crime related factors links to the blending of risk, need, and responsivity concepts as discussed in literature and by participants (i.e., Hannah-Moffat & Maurutto 2003). The blending of these concepts allows individual and crime-related information to shift emphasis from perceiving these factors collectively as either a need or risk. These factors are shown in theme 2 to similarly influence the perceptions of young offenders and appropriate sentencing options, whereby increased public safety concerns demand secure or structured sentencing. Within this legal context and a combined view about ID as highly medical and static, there is also a tendency to view ID as a barrier to successful rehabilitation. For example, most participants saw youth with ID as having an increased vulnerability to peer influence and therefore as having a need for external support systems. Further, participants described youth with ID as having poor judgement, problem solving skills, coping mechanisms, and emotion regulation.

The prominence of the medical model of perceiving disability lacks appreciation for the interaction between biological, psychological, and social factors that may

influence both offending behaviour and the ability to adhere to sentencing dispositions for this population. This may allow persons with disabilities to be perceived and sentenced as a cohesive group who share similar limitations. A lack of appreciation for these factors presents a major concern for the implementation of the ‘different but equal’ philosophy and has been previously mentioned by disability advocates (see Sabatello, 2005). For instance, differences in the developmental trajectory of ‘problem behaviours’ (see De Ruiter et al., 2007) across the severity or type of disability (see Dekker et al., 2002) or in relation to particular environmental or social barriers faced by an individual (see Shogren et al, 2010; Bierbaum et al., 2005) would suggest the need for very specialized treatment amongst individuals with ID. Unfortunately, misconceptions about ID were shown to permeate all other themes within this study leading to shifts in emphasis between YCJA sentencing goals, sentencing trends and experiences within the courthouse, discretionary use of external resources, and how failure or success within rehabilitative programming or in adherence to sentencing dispositions are conceptualized.

Within the framework of the medical model, interviewees as reflected in both themes 2 and 4 acknowledged an existing conflict between addressing individual needs and concern for community safety within Ontario courts when sentencing this population. This conflict was documented by Traynor (2002) in the mental health field who proposed a tension between “providing a discount in sentence on the basis that the mentally disordered offender is less culpable, and increasing the sentence on the basis that the offender has little control over his or her actions and may be a continuing threat to society” (para. 15).

Theme 2 specifically answers the second research question by addressing how the current perceptions of risk, need, and responsibility associated with ID shift emphasis between YCJA sentencing goals. Where an ID is present, the risk, need, and responsibility issues are compounded with other case specific information (i.e., offence history and type). Most participants commented on the challenges that the presence of an ID creates for the full application of the YCJA principles. Cognitive differences were discussed as making it difficult or impossible to deter youth with ID, hold them accountable, or craft meaningful sentences. Within the context of the YCJA, which promotes early intervention and the least restrictive sentences for young offenders, rehabilitation is given a heightened emphasis when working with young offenders. In combination with the notion of reduced culpability for offenders with ID, the legal context makes it easier to justify rehabilitation and non-custodial penalties through the assumptions about the root of disability, particularly in less serious criminal cases. Where individual and crime-related factors increase the concern for public safety, cognitive differences were more likely to be associated with ID and considered an additional risk factor but were not necessarily directly connected to more structured sentencing by participants.

Theme 4, which addresses research questions 3, examines current sentencing trends amid the inherent challenge of dually addressing the heightened needs and risks of this population, found both differential treatment of this population in the system and flawed justifications behind such treatment. In balancing these concepts, the results demonstrate specific differences in sentencing trends and service allocation for youth with ID in Ontario, across offence type and disability.

For first time offenders or where a minor crime is present, the results suggest that youth with ID may receive more lenient sentencing aimed at decreasing the negative effects of exposure to the justice system or a criminal record. This coincides with research looking at adult populations with ID (see Cockram, 2005) where sentencing trends may include increased rates of charge withdrawal, diversion referrals, or the use of warnings. Diversion programs are typically rehabilitative for all youth given the goals of the YCJA, but may look different for youth with ID. Results suggest that these programs are tailored to individual needs and for youth with ID may include shorter diversionary periods, fewer conditions, or an increase in supervision.

