The Law Society of British Columbia

Agenda

Benchers

Date: Saturday, October 16, 2021

Time: **7:30 am Buffet breakfast**
8:30 am - Call to order

Location: Harmony Ballroom at the Four Seasons Whistler
Zoom will be set-up for those attending virtually

Recording: ***Benchers, staff and guests should be aware that a digital audio recording is made at each Benchers meeting to ensure accurate record of proceedings. Any private chat messages sent will be visible in the transcript that is produced following the meeting.***

CONSENT AGENDA:

Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance & Board Relations prior to the meeting.

1	Minutes of September 24, 2021 meeting (regular session)	
2	Minutes of September 24, 2021 meeting (*in camera* session)	
3	2022 Fee Schedules	
4	Recommended Amendments to the *Code of Professional Conduct for British Columbia* Commentaries	
REPORTS		
5	President's Report	Dean Lawton, QC
6	CEO's Report	Don Avison, QC
7	Briefing by the Law Society's Member of the Federation Council	Pinder Cheema, QC
DISCUSSION/DECISION		
8	Mental Health Task Force: Recommendation on the Development of an Alternative Discipline Process	Brook Greenberg, QC
9	Lawyer Development Task Force: Recommendations Concerning Remuneration and Hours of Work for Articled Students	Steve McKoen, QC
10	Access to Justice Advisory Committee: Increasing Access to Non-Adversarial Resolution of Family Law Matters	Lisa Hamilton, QC

Agenda

UPDATES		
11	Report on Outstanding Hearing & Review Decisions (*Materials to be circulated at the meeting*)	Dean Lawton, QC
FOR INFORMATION		
12	Three Month Bencher Calendar – November 2021 to January 2022	
IN CAMERA		
13	Other Business	

The Law Society of British Columbia

Minutes

Benchers

Date: Friday, September 24, 2021

Present:
Dean P.J. Lawton, QC, President
Lisa Hamilton, QC, 1st Vice-President
Christopher McPherson, QC, 2nd Vice-President
Paul Barnett
Kim Carter
Pinder K. Cheema, QC
Jennifer Chow, QC
Barbara Cromarty
Cheryl S. D'Sa
Jeevyn Dhaliwal, QC
Lisa Dumbrell
Lisa Feinberg
Martin Finch, QC
Brook Greenberg, QC
Sasha Hobbs
Dr. Jan Lindsay
Jamie Maclaren, QC
Geoffrey McDonald
Steven McKoen, QC
Jacqueline McQueen, QC
Elizabeth J. Rowbotham
Mark Rushton
Thomas L. Spraggs
Michael Welsh, QC
Kevin B. Westell
Chelsea D. Wilson
Guangbin Yan
Gaynor C. Yeung
Heidi Zetzsche

Unable to Attend: Karen Snowshoe

Staff:
Don Avison, QC
Avalon Bourne
Shelley Braun
Barbara Buchanan, QC
Jennifer Chan
Lance Cooke
Natasha Dookie
Su Forbes, QC
Andrea Hilland
Kerryn Holt
Jeffrey Hoskins, QC
Arielle Jimenez
Jason Kuzminski
Andrea Langille
Michael Lucas, QC
Alison Luke
Claire Marchant
Tara McPhail
Jeanette McPhee
Cary Ann Moore
Doug Munro
Lesley Small
Michael Soltynski
Adam Whitcombe, QC
Vinnie Yuen

Guests:	Dom Bautista	Executive Director & Managing Editor, Law Courts Center
	Mark Benton, QC	CEO, Legal Aid BC
	Ian Burns	Digital Reporter, The Lawyer's Daily
	Harry Cayton	Advisor, Professional Regulation and Governance
	Richard Fyfe, QC	Deputy Attorney General of BC
	Jonathan G. Herman	CEO, Federation of Law Societies of Canada
	Clare Jennings	President, Canadian Bar Association, BC Branch
	Derek LaCroix, QC	Executive Director, Lawyers Assistance Program of BC
	Mark Meredith	Treasurer and Board Member, Mediate BC Society
	Caroline Nevin	CEO, Courthouse Libraries BC
	Josh Paterson	Executive Director, Law Foundation of BC
	Stephen Raby, QC	President, Federation of Law Societies of Canada
	Michèle Ross	President, BC Paralegal Association
	Linda Russell	CEO, Continuing Legal Education Society of BC
	Kerry Simmons, QC	Executive Director, Canadian Bar Association, BC Branch

OATH OF OFFICE

President Lawton administered the Oath of Office to new Bencher, Gaynor C. Yeung.

CONSENT AGENDA

1. Minutes of July 9, 2021, meeting (regular session)

The minutes of the meeting held on July 9, 2021 were approved unanimously and by consent as circulated.

2. Minutes of July 9, 2021, meeting (*in camera* session)

The minutes of the *In Camera* meeting held on July 9, 2021 were approved unanimously and by consent as circulated.

3. Rule 1-41: Election of Executive Committee

The following resolution was passed unanimously and by consent:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. Rule 1-41 (11) is rescinded and the following substituted:

(11) If, because of a tie vote or for any other reason, the Benchers fail to elect 4 members of the Executive Committee under subrule (1), or if a vacancy occurs on or before August 31 of any year, the Benchers or the appointed Benchers, as the case may be, must promptly hold an election to fill the vacancy.

(11.1) Despite subrule (3), when a tie vote causes an election under subrule (11) the candidates who were tied are the only candidates.

4. Rule 2-84: Presentation to Court on Call and Admission

The following resolution was passed unanimously and by consent:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. Rule 3-84 is amended as follows:

(a) by adding the following subrule:

(2.1) Despite subrule (2)

(a) a lawyer who has been called and admitted in another Canadian jurisdiction before taking the barristers' and solicitors' oath under subrule (2) (a) is permitted but not required to be presented in open court under subrule (2) (b), and
(b) the Executive Director may exempt a lawyer or a category of lawyers from the requirement to be presented in open court under subrule (2)(b).**;**

(b) by rescinding subrules (5) and (6) and substituting the following:

(5) The Executive Director must not renew a practising certificate issued under subrule (4) unless the lawyer has been presented in open court if required under this rule.

(6) Despite subrule (5)
(a) the Executive Director may renew a certificate issued under subrule (4) on or after September 1 of the same year as its expiry , and
(b) the Benchers may, by resolution, extend the time for a lawyer or a category of lawyers to be presented in open court.

5. Law Society Awards: Recognition, Selection, and Approval Process

The following resolution was passed unanimously and by consent:

BE IT RESOLVED THAT the approval of award recipients for the Equity, Diversity, and Inclusion Award; Excellence in Family Law Award; Award for Leadership in Legal Aid; the Pro Bono Award, and the Mark Andrews Excellence in Litigation Award be delegated from the Benchers to the Executive Committee.

6. BC Superior Courts Clerkship Program

The following recommended resolution was approved, in principle, unanimously and by consent:

BE IT RESOLVED that the Law Society Rules be amended to recognize that the completion of a judicial law clerkship fully satisfies the articling requirement for the purpose of admission to the bar.

The amendment has been referred to the Act and Rules Committee to develop rules to implement the recommendation, and to return the matter to the Benchers to approve the rule changes.

REPORTS

7. President's Report

Mr. Lawton began his report with an update on the Indigenous intercultural course, where he indicated that the course materials will be provided to a broader audience for input towards the end of September with a full launch planned for January 2022.

Mr. Lawton informed Benchers that the composition of the Indigenous Engagement in Regulatory Matters Task Force had been confirmed. The Task Force will be led by two co-chairs.

Mr. Lawton then spoke about the recent communications he had with Steve Raby, QC, President of the Federation of Law Societies, regarding the upcoming Federation Conference, which will no longer be held in-person. Mr. Lawton also spoke about recent communications he had with Justice Sheri Ann Donegan and Justice Mona Lynch of the International Association of Women Judges regarding the provision of a statement of support advocating for the protection of all members of the judiciary in Afghanistan. The Federation, in consultation with Canada's law societies, has issued a statement regarding this matter.

Mr. Lawton updated the Committee regarding consultations with Deputy Attorney General Richard Fyfe, QC regarding changes to the *Offence Act*, particularly in regard to requests to remove many of the requirements to appear in court in person, which would allow for virtual appearances. Mr. Lawton noted that the Law Society had also been asked by the provincial government to provide a response regarding possible amendments to the *Jury Act*.

The federal government recently passed legislation to make September 30 a federal statutory holiday called the National Day for Truth and Reconciliation. Mr. Lawton informed Benchers that the Law Society offices would be closed and staff have been encouraged to participate in this important day through reflection or education as related to truth and reconciliation.

Mr. Lawton then provided an update on call and admission ceremonies, noting that a return to in-person ceremonies is not yet possible due to the COVID-19 pandemic. Mr. Lawton reviewed with Benchers the rule amendments approved at the July Bencher meeting, which will provide the Law Society with some latitude in how to address the considerable backlog of students waiting to attend a call ceremony, while also ensuring that students are not penalized for not attending a call ceremony within a certain period of time.