Further research is required to address how more serious offenders or offences committed by youth with ID are being addressed by the YCJA's focus on rehabilitative sentencing. This study did not find direct links between ID and longer or more structured sentencing for more serious crimes, at least within the limits of interviews with professionals, as indicated in past research with adult populations (see Cockram, 2005). However, the general misunderstanding of ID presented in this study along with commentary regarding their influence on YCJA sentencing goals raises concern for the similar treatment of Ontario's young offenders. Emphasis on ID as a static factor, overlooking how dynamic factors contribute to offending behaviour, may result in an over prediction of risk and lead to disproportionate interventions in some cases.

The importance of properly identifying risk and need is supported by numerous studies that link proportionate interventions via the proper allocation of services and supervision to positive intervention outcome (Andrews, Bonta, & Hoge, 1990). Over-

intervening in the lives of offenders has been shown to have a negative influence and contribute to a cyclical relationship with the justice system (see Gendreau et al., 2000).

For offenders who have committed offences that are relatively moderate in severity and who are not eligible for more lenient responses as outlined above (i.e., diversion/extrajudicial measures), the case study results suggest that differential treatment may be reserved for those offenders whose disability is directly linked to their offence. The rationale behind the distinction is that tailored sentences should reflect the motivation or cause behind offending behaviour or the culpability of the offender. Where a mental health condition or ID may influence or cause criminal behaviour (i.e., impulse control issues), participants suggested that minor adjustments in the sentence type or length may be made. In these cases, youth may receive a conditional discharge in place of a probation order or a shortened custodial sentence. However, this type of tailored sentence was discussed by only a few participants and was not proposed as a common practice or sentencing trend suggesting similar treatment for ‘middle of the road’ offenders both with and without ID’s. When implemented, this type of tailored sentencing appreciates the importance of culpability in determining the severity of a crime and service allocation. It neglects however, the importance of appreciating individual differences essential for ensuring meaningful consequences and rehabilitative-tailored sentencing.

While yet to be extended to youth with ID, appreciation of individual differences for the purpose of tailoring probationary conditions has become commonplace amongst other offender populations. The results suggest that the courts have an interest in tailoring probation conditions for young offenders in such a way that holds them accountable

while not unnecessarily setting them up to breach. While participants identified barriers that individuals with ID may face when complying with sentencing dispositions, the results of the case study show that youth with ID are unlikely to have their unique needs similarly appreciated or taken into consideration when crafting probation conditions, particularly when their disability is not directly connected to the offence. In some cases this may increase the incidence of administration of justice breaches which heavily influence the use of custodial sentences (Department of Justice, 2013).

Within the Ontario landscape, sentencing trends are further impacted by both the discretionary use of external resources and the regional discrepancies in resources available to tailor responses for youth with ID's across Ontario as discussed in theme 3 and 5. Theme 3 suggests that external reports and assessments (PSR's, Psychological Assessments, NCR/Fitness Tests) are used sparingly to inform sentencing for youth with ID. Specifically, participants reported feeling obligated to use discretion when requesting the use of these tools as they have the potential to highlight individual cognitive differences that are perceived to increase the likelihood of recidivism, thus impacting sentencing. Subsequently, these tools are most commonly used in more serious cases where a custodial sentence could be imposed and public safety is a greater concern. The proposed implication is that perceptions based in the medical model of perceiving disability may be more strongly felt by serious offenders with ID. The discretionary use of these tools with respect to this concern and its impact on sentencing may create disproportionate sentencing amongst serious offenders with ID.