Mr. Lawton concluded his report with a summary of his recent events and activities, including his continued involvement with the Council of Canadian Law Deans and the Federation joint working group, which is focused on creating more cohesion between law schools and the implementation of the Truth and Reconciliation Commission's calls to action; his recent

interview with Harry Cayton as part of Mr. Cayton's review of the Law Society's governance; and ongoing preparation for the Law Society's Annual General Meeting in October.

8. CEO's Report

Mr. Avison began his report with a status update on COVID-19 and Law Society operations, noting that the Law Society is currently looking into the development of hybrid workplace strategies.

Mr. Avison then spoke about the Indigenous intercultural course and thanked Benchers for their feedback regarding the program materials. Mr. Avison informed Benchers that the program is entering phase 2 of review, which will include providing the program to a number of organizations and individuals for input, while also making the program available to the profession with the caveat that the program is under review and has not yet been finalized, or made mandatory for the profession. The program will also be made available to Law Society staff with the intent of having all staff complete the program.

Mr. Avison updated Benchers on plans for the Bencher Retreat, which will include a working session on the Law Society's regulatory processes.

Mr. Avison then spoke about the Federation Fall Conference, which will focus on challenges to entry to practice.

Mr. Avison presented a progress report on the implementation of the Law Society's strategic plan, reviewing the status of each objective in detail. Mr. Avison noted that the next progress report would be provided at the December Bencher meeting, and would also be included within the new Bencher orientation materials for 2022. Benchers discussed the status of the strategic plan with some Benchers suggesting that further detail regarding categorization of priorities year by year could be helpful.

GUEST PRESENTATION

9. Update on the Federation of Law Societies of Canada

Mr. Lawton introduced Steve Raby, QC, President of the Federation of Law Societies of Canada, and Jonathan Herman, Chief Executive Officer of the Federation of Law Societies of Canada, and welcomed them to the meeting.

Mr. Raby spoke about the role of the Federation, as well as the relationship between the Federation and Canada's individual law societies, noting that the Federation's goal is to facilitate national conversation amongst the law societies. Mr. Raby thanked Benchers and Law Society staff for all their contributions and involvement with the Federation's committees and initiatives.

Mr. Raby updated Benchers on several of the Federation's current initiatives and priorities, including CanLII, anti-money laundering, the Model Code, the National Committee on Accreditation, and truth and reconciliation. Mr. Raby spoke about the Federation rules regarding money laundering, and the importance of collaboration between the Federation and the law societies regarding this matter.

Mr. Raby concluded his report by providing an overview of the Federation's fall conference, noting that the program was circulated to all law societies the day before the Bencher meeting. Mr. Raby encouraged all Benchers to attend the conference.

Mr. Herman spoke about the importance of the collaborative relationship between the Law Society and the Federation.

Benchers engaged in discussions regarding the formation of the Federation's national agenda and how regional initiatives become national initiatives. Mr. Raby noted that the consultation process for development of the Federation's strategic plan includes all the law societies so as to have a clear sense of what the priorities are across the country. The wellbeing of the profession was an area that came up during the consultation for the last strategic plan, and Mr. Raby spoke about the national wellness survey, which is being overseen by the Federation.

DECISION

10. 2022 Initiatives, Finances, and Fees

Ms. Hamilton introduced the item, followed by a presentation to Benchers on the proposed 2022 initiatives, finances, and fees delivered by Mr. Avison.

Mr. Avison began by informing Benchers that the Law Society will avoid a projected deficit for 2021 due to a higher number of lawyers, compensation savings, and continued savings in meetings and travel. He then highlighted some of the Law Society's key financial considerations for 2022, including a focus on strategic priorities and effective operations, ensuring the appropriate level of resources, and no increase to practice and indemnity fees. Mr. Avison reviewed expense highlights for 2022, including increased technology costs to support the digitization of the workplace, as well as an increase in external counsel fees in legal defence and Investigations, Monitoring, and Enforcement due to additional files in these areas and the special expertise required for certain files. He then reviewed the funding for external organizations, noting that the Federation fee will be reduced in 2022 as the Federation will use some net asset reserves to fund its operations for the next three years. Mr. Avison then provided an overview of the Lawyers Indemnity Fund (LIF), detailing the number of reports over the past three years and the average of claim payments, as well as net assets, revenue, and expenses.

Benchers discussed the COVID-related claims LIF had received over the past year, which have been primarily related to missed limitations. Benchers also discussed the education and training that LIF had been providing to the profession.

The following resolution was passed unanimously.

BE IT RESOLVED that:

- Effective January 1, 2022, the practice fee be set at $2,289.00, pursuant to section 23(1)(a) of the Legal Profession Act.

The following resolution was passed unanimously.

BE IT RESOLVED that:

- the indemnity fee for 2022 pursuant to section 30(3) of the Legal Profession Act be set at $1,800;
- the part-time indemnity fee for 2022 pursuant to Rule 3-40(2) be set at $900; and
- the indemnity surcharge for 2022 pursuant to Rule 3-44(2) be set at $1,000.

11. Indigenous Engagement in Regulatory Matters Task Force: Terms of Reference and Work Plan

Ms. Cheema reviewed with Benchers the Indigenous Engagement in Regulatory Matters Task Force's terms of reference and work plan, noting the revisions made to the terms of reference as a result of the Task Force's consultation with the Truth and Reconciliation Advisory Committee. Ms. Cheema noted that the Task Force is planning on providing its final recommendations to Benchers in September 2022.

A motion to approve the revised terms of reference was unanimously approved.

DISCUSSION

12. Mental Health Task Force: Recommendation on the Development of an Alternative Discipline Process

Mr. Greenberg reviewed with Benchers the recommendations from the Mental Health Task Force regarding the implementation of an alternative discipline process no later than September 2022, to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The alternative discipline process

would begin with a pilot project, followed by an interim and final review of the pilot project in 2023 and 2025 respectively, at which point the matter would return to Benchers for a final determination as to whether to establish the alternative discipline process as a permanent regulatory program.

Benchers discussed the different types of behaviour that would be eligible for the alternative discipline process. Mr. Greenberg noted that there would be different categories for exclusions based on the seriousness of the conduct. He indicated that disbarment, misconduct leading to disbarment or a lengthy suspension, or misappropriation of funds would not be eligible for the alternative discipline process.

Benchers discussed what would constitute a mental health matter, and whether or not those lawyers suffering from debilitating stress or anxiety would be eligible for the alternative discipline process. Benchers also discussed what requirements would be in place in terms of treatment or counselling as a component of the alternative process.

Benchers discussed the importance of addressing mental health issues early in proceedings and training for Law Society counsel and staff to ensure that there is understanding of mental health issues.

Benchers discussed the decision-making authority in determining who would be eligible for the alternative discipline process. Some Benchers noted the importance of decisions needing to be made quickly, and Mr. Greenberg pointed out that there are other matters in the discipline process that are overseen by the Executive Director, so it made sense to have the Executive Director also oversee the eligibility for the alternative discipline process.

Benchers discussed the input of the complainant in determining whether a respondent should go through the alternative discipline process. Mr. Greenberg noted that the proposed process was modeled after complainant involvement within a conduct report, and that the complainant would be one of the factors in determining whether the alternative process was appropriate.

The report was on the agenda for discussion and will be on the agenda for the October Bencher meeting.

13. Lawyer Development Task Force: Recommendations Concerning Remuneration and Hours of Work for Articled Students

Mr. McKoen reviewed with Benchers the recommendations from the Lawyer Development Task Force regarding remuneration and hours of work for articled students. In particular, the Task Force recommends that the Benchers endorse, in principle, the Law Society establishing limits on the number of hours of work during articles, with limited exceptions; and that the Benchers

endorse, in principle, the Law Society establishing minimum levels of financial compensation during articles, with limited exceptions. Mr. McKoen noted that the Task Force also recommends that the standards included in the Task Force's report not be implemented until the Law Society has established at least one alternative to articling, through which candidates' ability to fulfill the experiential training portion of the licensing process will no longer entirely be dependent on the availability of articles.

Mr. Maclaren proposed two additional recommendations for consideration; the first relating to the development of an alternative pathway to licensing where the Law Society would accept a period of nine months of experiential learning at an approved clinical law program (inside or outside of law school) as an alternative to articling, and the second that the Law Society establish an articles registry.

Benchers discussed timing regarding recommendations for alternative pathways for licensing. Mr. McKoen noted that the Task Force was engaging in discussions with BC's law schools regarding adding experiential learning to programs. Benchers also discussed the need for a well-formed definition of what experiential training should accomplish. Mr. McKoen noted that the Task Force had approached Jordon Furlong to help with establishing criteria that an experiential learning program should meet, which could be used as a measurement for review.

Benchers discussed the relationship between articling students and their law firm/principle and how best to address any issues of exploitation that may exist. Benchers discussed the challenges in acquiring feedback and data as the best sources to date are the students, who are generally reluctant to provide information until their articles are complete. Benchers also discussed the importance of having standards and training for law firms and/or principals. Mr. McKoen noted that the Task Force is considering a certification program for principals with an alternate complaints process for students.