Jurisdictional resources from mental health court availability, alternative custody facilities, and mental health diversion practices create further sentencing disparities

amongst youth with ID across Ontario. Mental health courts are discussed both within the current study and relevant literature as providing unique opportunities to address the needs of youth with ID or other additional concerns and to reduce recidivism (see McNiel & Binder, 2007). Unfortunately, the prevalence of ID amongst offenders in rural centers does not necessitate or qualify for the use of funding to run specialized courts in these regions. Mental health diversion referral practices create further disparities in the treatment of youth with ID. Most notably, this study points to large discrepancies across Ontario in diversion referrals for assault cases.

The outcome of such discrepancies suggests that youth with ID who share commonalities and who commit similar offences will receive different sentences within Ontario. This is in conflict with section 38.2.b of the YCJA (2002) which reads “the sentence must be similar to the sentences imposed in the region on similar young persons’ found guilty of the same offence committed in similar circumstances.” This is not to suggest that all assault cases should either be diverted or not diverted, but that Ontario should aim to provide the best treatment for all youth with ID. Similar sentencing patterns would reflect the availability of valuable services across the province providing all youth the same benefits under the law.

By extension, Theme 5 positioned limits in assessment and program accessibility alongside program funding limitations in the community, custody facilities, and the courthouse as preventing tailored sentencing and creating anti-therapeutic environments. For example, lack of program accessibility which results in long wait lists was described as diminishing youth engagement within these programs. The Mental Health Commission of Canada (2013) specifically suggests that “mental wellbeing” should be promoted

through resource accessibility and knowledge exchange that gives people the tools to “recognize the signs and symptoms of mental health problems, giving them increased awareness and reduced stigma around mental illness” (p.17) This, the Commission asserts, is “essential for building a person-centred, recovery-oriented and culturally safe mental health system in Canada” (Mental Health Commission of Canada, 2013, p.31)

Taken together, themes 1 to 5 provide a detailed examination of how the predominate medical model of perceiving disability is integrated within the legal framework of the YCJA during sentencing. These themes suggest that all offenders with ID may face barriers within the Ontario justice system, with particular differences based on their offence, criminal history, disability, and location. These barriers may contribute to future offending behaviour through a lack of court and community resources to adequately identify and address the needs of this population. However, particular attention should be paid to how these limitations in both the community and courthouses interact with current disability perceptions. Theme 5 suggests that in a roundabout way, limited availability of education resources and services has created an environment where sentencing practices based on uniformed conceptualizations reinforce those very beliefs. In particular, a few participants noted that unsuccessful rehabilitative attempts are often construed as arising from biological or static factors associated with ID, when in fact they are often linked to structural barriers. In doing so, inaccurate beliefs about youth with intellectual disabilities are perpetuated and contribute to sentencing practices that can have a negative or counterproductive influence.

Limitations and Future Research

Quantitative data describing sentencing trends would contribute significantly to our knowledge in this research area. However, the barriers associated with the collection of this data inhibited its use in this particular study. These barriers include issues with identification and labelling, co-morbidity of disabilities/mental health issues, and the vulnerability of this population as associated with their perceived status in society (Jones, 2007; Mallett, 2009). Current charging and sentencing practices further compound these issues as a youth's criminal history is not always easily accessible or traceable. Specifically, a young offender with an ID may come into contact with the law numerous times prior to being formally charged and processed through the system (Jones, 2007). In most cases, these records would not be accessible making it challenging to compare first time offenders to repeat offenders, which is necessary as these populations are conceptualized independently and treated differently during sentencing. To fully address the proposed research questions, these feasibility issues, from initial contact through to sentencing, were considered during the interview process. Results outlined informal practices that assist the courts in dealing with offenders and identified areas for improvement within the system such as identification programs. Future research triangulating data or including any combination of the following would contribute substantially to this area of research and the understanding of how to best address the needs of these youth: interviews with judges, prosecutors, probation officers, police, and young offenders with ID or probation/court records (crown briefs, dispositions), and open/closed custody studies on the prevalence of ID amongst incarcerated youth. Future research would benefit from including contextual factors such as public attitudes,

resource availability, age, gender, and ethnicity across different types of disability or co-morbid disabilities, in their analysis.

Due to time constraints and issues surrounding research approval through probation offices and the Ministry of the Attorney General, crown attorneys, presiding judges, probation officers, and young offenders with intellectual disabilities were not included in this sample. Exploring the perceptions and experiences of these individuals would add valuable knowledge and depth to this research area. Young offenders with ID (and caregivers if applicable) would offer a unique dialogue regarding their experiences in the justice system. In particular, these youth would add to knowledge about the barriers faced in complying with sentencing dispositions and whether the outcome or influence of these dispositions are in line with YCJA principles, most notably meaningful and rehabilitative sentencing. Probation officers would offer valuable insight into how their discretion may influence youth with ID via administration of justice charges and how they refer or tailor their response to individual needs. Further, interviews with judges and prosecutors could highlight different perspectives in relation to appropriate sentencing options and the assessment of risk, needs, and responsivity factors for this population. Insight from Community Living Ontario personal or other community support services could add yet another layer of valuable knowledge to research in this area.

While exploring the perceptions of judges and prosecutors would add depth to this area of research, data collected from Defence Counsel and Mental Health Workers continue to contribute immensely to the understanding of this population's experience in the justice system. First, more lenient sentencing practices for minor charges and first time offenders with ID are supported by past research (see Cockram, 2005) and the

results of this study, within the limits of criminal justice professionals' perspectives. Additionally, given that defence counsel are responsible for addressing the needs of offenders, it is these professionals who would recommend sentencing or probation conditions that would be tailored to the individual needs of youth with ID. Further research in this area would benefit from distinguishing between different offences and incorporating sentencing recommendations of judges and prosecutors.

Conclusion

This research has contributed to our understanding of how youth with intellectual disabilities are conceptualized by lawyers and mental health workers, and provides us with a critical analysis of the extent to which the application of the YCJA is appropriate, proportionate, and just for this population specifically within the context of informal risk/need assessments, conceptualizations of their risks, needs and responsivity to programs, and sentences of probation. The results have identified specific ways in which the justice system can develop and best support youth with intellectual disabilities consistent with the stated goals of the YCJA. Specifically, this study builds on previous research that has highlighted the need for identification programs in all courthouses and for ongoing programming and workshops for professionals in this field and tailored community programming. In line with social theorists, a more nuanced perspective of disability and implications for programs and policy would be beneficial for addressing the bio-psycho-social factors that play a role in shaping the daily lives of individuals with ID.

More specifically, it is important that the courts extend consideration of individual and contextual factors in tailoring probation conditions to youth with ID. Educational resources for persons working with this population (judges, lawyers, mental health workers) structured both around general understanding and specific adaptations of the traditional probation order/conditions would prove beneficial in adhering to the YCJA sentencing goals and by offering youth with ID similar opportunities to succeed. It would be further beneficial to include specialized professional input regarding ID on sentencing matters for all offenders regardless of offence type. Currently, these resources appear to be saturated at the front and back ends of the justice system for use by the least and most serious offenders. As an extension, Watson (2004) proposes that “impairment and disablement are but a strand of a complexly constructed social identity” (p.117). “Age, gender, ethnicity, class, and sexuality among many others, are all of equal importance and can create differences between disabled people” (Watson, 2004, p. 117) and thus should be simultaneously considered.

Given that limited accessibility to programming/workshops have negatively impacted the understanding of what an ID is, how it impacts youth, the associated risk/needs, and the appreciation of social barriers, the successful implementation of the YCJA sentencing goals for youth with ID are at risk. This research stresses the importance of tailoring interventions to individual cognitive learning strategies and circumstances as to engage youth with ID in these services and promote positive change and reduced recidivism. By failing to accurately identify and account for individual differences and social barriers, sentencing practices may inhibit youth with ID from receiving meaningful rehabilitative sentences. In a cyclical fashion, uninformed beliefs

about this population allow for these failures to negatively impact perceptions of this population which can lead to and perpetuate counterproductive sentencing practices.