Benchers discussed challenges facing law firms and principals in accommodating the number of students seeking articles, as well as possible funding options for communities that may struggle to meet the proposed minimum salary requirements for students. Mr. McKoen noted that an option could be having several principals take on a group of students with the costs shared amongst the principals.

Benchers discussed the role of the Law Society and law schools in determining the formal learning requirements for call in BC.

The report was on the agenda for discussion and will be on the agenda for the October Bencher meeting.

14. Access to Justice Advisory Committee: Increasing Access to Non- Adversarial Resolution of Family Law Matters

Ms. Hamilton reviewed with Benchers the recommendations from the Access to Justice Advisory Committee regarding access to non-adversarial resolution of family law matters.

Benchers discussed the weight and impact of making decisions that affect children, as well as the importance of not oversimplifying the approach to dealing with family law matters. Some Benchers suggested additional information regarding Adverse Childhood Experiences (ACEs) would be helpful in determining a decision in regard to the Advisory Committee's recommendations. Ms. Hamilton noted additional supporting material could be provided to Benchers.

The report was on the agenda for discussion and will be on the agenda for the October Bencher meeting.

UPDATES

15. Bencher and Committee Mid-Year Evaluation Results

Ms. Dhaliwal briefed Benchers on the results of the mid-year Bencher and Committee surveys, noting low participation rates. Ms. Dhaliwal highlighted to Benchers the questions which elicited the most agreement, as well as those that elicited the least agreement, and also noted the questions regarding the effects of the COVID-19 pandemic on Benchers and Committee members.

Ms. Dhaliwal then reviewed next steps regarding the surveys, noting that the Governance Committee will be considering some changes to the evaluation process for 2022. In the meantime, the Governance Committee will be proposing that the process be changed for the 2021 End-of-Year Evaluations to encourage higher participation.

16. 2020 National Discipline Standards Report

Ms. Dookie reviewed the background of the development of the national discipline standards and presented the results of the 2020 implementation report. She also reviewed the performance of the Law Society of BC versus the national average, noting that the Law Society of BC consistently meets the standards beyond the national average.

17. Report on Outstanding Hearing & Review Decisions

President Lawton provided an update on outstanding hearing and review decisions and thanked Benchers for their efforts to get decisions in on time, as timeliness is important to the public and those involved in proceedings.

FOR INFORMATION

18. Minutes of September 9, 2021 Executive Committee Meeting (regular session)

There was no discussion on this item.

19. 2021 Annual General Meeting: Second Notice to the Profession

There was no discussion on this item.

20. Three Month Bencher Calendar – October to December 2021

There was no discussion on this item.

The Benchers then commenced the *In Camera* portion of the meeting.

AB
2021-09-24

The Law Society of British Columbia

Memo

To:	Benchers
From:	Jeffrey G. Hoskins, QC
Date:	October 4, 2021
Subject:	**2022 Fee Schedules**

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1. Before the end of each calendar year, the Benchers must revise the fee schedules, which appear as schedules to the Law Society Rules, to reflect changes taking effect on the following January 1.

2. Under section 23(1)(a) of the *Legal Profession Act*, the Benchers have approved a practice fee of $2,289 for 2022.

3. The indemnity fee was also approved at $1,800 for lawyers in full-time practice, $900 for those in part-time practice and a liability indemnity surcharge of $1,000. These represent no change from the 2021 fees.

4. I attach a suggested resolution that will give effect to the change.

JGH

Attachments: resolution

2022 FEE SCHEDULES

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules, effective January 1, 2022, as follows:

1. ***In Schedule 1, by striking "***$2,289.12***" at the end of item A 1 and substituting "***$2,289.00***";***

2. ***In Schedule 2, by revising the prorated figures in the columns headed "***Practice fee***" accordingly; and***

3. ***In the headings of schedules 1, 2 and 3, by striking the year "***2021***" and substituting "***2022***".***

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

The Law Society of British Columbia

Memo

To: Benchers

From: Ethics Committee

Date: September 15, 2021

Subject: Recommended Amendments to the *Code of Professional Conduct for British Columbia* Commentaries

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This memorandum presents the Ethics Committee's recommendations for amendments to the commentaries of the *Code of Professional Conduct for British Columbia* ("*BC Code*"). Very early in the year, the Ethics Committee received a mandate letter from President Dean Lawton, QC, requesting that the Committee make substantial progress on the following priority:

> *Examine the commentaries of the Code of Professional Conduct for B.C. and update them as necessary to reflect current case authorities and Law Society Rules, keeping in mind the role of the Federation of Law Societies of Canada in relation to the Model Code of Professional Conduct.*

The Committee commenced its review of the commentaries in January 2021 and has now completed it. In addition to reviewing each commentary for updating any contained references to the Law Society Rules, case law, or any other external information sources, the Committee's review extended to include a general review for punctuation, grammar, and diction. In the latter regard, the Committee has had a specific focus on gendered language, with an eye to improving the inclusivity reflected in the Law Society's core documents. Where the Committee has decided it was appropriate and there is no loss of significant meaning in the resulting text, instances of gendered language have been updated to non-binary language. Each external source reference has been checked for currency and accuracy and the amendments set out below address any required updating, in addition to addressing any noted needs to correct punctuation and grammar.

Many of the recommended changes set out below are clerical in nature. Although the Committee views the gendered language aspect of the review as important, it does not view the extent of the changes recommended here as controversial. The significant intended meaning of the provisions has been preserved. Most pronoun references to specific individuals, which are not known to be inaccurate, are unchanged; as are contained direct quotations from case authorities and other authoritative materials. For example, Appendix A references to the text of the *Rules of Court*, the *Evidence Act*, and the *Canada Evidence Act* have been preserved for accuracy for the time being, while it is anticipated that the similar reviews of those source materials by the relevant originating

authorities are likely to prompt at least some further revision upon a future review of the *BC Code* commentaries.

Further, the Committee observes that reviews such as the one leading to the amendments recommended below are periodically necessary, as the *BC Code* continues to evolve and the Law Society attends on an ongoing basis to relevant issues of law, ethics, and professional responsibility. It may be that future work on the *BC Code* will include viewing its provisions through an indigenous lens, as part of the overall effort to have and maintain a code of conduct that provides lawyers with helpful guidance and underpins the exercising of appropriate disciplinary authority.

Recommendation

The Ethics Committee recommends that the Benchers adopt the amendments to the *Code of Professional Conduct for British Columbia* commentaries reflected in the red-lined version of the provisions presented below.

Recommended changes to the existing text

Rule 2.2-1

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If ~~a~~ client~~s~~ ~~has~~ have any doubt about ~~his or her~~their lawyer~~s~~'~~s~~ trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

Rule 3.1-2

Commentary

[13] The lawyer should refrain from conduct that may interfere with or compromise ~~his or her~~ the lawyer's capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

Rule 3.2-1

Commentary

[4] A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a

duty to so inform the client, so that the client can make an informed choice about ~~his or her~~the client's options, such as whether to retain new counsel.

Rule 3.2-7

Commentary

[3] ~~Before accepting a retainer, or during a retainer, i~~If ~~a~~ lawyers ~~has~~ have suspicions or doubts about whether ~~he or she~~they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

Rule 3.2-8

Commentary

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, ~~when he or she~~ upon learn~~s~~ing that the organization has acted, is acting, or proposes to act in a way that is dishonest, criminal or fraudulent. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (section 3.3).

Commentary

[4] In considering ~~his or her~~a lawyer's responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

Commentary

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter "up the ladder" of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer's advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal

means resigning from ~~his or her~~the lawyer's position or relationship with the organization and not simply withdrawing from acting in the particular matter.

Rule 3.2-9

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about ~~his or her~~the client's legal affairs and to ~~give~~ provide the lawyer with instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs ~~his or her~~the client's ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from ~~giving~~ providing instructions or entering into binding legal relationships.

Rule 3.4-1

Commentary

[6] The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil*, 2002 SCC 70 and *Strother v.~~,~~ 3464920 Canada Inc.*, 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.

Commentary

[8] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

…

(e) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning ~~his or her~~the client's affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by ~~his or her~~the lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(f) A lawyer or ~~his or her~~a lawyer's law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

Rule 3.4-2

Commentary

[7] The requirement that the lawyer reasonably believes that ~~he or she~~the lawyer is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Rule 3.4-18

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *Mac~~d~~Donald Estate* v. *Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

Rule 3.4-29

Commentary

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

Rule 3.7-1

Commentary

[6] When this Chapter requires a notification to clients, each client must receive a letter as soon as practicable after the effective date of the changes is determined, informing the client of the right to choose ~~his or her~~a lawyer.

Commentary

[7] It is preferable that this letter be sent jointly by the firm and any lawyers affected by the changes. However, in the absence of a joint announcement, the firm or any lawyers affected by the changes may send letters in substantially the form set out in a precedent letter on the Law Society website (see Practice Resources: Law Office Administration | The Law Society of British Columbia).

Commentary

[9] The right of a client to be informed of changes to a law firm and to choose ~~his or her~~a lawyer cannot be curtailed by any contractual or other arrangement.