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Appendix A

Letter of Invitation

Title of Study: **Bridging the Legal Construction of Youth with Intellectual Disabilities to Sentencing under the YCJA**

Principle Student Investigator: Amanda Jones, Masters Student, Department of Child and Youth Studies, Brock University, Email: aj09wh@brocku.ca

Faculty Supervisor: Dr. Voula Marinos, Associate Professor, Department of Child and Youth Studies, Brock University, Email: vmarinos@brocku.ca

I, Amanda Jones, a Masters Student from the Department of Child and Youth Studies at Brock University, invite you to participate in a research project entitled: *Bridging the Legal Construction of Youth with Intellectual Disabilities to Sentencing under the YCJA*.

As a participant you will be asked to take part in a semi-structured interview at a place and time convenient to you. The expected duration of your interview will be approximately 1 hour. All information provided during the interview process is completely confidential, including any and all correspondence prior. Please note that public venues present more risks in terms of confidentiality as interviews may be overheard by bystanders. Participation in this study is voluntary. If you wish, you may decline to answer any questions or participate in any component of the study. Further, you may decide to withdraw from this study at any time and may do so without any penalty. It is important to note that the researcher will not be asking questions regarding individual youth or actual court cases. The interview will focus on individual experiences working with this population and the perceived risks and needs of youth with intellectual disabilities as they relate to sentencing. This will include questions pertaining to a hypothetical court case scenario and appropriate sentencing options.

There are no known or anticipated risks associated with your participation in this study. Alternatively, results may provide information about specific ways in which the justice system can develop and best support youth with intellectual disabilities consistent with the stated goals of the YCJA. This research may further support the need for ongoing programming or workshops for professionals in this field as our knowledge and understanding of intellectual disabilities advance through research.

If you have any pertinent questions about your rights as a research participant, please contact the Brock University Research Ethics Officer (905 688-5550 ext 3035, reb@brocku.ca).

Please email me if you are interested in participating or have any further questions.

Thank you.

Amanda Jones

Masters Student

Brock University

aj09wh@brocku.ca

Appendix B

Informed Consent Agreement

Project Title: Bridging the Legal Construction of Youth with Intellectual Disabilities to Sentencing under the YCJA

*Principal Investigator (PI): Voula Marinos, Associate Professor
Department of Child and Youth Studies
Brock University
Phone (905) 688-5550, ext. 3386; vmarinos@brocku.ca*

*Student Principal Investigator (SPI)
Amanda Jones
Masters of Art Candidate, Child and Youth Studies
Brock University
aj09wh@brocku.ca*

INVITATION

You are invited to participate in a study that involves research. The purpose of this study is to explore the experiences of youth with Intellectual Disabilities with the Justice System. Specifically, this research aims to study how the perceived needs, risks, and responsibility factors related to youth with Intellectual Disabilities are taken into consideration during youth sentencing.

WHAT'S INVOLVED

As a participant, you will be asked to take part in a semi-structured interview lasting approximately 1 hour. Interviews will focus on the above topic and include one hypothetical court case scenario to which you will be asked questions relating to sentencing. You will not be asked about specific individuals or court cases.

POTENTIAL BENEFITS AND RISKS

There are no known or anticipated risks, either physical or psychological, associated with your participation in this study. While there are no personal benefits, this research will enhance the understanding of how youth with intellectual disabilities are conceptualized and if the application of the YCJA is appropriate, proportionate, and just for this population. Results may provide information about specific ways in which the justice system can develop and best support youth with intellectual disabilities consistent with the stated goals of the YCJA. This research may further support the need for ongoing programming or workshops for professionals in this field as our knowledge and understanding of intellectual disabilities advance through research.