Rule 5.1-2

Commentary

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also rules 3.2-5 (Threatening Criminal or Regulatory Proceedings) and 3.2-6 (Inducement for Withdrawal of Criminal or Regulatory Proceedings) and accompanying commentary.

Rule 5.1-6

Commentary

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and ~~t~~Trust ~~c~~Conditions).

Rule 5.5-6

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of ~~members of his or her~~the juror's family members.

Rule 6.1-1

Commentary

[1] A lawyer may permit a non-lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion. ~~A lawyer must limit the~~The number of non-lawyers that ~~he or she~~a lawyer supervises must be limited to ensure that there is sufficient time available for adequate supervision of each non-lawyer.

Rule 6.1-3

Commentary

[1] A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under ~~his or her~~the lawyer's supervision.

Rule 6.2-2

Commentary

[1] A principal or supervising lawyer is responsible for the actions of students acting under ~~his or her~~the principal or supervising lawyer's direction.

Rule 7.1-2

Commentary

[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise ~~him or her~~that person about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

Rule 7.2-7

Commentary

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by ~~closing his or her eyes to the obvious~~ignoring the obvious.

Rule 7.2-8

Commentary

[2] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of section 3.4 (Conflicts), and particularly rules 3.4-5 to 3.4-9. A lawyer must not represent that ~~he or she~~the lawyer acts for an employee of a client, unless the requirements of section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

Rule 7.2-11

Commentary

[3] The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer, after accepting a trust condition, to ignore or breach it ~~a trust condition he or she has accepted~~ on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

Rule 7.2-12

Commentary

[1] Unless funds are to be paid under an agreement that specifically requires another form of payment or payment by another person, a lawyer must not refuse to accept another lawyer's uncertified cheque for the funds. It is not improper for a lawyer, at ~~his or her~~that lawyer's own expense, to have another lawyer's cheque certified.

Appendix A

Commentary

[3] A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC *for use in BC*: See sections 59~~,~~and 63, ~~and related~~as well as sections 56 and 64 of the *Evidence Act*, RSBC 1996, c.124.

Commentary

[7] See *R.* v. *Schultz*, [1922] 2 WWR 582 (Sask. CA) in which the accused filled in and signed a declaration and left it on the desk of a commissioner for taking oaths, later meeting the commissioner outside and asking him to complete it. The court held that it was not a solemn declaration within the meaning of the *Canada Evidence Act*, stating that: "The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was 'declared before him' is not true. The essential requirement of the *Act* is not the signature of the declarant but his solemn declaration made before the commissioner~~.~~" (p. 584). Likewise, it has been held in the U.S. that the taking of an affidavit over the telephone is grounds for a charge of negligence and professional misconduct: *Bar Association of New York City* v. *Napolis* (1915), 155 N.Y. Sup. 416 (N.Y. Sup. Ct. App. Div.). In B.C., the conduct of a lawyer who affixed ~~his~~ the lawyer's name to the jurat of the signed affidavit without ever having seen the deponent constituted professional misconduct: Law Society *Discipline Case Digest* 83/14.

Commentary

[8] The commissioner should be satisfied ~~that~~ of the deponent's identity ~~is who the deponent represents himself or herself to be~~. Where the commissioner does not know the deponent personally, identification should be inspected and/or appropriate introductions should be obtained.

Commentary

[10] It is also important that the deponent understands the significance of the oath or declaration ~~he or she is proposing to take~~to be taken. See *King* v. *Phillips* (1908), 14 CCC 239 (B.C. Co. Ct.); *R.* v. *Nichols*, [1975] 5 WWR 600 (Alta SC); and *Owen* v. *Yorke*, (6 December, 1984), Vancouver A843177 (BCSC).

Commentary

[12] ~~The British Columbia Law Reform Commission has raised the question of whether an affidavit may properly be created by solemn affirmation under provincial law. For this reason, in cases where a deponent does not want to swear an affidavit, it may be prudent to create the affidavit by solemn declaration rather than by solemn affirmation. See Appendix B to Law Reform Commission of British Columbia, *Report on Affidavits: Alternatives to Oaths* LRC 115 (1990).~~

In cases where a deponent does not want to swear an affidavit by oath, an affidavit can be created by solemn affirmation. See section 20 of the *Evidence Act*, R.S.B.C. 1996, c. 124.

Commentary

[14] Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, defines an affidavit or oath as follows:

"affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm~~;~~.

Commentary

[17] Swearing to an affidavit exhibits that are not in existence can amount to professional misconduct: *LSBC v. Foo*, *supra*.

Commentary

[20] A deponent unable to sign an affidavit may place ~~his or her~~the deponent's mark on it: *Rules of Court*, Rule 22-2(4)(b)(ii). An affidavit by a person who could not make any mark at all was accepted by the court in *R.* v. *Holloway* (1901), 65 JP 712 (Magistrates Ct.).

Appendix B

Commentary

[2] Designated paralegals are permitted to represent a client at family law mediations in circumstances the supervising lawyer deems appropriate. However, family law mediations

present unique challenges and before permitting a paralegal to represent a client in such processes the supervising lawyer must:

(a) determine whether the designated paralegal possesses the necessary skill and knowledge to act in the matter (consistent with the general obligation for determining whether to delegate work to the designated paralegal);

(b) ensure that there is no prohibition at law that prevents the designated paralegal from representing the client. For example, consider the restrictions in the Notice to Mediate Regulations (Family) regarding who has the right to accompany a party to a mediation;

(c) obtain the client's informed consent to the use of the designated paralegal.

Commentary

[4] In addition to considering the process in Appendix E of the BC Code, lawyers should consider the following before permitting a designated paralegal to represent a client at a family law mediation:

…

> Family law is a unique area of law in which many other areas of law intersect. In addition, clients are often dealing with considerable emotional stress and in some cases come from environments where family violence exists. It is an area of practice fraught with risks that both the lawyer and the designated paralegal need the skills and knowledge to identify and properly manage. Considerable skill is required to represent a client effectively at a family law mediation. A supervising lawyer should ensure the designated paralegal has received specific training in representing a client at a family law mediation. It is prudent to have the designated paralegal shadow the lawyer for several sessions and then have the lawyer shadow the designated paralegal for ~~his or her first~~the next few sessions.

Commentary

[6] Lawyers must review any settlement agreement arising from a family law mediation where their designated paralegal represented the client, and such agreements are provisional until such time as the lawyer has signed off on ~~it~~them. This provides an opportunity for review and an additional safeguard for the client. The lawyer would also be prudent to advise the client about this process as a standard part of the retainer agreement.

[End of memorandum]

The Law Society of British Columbia

CEO's Report to the Benchers

October 16, 2021

Prepared for: Benchers

Prepared by: Don Avison

DM3326162

1. 2021 Annual General Meeting

The annual general meeting (AGM) on October 5, 2021 was the third time we have provided for a period of advanced voting prior to the live meeting, and the second time we have conducted the meeting entirely virtually.

From a technical perspective, this virtual meeting went well. Fewer than 10 technical issues were reported to staff by attendees, and involved difficulty joining or speaking at the virtual meeting, or voting, due to human error (relevant emails were located in a spam folder or the attendee was using an outdated version of Zoom). No technical delays, errors or audio issues occurred with either the Zoom webinar platform or the Simply Voting website, other than the inevitable muting/unmuting challenges.

In terms of engagement, more members participated in the 2021 AGM than ever before and member participation continues to increase. Facilitating virtual engagement and voting in advance has created a more accessible and inclusive meeting format. What follows is data on participation levels over the last five years.

	Meeting Format	**Attendance**
2017	In-person with real-time online attendance (first year)	112 members and 5 students, with 14 members participating online
2018	In-person locations only	Interrupted AGM: 1,765 members and 7 students Continued AGM: 1,521 members and 22 students
2019	In-person locations with a period of advanced online voting	782 members and 1 student (56 members and 1 student in person, and 782 members voted in advance)
2020	Entirely virtually with a period of advanced online voting	3,155 members and students (248 members and students during the virtual meeting, and 2,877 members voted in advance)
2021	Entirely virtually with a period of advanced online voting	3,921 members and 5 students (350 members and 5 students during the virtual meeting, and 3,571 members voted in advance). **while these were the attendance numbers when the meeting was called to order, we actually had 453 members and 7 students attend over the course of the meeting*

We continue to refine the process each year and would welcome thoughts on further modifications that might be considered for the 2022 AGM.

With respect to the Resolutions considered at this year's meeting, I can advise we are already working on updating our Lawyer Directory page so lawyers will be able to indicate their preferred pronouns.

I also want to express my thanks to Avalon Bourne, Kerryn Holt and all the other staff members responsible for ensuring that the 2021 AGM advance voting, online comment platform and the virtual meeting itself were successfully delivered.

2. Indigenous Cultural Awareness Program – Phase Two Pilot

As Benchers know from the September 24 Bencher Meeting, the Law Society commenced our Phase Two pilot of the Indigenous Cultural Awareness program on September 28, 2021.

In addition to a number of individuals that we specifically invited to comment, we also opened up the course for members of the profession interested in participating in the pilot.

On the first day we had approximately 300 requests for access and, as of October 7, 2021, the number stands at over 600. This is a quite remarkable level of engagement and we greatly appreciate the time that members of the profession are taking to review the content and to offer input.

3. Bencher Elections

The nomination period for Bencher elections has now been extended to October 18, 2021. Nominations will close at 5:00pm on that date.

Bencher candidate election statements will be posted to the Law Society website.

Voting will take place from November 1 until November 15, 2021 at 5:00 pm. Vote counting will be done on November 16, 2021 with the results communicated to the profession later on the 16th.

4. COVID-19 Update

There have been a number of developments on this front and I will update Benchers at the October 16 meeting regarding the status of workplace and vaccination policies.

Don Avison, QC
Chief Executive Officer

The Law Society of British Columbia

Recommendation on the Development of an Alternative Discipline Process ("ADP")

For presentation at the September 24, 2021 Bencher meeting

Mental Health Task Force

Brook Greenberg, QC (Chair)
Phil Dwyer
Honourable Madam Justice Nitya Iyer
Derek LaCroix, QC
Christopher McPherson, QC
Kendra Milne
Michelle Stanford, QC (Vice Chair until March 2021)
Honourable Judge Patricia Stark (appointed December 2020)

Date: September 24, 2021

Prepared for:	Benchers
Prepared by:	Policy and Planning Staff on behalf of the Mental Health Task Force
Purpose:	For Decision in Principle

Table of Contents

Executive Summary

1. Many legal regulators, including the Law Society of British Columbia, have observed that mental health and substance use issues can be a contributing, though not necessarily causative, factor in some instances of lawyer misconduct. Traditional approaches to regulation, which predominantly focus on whether there has been a discipline violation and imposing appropriate sanctions, are limited in their ability to tailor the regulatory response in a manner that addresses these and other health issues. Additionally, it appears that many lawyers have apprehensions about sharing relevant health information within the Law Society's current regulatory framework.

2. As new data confirms high rates of mental health and substance use issues within the profession, establishing alternative regulatory processes to address situations where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice. Accordingly, the Mental Health Task Force has undertaken a detailed examination of how the Law Society's processes might be better equipped to promote the disclosure of relevant health information, integrate support and treatment into its regulatory response and ultimately improve outcomes for both the lawyer and the public.

3. Following this comprehensive review, and pursuant to the Task Force's terms of reference and the Law Society's strategic goal to revise its regulatory processes to support and promote mental and physical health, while upholding its public interest mandate, this report is dedicated to advising the Benchers with respect to the development of an alternative discipline process, or "ADP".

4. At its core, the proposed ADP is a voluntary, confidential process designed to customize the regulatory response in circumstances where a lawyer's conduct issue is linked to a health condition. In adopting an innovative and proactive approach to professional regulation, the ADP aims to support lawyers in addressing their underlying health issues, placing practitioners in a stronger position to meet their professional responsibilities. In this regard, the ADP creates the potential to realize significant public interest benefits by reducing the likelihood that problematic behaviour will escalate or reoccur.

5. Following a discussion of the elements of the proposed model, including the ADP's guiding principles and key design features, and a consideration of the policy issues engaged by creating an alternative discipline process in BC, the report concludes with a formal recommendation that the ADP is established as a three year pilot project, commencing in 2022.

Resolution

6. The Benchers adopt the recommendations of the Mental Health Task Force that:

   No later than September 2022, the Law Society will implement an alternative discipline process ("ADP") to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The ADP will comport with the purpose, principles, design features and policy rationale described in the Mental Health Task Force's September 2021 recommendation report and commence as a three year pilot project. Following an interim and final review of the pilot project in 2023 and 2025, respectively, the matter will return to the Benchers for a final determination as to whether to establish the ADP as a permanent regulatory program.

Background and Process

7. In recent years, a number of groundbreaking studies have documented concerning levels of mental health and substance use issues among lawyers, including rates of depression, anxiety and problematic alcohol use that greatly exceed that of the general population.[1] This emerging data indicates that these issues are widespread within the profession and can arise at any point in a lawyer's career, affecting seasoned practitioners, mid-career lawyers and new entrants to the profession alike.[2]

8. Recognition of the pervasiveness of these issues within the legal profession has led to a remarkable shift in awareness of, and discussions about, lawyer wellbeing. Outdated views that those experiencing mental health and substance use issues are

[1] In 2016, research conducted by the American Bar Association and the Hazelton Betty Ford clinic found that between one-fifth to one-third of US lawyers qualify as problem drinkers, and that approximately 28 percent and 19 percent are struggling with depression and anxiety, respectively. See P.R. Krill, R. Johnson & L. Albert, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys" (2016) 10 J. Addiction Med. 46 ("ABA Study"). The Federation of Law Societies is currently undertaking a national survey to explore the prevalence of mental health and substance use issues among Canadian lawyers, modelled on an earlier study commissioned by the Barreau du Québec.

[2] See for example the ABA Study *supra* note 1(lawyers in their first ten years of practice demonstrated the highest rates of problematic drinking with declining rates reported with the advancement in position and increasing age). See also J. Koltai, S. Schieman. & R. Dinovitzer, "The Status-Health Paradox: Organizational Context, Stress Exposure, and Well-Being in the Legal Profession" (2018) J. Health Soc. Behav. 59(1) at 20 (a finding that Canadian lawyers at large firms in the private sector, widely considered to be the most prestigious roles, were most likely to experience depressive symptoms); J. Anker and P.R. Krill, "Stress, drink, leave: An examination of gender-specific risk factors for mental health problems and attrition among licensed attorneys" (2021) PLoS ONE 16(5): e0250563 (a finding that there was heightened problematic drinking in female lawyers as compared to their male counterparts, and that women also had had elevated levels of anxiety, depression, and stress, highlighting a very real mental health disparity that exists within the legal profession).

blameworthy or simply not "up to" the rigours of practice have largely been displaced by evidence-based understandings of the complex physical, emotional, social and occupational causes and consequences of these issues. An increased focus on lawyer wellness by researchers, regulatory bodies, legal organizations and law schools, as well as the growing number of lawyers and judges that have stepped forward to share their personal stories, have begun to dismantle the stigma that can create significant barriers to speaking openly about these issues within the profession.

9. The Law Society of BC formally joined this conversation in 2018, with the establishment of the Mental Health Task Force. Over the course of following years, the Task Force has authored two reports that include 20 recommendations addressing the dual aspects of its mandate: to promote and protect the public interest by identifying ways to reduce the stigma of mental health issues, and to improve the manner in which the Law Society's regulatory approaches address these issues.[3]

10. The Task Force has dedicated its third report to one of its remaining responsibilities pursuant to its terms of reference, namely: to advise the Benchers with respect to the development of a "diversion" or other alternative discipline process.[4] This report, and the recommendation contained therein, reflects the Task Force's considerable efforts to advance this aspect of its mandate through a detailed examination of how the Law Society's regulatory approaches might be improved in circumstances where a health issue has contributed to lawyer misconduct.[5]

11. Work on developing a recommendation for the Benchers on alternatives to discipline began in 2019. As a preliminary step, the Task Force explored how conduct concerns associated with mental health or substance use issues are addressed within the Law Society's regulatory processes. In doing so, the Task Force undertook a detailed review of the existing rules and consulted widely with the various groups within the Professional Regulation department to improve its understanding of how mental health and substance issues manifest in the course of the traditional discipline process and the limitations of the current approaches.[6]

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[3] Mental Health Task Force First Interim Report (October 2018) and Second Interim Report (January 2020).

[4] Mental Health Task Force Terms of Reference.

[5] Misconduct refers broadly to an allegation, that if proven, would lead a hearing panel to find the lawyer had committed professional misconduct, conduct unbecoming a lawyer, a breach of the *Legal Profession Act* or the Law Society Rules or incompetent performance of duties undertaken in the capacity of a lawyer.

[6] The Professional Regulation Department is comprised of several groups: Intake and Early Resolution, Investigations, Practice Standards, Custodianships, Unauthorized Practice and Discipline.

12. Building on this foundational work, the Task Force shifted its focus to a consideration of potential improvements to the Law Society's existing processes, including establishing alternative approaches to discipline matters. Following a review of a wide range of rules, policy papers, reports and academic scholarship addressing the use of alternative discipline schemes in the medical, legal and criminal justice sectors, the Task Force concluded that establishing an alternative process for health-related conduct issues had sufficient merit to warrant the development of a recommendation to the Benchers.

13. A Task Force sub-committee was subsequently established to sketch out a framework for how such an alternative discipline process — or ADP— might operate in BC. Over the past year, the Task Force has refined this framework in consultation with the Professional Regulation and Policy and Planning departments, the results of which are presented to the Benchers in this recommendation report.