CONFIDENTIALITY

All formation provided during the interview process is completely confidential, including any and all correspondence prior. If you have chosen to conduct this interview in a public setting, please note that this poses some risks in terms of confidentiality as the interview may be overheard by bystanders. Your name, place of employment, or associated

organizations will not be identified individually in any written reports of this research, however, with your permission, anonymous quotations may be used. Please attempt to avoid the use of these identifiers during the interview process to protect you and affiliated places of employment. All audio recordings will be kept secure and separate from consent forms. Transcribed data will not include your name or affiliated courthouses/law firms/organizations.

Data collected during this study will be stored on one locked computer. After this paper is finished data will be stored on one disk in a locked cabinet in Dr. Voula Marinos office. After 5 years this data will be erased and deleted from the computer permanently. Consent forms will be kept separate in a locked cabinet in Dr. Voula Marinos office.

Access to this data will be restricted to the primary investigator and the principal student investigator named above.

VOLUNTARY PARTICIPATION

Participation in this study is voluntary. If you wish, you may decline to answer any questions or participate in any component of the study. Further, you may decide to withdraw from this study at any time and may do so without any penalty or loss of benefits to which you are entitled. If you choose to withdraw, both audio recording and transcribed data will be completely erased from the computer hard-drive and destroyed. Any anonymous quotes will also be removed from the current research draft. If you wish to withdraw your data subsequent to publication please contact the student principal investigator at aj09wh@brocku.ca prior to August 1st, 2013. Individual interview data cannot be withdrawn after the final draft has been submitted.

PUBLICATION OF RESULTS

Results of this study may be published in professional journals and presented at conferences. Feedback about this study will be available fall of 2013 and available via the Brock Libraries. Contact the Student Principal Investigator if you would like a copy emailed. If you require a copy of the study prior to publication please **contact the Student Principal Investigator at aj09wh@brocku.ca** prior to August 1, 2013.

CONTACT INFORMATION AND ETHICS CLEARANCE

If you have any questions about this study or require further information, please contact Dr. Voula Marinos or Amanda Jones using the contact information provided above. This study has been reviewed and received ethics clearance through the Research Ethics Board at Brock University [**File #: 12-244-MARINOS**]. If you have any comments or concerns about your rights as a research participant, please contact the Research Ethics Office at (905) 688-5550 Ext. 3035, reb@brocku.ca.

Thank you for your assistance in this project. Please keep a copy of this form for your records.

CONSENT FORM

I agree to participate in this study described above. I have made this decision based on the information I have read in the Information-Consent Letter. I have had the opportunity to receive any additional details I wanted about the study and understand that I may ask questions in the future. I understand that I may withdraw this consent at any time.

Name: _____

Signature: _____ Date: _____

Appendix C

Interview Questions

1. What is your current position and how long have you been involved in this work?
2. Hypothetical Case Scenarios: How would you sentence the following offender?

Case 1: A 15 year old boy plead guilty to the offence of assault. Although he is not particularly remorseful for the offence, he has plead guilty early in the process. The offence occurred at approximately 10pm Saturday night and the youth and co-accused were found to be intoxicated. This offence constitutes the third time this youth has been in trouble with the law. Previous offences have included theft and assault to which the youth received diversion and a sentence of 1 year probation, respectively. However, the previous sentence of probation had been completed successfully, without any breaches. This youth's school attendance is satisfactory. He lives at home with his parents and brother.

Half the respondents will be presented with the following scenario:

Case 2: A 15 year old boy plead guilty to the offence of assault. Although he is not particularly remorseful for the offence, he has plead guilty early in the process. The offence occurred at approximately 10pm Saturday night and the youth and co-accused were found to be intoxicated. This offence constitutes the third time this youth has been in trouble with the law. Previous offences have included theft and assault to which the youth received diversion and a sentence of 1 year probation, respectively. However, the previous sentence of probation had been completed successfully, without any breaches. He lives at home with his parents and brother. This youth's school attendance is satisfactory however reports from the school suggest that he has an identified moderate intellectual disability that affects his attention, memory, and language skills.