The Problem

14. Many legal regulators, including the Law Society of BC, have observed that mental health and substance use issues can be a contributing factor in some incidences of lawyer misconduct. Although there is not necessarily a causal relationship between mental health or substance use issues and misconduct, untreated health conditions can affect cognitive and other skills that are critical to a lawyer's ability to discharge their professional responsibilities.[7]

15. Traditional approaches to regulation, which predominantly focus on establishing whether there has been a discipline violation and imposing appropriate sanctions, provide limited opportunities to address health issues that have affected a lawyer's conduct. The Law Society does, however, have some latitude under Parts 3 and 4 of its rules to tailor its response in circumstances where a lawyer's health condition has contributed to problematic behaviour. This includes referrals to the Practice Standards program's remedial processes, establishing conditions or restrictions on practice or requirements for treatment and directing the lawyer to obtain clinical assessments and

[7] Cognitive deficits may result in the inability to pay attention, process information quickly, remember and recall information, respond to information quickly, think critically, plan, organize and solve problems and initiate speech. Neurocognitive deficits are common in a range of mood and substance use disorders. See for example, P. D. Harvey and C. R. Bowie "Cognition in severe mental illness: Schizophrenia, bipolar disorder, and depression" in M. Husain and J.M. Schott (eds.) Oxford Textbook of Cognitive Neurology and Dementia (2016) Oxford University Press, c. 41; C. Bruijnen et al. "Prevalence of cognitive impairment in patients with substance use disorder" (2019) Drug and Alcohol Rev. vol. 38(4) at 435.

assistance.[8] The Law Society may also consider the presence of a health issue as a mitigating factor when issuing discipline sanctions and in accommodating lawyers with a health-related disability.[9]

16. Although these measures can improve regulatory outcomes, generally speaking, very few lawyers disclose, and provide evidence in relation to, health conditions in the course of an investigation into a complaint. In the context of the high rates of mental health and substance use issues within the profession, the infrequency with which lawyers raise these issues in the Law Society's regulatory processes suggests that many practitioners have apprehensions about revealing that a health condition has adversely impacted on their ability to fulfill their professional responsibilities.[10]

17. What prevents lawyers from sharing information about mental health or substance use issues with the regulator? Research suggests that stigma and confidentiality concerns, including not wanting others to "find out", are identified as the primary barriers to disclosure.[11] These concerns are likely compounded by the public nature of the lawyer discipline system, including the possibility of information being divulged to a complainant or appearing in a hearing panel's reasons for judgment. Apprehensions may be further exacerbated by the current rules, which permit the Law Society to share health and other information across its regulatory programs,[12] as well as uncertainty as to who within the Law Society will have access to such information, for how long, and what use might be made of this information. Many lawyers may also be under the misconception that revealing a mental health or substance use

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[8] For example, a panel of three or more Benchers may order restrictions on practice or require a lawyer to undergo medical assessments, if satisfied that extraordinary action is necessary to protect the public. See Law Society Rules 3-10 and 3-11. Similarly, the Practice Standards Committee may make recommendations or orders with respect to conditions or limits on a lawyer's practice as well as various types of health assessments and assistance. See Law Society Rules 3-19 and 3-20. Restrictions on practice or a change to non-practising status may also be negotiated at the investigation stage and prior to the involvement of a Committee.

[9] In some cases, the Law Society will be required to accommodate a lawyer in order to meet its obligations under section 14 of the *Human Rights Code*, [RSBC 1996] c. 210.

[10] Even in instances where lawyers do volunteer information about mental health or substance use conditions, this often occurs at the final stages of the disciplinary process (e.g. as a defence at a hearing) when the matter becomes, from the lawyer's point of view, more serious, and from the Law Society's perspective, opportunities to take proactive steps to support the lawyer and protect the public interest have been missed.

[11] The two most common barriers to lawyers seeking assistance for substance use disorders are not wanting others to find out they need help and concerns regarding privacy or confidentiality. See ABA Study, *supra* note 1.

[12] For example, the Practice Standards Committee, which oversees a remedial program for lawyers with competency concerns, may undertake practice reviews and make recommendations with respect to restrictions on a lawyer's practice, psychological or psychiatric assessments, counselling, medical assistance or assessments. If a lawyer fails to comply with these recommendations, the Committee may issue mandatory orders in this regard. Under Rule 3-21, the Practice Standards Committee may, at any stage, refer to the Discipline Committee all or any part of a practice review report, a report on the manner in which the lawyer has (or has not) carried out or followed any recommendations or any orders made by the Committee or a report on non-compliance with such orders.

disorder will, in and of itself, result in an adverse disciplinary outcome, and that it is therefore preferable to conceal these issues.

18. Failure to provide the regulator with information about a relevant health condition can lead to suboptimal outcomes for the subject lawyer, the Law Society and the public. In addition to limiting the extent to which the Law Society can employ proactive, remedial measures to help address the health concern, it also reduces the lawyer's ability to take advantage of referrals to appropriate support and resources. Absent evidence supporting a connection between the conduct issue and a health concern, the Law Society must proceed as if the matter is simply a conduct or competence issue. This forecloses opportunities to customize the regulatory response to help address the underlying health issue and reduces the likelihood that the necessary steps are taken to ensure the problematic conduct does not reoccur or escalate.

19. There are a number of ways to address the problems identified. Promoting awareness of mental health and substance use issues within the profession, combating stigma and improving the quality of, and access to, support resources will continue to be critical. Over the past several years, the Benchers have approved a number of the Task Force's recommendations in this regard.

20. The Task Force is of the view, however, that educational initiatives are not, on their own, sufficient. In the wake of emerging data confirming high rates of mental health and substance use issues within the profession, additional steps must be taken to ensure the Law Society's regulatory processes are better equipped to promote the disclosure of health information and to integrate support and treatment into the regulatory response. On this basis, and as described in greater detail in the remainder of this report, the Task Force recommends that the Law Society establish an alternative discipline process through which eligible matters are referred from a complaint investigation into a program specifically designed to address circumstances in which there is a linkage between a lawyer's conduct issue and a health condition.

The Proposed Model

21. Recognizing that traditional disciplinary processes can be poorly suited to addressing conduct issues associated with a health condition, a number of sectors have established alternative processes that focus on remediation and rehabilitation rather than imposing discipline sanctions. Diversionary criminal justice programs, for example, have long provided an alternative to prosecution in cases where voluntary mental health treatment and support are deemed to be reasonable alternatives to

criminal justice sanctions.[13] Some self-regulating professions, including medicine and nursing, have also established alternatives to discipline to address misconduct linked to mental health or substance use issues.

22. The Task Force is aware of only one Canadian law society that has a formalized alternative discipline program.[14] However, legal regulators in the United States have utilized alternatives to discipline — often referred to as "diversion" programs — to address lawyer misconduct for some time. Although the design features of these programs vary, the voluntary nature of a subject lawyer's participation is a key feature. Additionally, to gain entry into the program, lawyers are generally required to meet a series of eligibility criteria, following which, they negotiate a contract with the regulator that sets the terms and conditions of their ongoing participation. Typically, a combination of rules and policies govern the operational aspects of the scheme. This includes referrals into the program, confidentiality assurances, the role of the complainant, the content of the diversion contract, the effect of the lawyer successfully fulfilling the terms of the contract as well as the consequences for breaching the agreement and costs associated with participating in the program.[15]

23. An examination of existing ADP schemes illustrates both the opportunities and complexities associated with creating alternative processes to deal with conduct matters linked to lawyers' health issues, as well as the diversity of current approaches.

24. In many jurisdictions, the manner in which alternative processes have been designed has resulted in low participation in, and completion of, diversionary programs. Features that have likely contributed to the limited success of existing schemes include: overly restrictive or narrow eligibility requirements; the use of orders (e.g. for an independent medical assessment) and undertakings (e.g. abstinence from alcohol use), a breach of which may lead to further disciplinary consequences and

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[13] See for example, British Columbia Prosecution Service, Crown Counsel Policy Manual "Alternatives to Prosecution - Adults" (retrieved September 5, 2021).

[14] Nova Scotia's Fitness to Practice Program is the only operational alternative discipline program for lawyers in Canada, and is specifically designed to address circumstances where a lawyer's ability to practise law has been substantially impaired by a physical, mental or emotional condition, disorder or addiction, pursuant to the process set out in Part 9 of the Nova Scotia Barristers' Regulations. The Benchers of the Law Society of Newfoundland and Labrador have approved, in principle, the development of an ADP-type program, but require legislative amendments prior to proceeding with implementation.

[15] There are currently over 30 ADP programs in operation in the United States. For a history of the development of alternatives to discipline in the United States see S. Saab Fortney, "The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms" (2014), St. Mary's Law Journal Symposium on Legal Ethics and Malpractice, Hofstra Univ. Legal Studies Research Paper No. 2014-01 at 10 ("Fortney").

result in more severe outcomes for the lawyer as compared to the matter being dealt with through the regular discipline process; and the unrestricted sharing of health information with the formal discipline stream should the lawyer be unsuccessful in completing the alternative measures. Additionally, a number of diversion programs conflate a conduct issue linked to mental health or substance use issues with a competence matter. This further deters participation given that most lawyers will seek to avoid having their competency challenged by the regulator on the basis of the existence of a health issue.

25. Based on this review, the Task Force concludes that there are certain design features that must be avoided, and conversely, those that ought to be included in developing an alternative process for health-related conduct issues. Additionally, as the breadth of existing schemes demonstrates, there is no one-size-fits-all model for ADP, and each program must be tailored to the particular regulatory context in which it operates. For this reason, and as outlined in further detail in the next section of this report, the Task Force has been careful to avoid replicating an existing scheme in favour of a more deliberate and innovative approach that ensures that the proposed program is optimally suited to BC's regulatory environment and maximizes the potential benefits to both participant lawyers and the public interest.