2a. What type of sentence would you deem most appropriate, a term of probation, community supervision, or incarceration? What would be an appropriate duration for this sentence?

On a scale of 1-5, with one representing no consideration and 5 representing complete dependence:

- i. What weight did you give to the offender's previous offense?
- ii. What weight did you give to the offence?
- iii. What weight did you give to the offender's age?
- iv. What weight did you give other factors (early plea, lack of remorse, school attendance, time of day)?

Case 2 only:

v. What weight did you give to the offenders ID?

vi. What weight did you give to the severity of the ID?

2b. What types of conditions would you deem most appropriate (community service, non-communication clauses, fines, prohibition of alcohol or drugs, curfew, or others).

On a scale of 1-5, with one representing no consideration and 5 representing complete dependence:

i. What weight did you give to the offender's previous offense?

ii. What weight did you give to the offence?

iii. What weight did you give to the offender's age?

iv. What weight did you give other factors (early plea, lack of remorse, school attendance, time of day)?

Case 2 only:

v. What weight did you give to the offenders ID?

vi. What weight did you give to the severity of the ID?

3. What is your interest in youth with Intellectual Disabilities and why have you decided to participate in this research?
4. What type of training or information have you personally sought or that has been provided to you in regards to Intellectual Disabilities? Has this been sufficient or would you like to see more training opportunities in your line or work?
5. In your opinion, what is an Intellectual Disability and what does it entail or mean for a youth who has and ID?
6. How are youth with intellectual disabilities first identified or their disabilities recognized in the criminal justice process (via defence counsel, crown attorney, self proclaimed, mental health worker, or a community worker)? When do you find out about a potential intellectual disability?
7. When a youth is identified as having or possibly having an intellectual disability, what information is usually obtained and discussed with you? (before or during the formal proceedings?)
8. Who is responsible for addressing the needs of these individual youth during the court process and at sentencing?
9. Is there information about the individual young person that is not discussed within the formal court proceedings? If so, what are some reasons why?
10. When or in what circumstances are mental health assessments requested?
11. When or in what circumstances is a mental health worker requested (when the youth does not already have one)?

12. What information do you require or attempt to obtain about an individual's intellectual disability before sentencing and why? What are the benefits and disadvantages to the young person if this information is presented formally?
13. In relation to youth recidivism or risk/needs assessment tools how do you define risk, needs, and responsivity factors?
14. Given how you have defined the above terms, what needs do you perceive this population (youth with ID) to have? Are these needs considered to be viable targets for treatment?
15. What risk factors do you perceive individuals with intellectual disabilities to pose in terms of recidivism? Are these risks considered to be stable and unchangeable?
16. How do these specific needs, risks and responsivity factors of a youth with ID influence principles of sentencing as outlined under the YCJA?
 - a. Do the perceived needs of this population shift emphasis towards either proportionality or accountability (rehabilitation and reintegration v. protection/security issues)?
 - b. Do the perceived risks of this population shift emphasis toward either proportionality or accountability (rehabilitation and reintegration v. protection/security issues)?
 - c. Do the perceived responsivity factors make it more or less challenging to fulfill the principles of accountability (meaningful consequences/rehabilitation) and proportionality (security issues/retributive)?
17. Given your experience, in general, are needs and risks independent of one another? What are your views on this?
18. Do you consider the needs or risks specific to this population during sentencing? Are both given equal consideration? If not, in what circumstances would a need turn into a risk? Please give examples.
19. In your experience, how are youth with intellectual disabilities treated in comparison to adults with ID? Are the risks and needs of this population dependent on age?
20. Are there any additional comments or questions you would like add?