Purpose, goals and guiding principles

26. Clearly identifying the purpose and goals of, and guiding principles for, a process that provides an alternative to traditional discipline is an essential first step in engineering an effective program.

27. The purpose of developing an ADP is to provide the Law Society with an opportunity to address alleged misconduct outside of the formal discipline stream in circumstances in which a lawyer's health condition is a contributing factor. The goal of the process is to individualize the regulatory response — with a focus on support, treatment, practice interventions and other remedial measures — to address the underlying health condition, rather than simply imposing sanctions. If the health issue is successfully resolved or managed as a result of the lawyer's participation in the ADP, it is likely that the risk of the conduct reoccurring will be reduced. This, in turn, enhances the protection of the public.

28. The ability of the ADP to achieve these goals will depend on its design. Unless the program creates an environment in which lawyers are willing to share relevant health information and commit to taking the necessary steps to address their health condition, the ADP's potential public interest benefits will not be realized. On this

basis, the design of the proposed ADP is informed by the following four guiding principles:

Confidentiality: The ADP must overcome the barriers to the disclosure of health information that exist within the regular discipline processes. Lawyers will only choose to participate in the process if they are satisfied that confidentiality measures are firmly in place to govern the collection and use of health and other personal information. This is particularly important given the stigma surrounding mental health and substance use disorders. While protecting the confidentiality of this information is a key consideration, the ADP must also retain as much transparency as possible in the circumstances.

Voluntariness: Participation in the ADP will be contingent on the extent to which lawyers clearly understand the voluntary nature of the process. Lawyers are more likely to provide the Law Society with the necessary information and take the required steps to address their health and associated behavioural issues if informed consent permeates all stages of the program's design.

Without risk process: It is important for the success of the ADP that there is no risk that those lawyers that opt to participate in the program's remedial processes will be subject to a "worse" regulatory outcome than they would had they remained in the traditional discipline process. It is equally important, however, that the implementation of the ADP does not inhibit the Law Society's ability to protect the public interest. Consequently, a key feature the ADP — and one which appears to differentiate it from many existing diversion programs — is that there is no risk to either the lawyer or the Law Society if a lawyer is unable or unwilling to complete the alternative process. Sanctions will not be imposed for a failed attempt to take remedial action and the matter will simply be returned to the regular discipline process. Consequently, both the lawyer and the Law Society will be in the same position they would have been had the ADP never been attempted. The public interest will be served either by the successful completion of the ADP or the application of the regular discipline process.

Public interest: At all stages of the process, the ADP must be informed by the Law Society's statutory mandate, which requires both policy and operational decisions to be based, ultimately, on what is in the public interest.

Key design elements

29. The proposed ADP comprises four key stages that chart a lawyer's progression through the process, namely: (1) eligibility and intake (2) negotiating the terms of the consent agreement (3) approval of the consent agreement, and (4) fulfilling the terms of the consent agreement. The material that follows outlines each of these stages and describes the manner in which they comport with the program's purpose, goals and guiding principles.

Eligibility and intake

30. Lawyers will be informed about the ADP during a complaint investigation and provided with information about its objectives, eligibility requirements, confidentiality assurances and what the lawyer can expect if the matter is referred. Similarly, the potential for a lawyer's participation in the ADP will be added to the list of discipline outcomes complainants receive from the Law Society in the course of responding to a complaint.

31. To reinforce the ADP's independence from the Professional Regulation department's disciplinary and remedial programs — as discussed in more detail below — eligibility for the ADP should be determined before a citation has been issued and the Discipline Committee has become involved in the matter.

Threshold eligibility

32. To clearly establish the ADP as an *alternative* process, the program must distinguish itself from the Law Society's regular disciplinary stream and the manner in which it collects and utilizes health information. In the Task Force's view, this will require the ADP to be entirely separate from the Professional Regulation department's discipline processes and the Discipline Committee. Additionally, on the basis that the Practice Standards Committee's mandate is to address lawyer competence, any association between the Practice Standards program and the ADP risks reinforcing the stigmatizing and incorrect view that there is necessarily a causal relationship between mental health and substance use disorders and competency issues, and should therefore be avoided.[16] As such, establishing rules, policies and other operational

[16] The Practice Standards program creates a process for investigating a lawyer's practice if there are reasonable grounds to believe the lawyer is practising law in an incompetent manner, including recommending remedial programs and issuing orders that impose conditions or limitations on the lawyers practice. See section 27 of the *Legal Profession Act* and Division 2 of the Law Society Rules.

firewalls to maintain the independence of the ADP from the Law Society's other regulatory programs will be critical.

33. How might the Law Society assess whether a matter is suitable for an alternative to traditional disciplinary processes? A review of existing ADP schemes suggests that there is no standard approach to determining threshold eligibility for a referral into an alternative discipline process. In some jurisdictions, only those lawyers with a narrow set of health conditions (e.g. chemical dependency, mental health disorder) are eligible to participate. Other programs explicitly exclude certain conduct[17] or limit eligibility to matters that constitute "less serious misconduct."[18] Several schemes rely on very broad eligibility criteria, including a lawyer's need for personal assistance or circumstances where there are "reasonable concerns" about a lawyer's capacity.[19]

34. The Task Force is of the view that the public interest is best served by avoiding both an overly restrictive approach that has the potential to prematurely exclude matters that may benefit from the ADP, and an overly broad approach that may not provide the Law Society with the necessary discretion to determine that very serious allegations of misconduct are not appropriate for an alternative process.

35. Accordingly, the Task Force recommends that the following three factors govern the Executive Director's decision as to whether a matter is eligible for a referral to the ADP:

    (1) the lawyer's acknowledgement of the existence of a health issue that has contributed to the conduct issue(s);
    (2) the seriousness of the alleged conduct, including whether the conduct has resulted in, or is likely to result in, substantial harm to a client or another person; and
    (3) written consent from the lawyer to participate in the ADP.

36. Guidelines will be developed with respect to the application of the second factor, and will reflect that certain conduct is not appropriate for the ADP. For example, conduct that if proven would result in a reasonable prospect of disbarment — such as the misappropriation of trust funds — would not be eligible for the ADP. The guidance

[17] Many US diversion programs explicitly exclude certain types of conduct including misappropriation of trust funds, dishonesty, deceit, fraud or misrepresentation, conduct that constitutes a serious crime or conduct that results in substantial prejudice to a client or another person.

[18] See for example, Washington State Court Rules: Rules for Enforcement of Lawyer Conduct at 6.1.

[19] See for example, the Nova Scotia Barristers' Society's Fitness to Practice Program, which is governed by the Nova Scotia Barristers' Society Regulations 9.3.

may also identify the types of conduct that would only be considered for the ADP in exceptional circumstances.[20]

37. Adopting this principled and flexible approach when considering a matter's eligibility for ADP provides a level of consistency and transparency as to how determinations about entry into the ADP are made, and ensures that the subject lawyer consents to participation. At the same time, it provides the Law Society with the ability to assess a matter's suitability for the ADP on a case-by-case basis. [21] This is particularly important during the early years of the program, when there remains a level of uncertainty with respect to the types of conduct for which referrals to the ADP may be sought.

38. Threshold eligibility determinations also serve a gatekeeping function, providing a mechanism to ensure that matters are not automatically referred to the ADP when, from a public interest perspective, they are clearly not appropriate for an alternative process.

39. To ensure that the impact of the conduct on the complainant is considered at the threshold eligibility stage, the application of the second factor will be informed by information that is routinely collected from complainants during the initial investigation of a complaint, regardless of whether a matter is being considered for the ADP. Importantly, the Law Society's investigating lawyer will not inform the complainant that the subject lawyer is being considered for the ADP when seeking this information. Protecting the confidentiality of the lawyer's health status in this manner will reduce the likelihood that lawyers will be deterred from considering the ADP based on concerns that others will become aware of the existence of a potential health issue before their eligibility has been determined. At the same time, this approach is not expected to limit or detract from the information obtained by the Law Society during the investigation process with respect to the impact of the conduct on the complainant.

40. The complainant will be provided with notice if, following the application of the eligibility factors, a decision is made to refer the matter to the ADP. Additionally, as discussed in further detail later in this report, the impact of the lawyer's conduct on the complainant is specifically considered in subsequent stages of the alternative

[20] Outlining exemptions in the supporting guidelines is similar to the approach taken by the BC Prosecution Service in its alternative measures program. See *supra* note 13.

[21] For example, Nova Scotia's Fitness to Practice Program, which has been in operation for many years, has not established blanket exclusions on specific types of alleged misconduct.

discipline process, including an opportunity for the complainant to provide information to the Executive Director in this regard.

Provision of health information

41. Once threshold eligibility has been established and a lawyer is formally referred to the ADP, the matter will be assigned to a Law Society lawyer, referred to as the ADP counsel, who is responsible for working with the lawyer, and their counsel, if applicable, to craft the terms of the consent agreement.

42. Prior to commencing the negotiation of the terms of the consent agreement, the subject lawyer will be asked to provide the ADP counsel with health information verifying the existence of a health issue that has contributed to the conduct issue and that is sufficient to satisfy the Law Society that:

    a. a health issue likely contributed to the conduct issue(s);
    b. the lawyer could benefit from remedial initiatives; and
    c. it would be in the public interest for the lawyer to engage in such remedial initiatives.

43. Any health or other personal information that is obtained by the Law Society during the lawyer's participation in the ADP will be treated as confidential, and lawyers will be advised what use will be made of such information prior to providing it to the Law Society. Absent the lawyer's consent, this information will not be disclosed to the complainant, the lawyer's firm or the public,[22] nor will it be shared with, or used in, any concurrent or future Law Society proceedings except for the purpose of meeting the Law Society's legal obligations to accommodate the lawyer.[23]

44. If the lawyer does not provide the Law Society with the required health information, or the information provided does not support a linkage between the conduct at issue and a health condition, the matter will be referred back to the Professional Regulation department and proceed as if no referral to the ADP had been made.

45. The collection of health information at this stage in the ADP serves three purposes. First, it enables the Law Society to assess whether there is a relationship between the

[22] The Law Society Rules provide for the non-disclosure of confidential information in a number of other circumstances. See for example Rule 4-15(4) (pertaining to the confidentiality of conduct reviews) and Rule 3-23 (pertaining the confidentiality of Practice Standards Committee deliberations).

[23] If, for example, the lawyer was unsuccessful in fulfilling the terms of the consent agreement and the matter was returned to the regular discipline process, the Law Society may be required to take into account the lawyer's health condition to meet its duty to accommodate under BC's *Human Rights Code*. The use of this health information will be highly circumscribed and likely improve the regulatory outcome for the lawyer.

conduct that gave rise to the initial complaint and a health condition. Second, this information provides the Law Society with current, credible information about the lawyer's health status that will inform the next stage of the ADP, in which the terms of the consent agreement are negotiated.

46. Third, if the medical, clinical or other information indicates that it is reasonably likely that the lawyer's health condition will result in behaviour that may have an imminent, adverse impact on the public, the Law Society may be required to take immediate action. In such cases, the ADP counsel will seek the lawyer's consent to enter into an interim agreement, prior to negotiating and drafting the terms of the final consent agreement, to ensure the public is protected. Terms of the agreement will be guided by the information that is provided to the Law Society, and may include, for example, restrictions or conditions on practice until further information and treatment has been sought.

47. The Task Force regards the use of an interim agreement as preferable to requiring lawyers to enter into undertakings for a number of reasons. In addition to aligning with the principles of voluntariness and consent, interim agreements also eliminate the possibility of a lawyer being subject to disciplinary action (an outcome that the ADP is specifically designed to avoid) for a breach of an undertaking.[24] In contrast, failure to enter into, or fulfil the terms of, an interim consent agreement will not be associated with any disciplinary sanction, but will result in the matter being returned to the Professional Regulation department for further action, including any interim orders that are available through the regular discipline process. In this regard, all parties are in the same position they would have been in if the ADP did not exist.

Negotiating the terms of the consent agreement

48. Once a linkage is established between a health condition and the conduct issue, ADP counsel will work with the lawyer to negotiate the terms of the consent agreement that will govern the lawyer's ongoing participation in the alternative process. The goal of this stage of the ADP is to bring the lawyer and the Law Society together in a consent-based process to decide what remedial measures are required to support the lawyer in improving their health and meeting the expected standards of professional conduct.

49. The Task Force endorses a collaborative approach to drafting the agreement, rather than one in which the Law Society unilaterally proposes the terms. In addition to

[24] Under Rule 3-8(4) a complaint may be referred to the chair of the Discipline Committee if there are allegations that the lawyer has breached an undertaking given to the Law Society.

aligning with the ADP's overarching voluntary, consent-based approach, a cooperative and iterative process may result in lawyers suggesting additional or alternative terms, informed by their experiences of managing their health issue and their familiarity with their particular practice setting, and being more committed to actions that they, themselves, have proposed. Additionally, supports and treatments that are imposed rather than agreed to are significantly less likely to succeed or benefit the lawyer and the public interest.

50. Ultimately, the aim is to create a consent-based agreement that is tailored to the lawyer's individual health and practice circumstances. Terms may include a recommended treatment plan (e.g. participation in a rehabilitation program,[25] counselling, clinical assessments), medical monitoring and reporting requirements, practice restrictions (e.g. limits on practice, participation in mentorship programs or supervisory arrangements), restitutionary steps to mitigate loss or harm to the complainant or others resulting from the misconduct, an apology, or other corrective courses of action agreed to by the ADP counsel and the lawyer.

51. When proposing terms related to support and treatment, the Law Society must remain cognizant that its institutional expertise lies in the realm of professional regulation, not healthcare. Accordingly, prior to proposing or agreeing to terms related to the lawyer's health condition, it is expected that the ADP counsel will consult with the appropriate professionals. Additionally, ADP counsel should receive dedicated education and training in mental health first aid and substance use issues, to ensure they have a robust understanding of the types of health concerns that are anticipated to be addressed in the ADP and an enhanced level of understanding of the scope of available clinical information, diagnoses and treatments.

52. Additional terms that can be expected in every consent agreement include those that address the duration of the lawyer's participation in the alternative process; confidentiality and information-sharing; oversight of the fulfillment of, or amendment to, terms of the agreement; responsibility for reporting a breach of terms; the outcome of the lawyer's successful or unsuccessful completion of the ADP; and costs. Each agreement will also include a term that prohibits a lawyer from asserting delay or any other prejudice as the result of participation in the ADP if the matter is subsequently returned to the discipline stream.

[25] If the terms of the consent agreement include enrollment in treatment or support programs, secular options must be included among the range of options presented.

53. Neither the ADP counsel nor the subject lawyer are required to accept any given term and, if no agreement is reached, the matter will be returned to the Professional Regulation department in accordance with regular processes. If, however, the parties agree on terms, the matter advances to the next stage of the ADP, namely, the final approval of the consent agreement.

Approval of the consent agreement

54. To reinforce the objectivity and independence of the decision-making process, and to ensure the approval of the consent agreement is consistent with the standards of simplicity, fairness and expediency, the Task Force recommends that the final approval of the consent agreement is the responsibility of the Executive Director. This approach is expected to provide a more agile and timely process than is typically available through Committee decision making, and also avoids concerns about confidentiality and conflicts that may arise if the approval of the agreement were the responsibility of the Discipline or Practice Standards Committees, for example.

55. To improve transparency, it is proposed that the Executive Director's decision-making is guided by a series of factors, such as the nature and scope of the terms of the agreement, including specific action taken to protect the public; the nature and gravity of the alleged conduct; the impact of the conduct on the complainant or others; the lawyer's previous participation in the ADP, if any; the effect of the agreement on the administration of justice and the public's confidence in the integrity of the profession; whether participation in the ADP is likely to improve the lawyer's future professional conduct and accomplish the goals of the alternative discipline process; and the presence of aggravating or mitigating factors, such as whether the lawyer has acknowledged the misconduct and taken steps to redress the wrong.[26] The Executive Director's application of these factors will be supported by accompanying guidelines.

56. At this stage, it is also contemplated that the complainant will have an opportunity to provide a statement regarding the effect that the conduct has had on them, which will inform the Executive Director's consideration of this factor in the decision-making process and ensure that the complainant has a similar level of involvement as in current discipline processes, such as a conduct review.

57. To assist the Executive Director in their decision-making, limited consultations with health and other professionals may be necessary to determine whether, from a

[26] It is expected that in considering the approval of the consent agreement, the Executive Director will also be provided with submissions on behalf of the ADP counsel and the subject lawyer that addresses these types of factors.

medical and clinical perspective and in relation to the lawyer's practice environment, the proposed terms of the consent agreement are appropriate. To maintain the confidentiality of the process, the subject lawyer's identity will not be revealed to those from whom expertise is sought.

58. To provide some level of Bencher oversight of the process, it is proposed that the Executive Director provides the Executive Committee with a summary of their decision to approve or not approve a consent agreement, including the manner in which the various factors were considered as part of that determination. Again, to preserve the confidentiality of the ADP, the lawyer will not be identified in the course of this reporting function.

59. If the Executive Director approves the agreement, the parties become subject to its terms for the duration of the lawyer's participation in the program. Alternatively, if the Executive Director declines to approve the agreement, the lawyer and the ADP counsel may propose amendments. In the event that the parties are unable to agree on mutually acceptable amendments, or the Executive Director determines that the amended agreement ought not to be approved based on the application of the above factors, the matter will be returned to the Professional Regulation department's regular processes for further action at "no risk" to either party, as both the Law Society and the lawyer will be in the same position that they would have been in had the matter not initially been referred to the ADP.

60. At all times, the consent agreement will be treated as confidential and will not be disclosed to the complainant, the public or the subject lawyer's firm without the lawyer's express consent,[27] nor will information relating to the lawyer's health condition or the terms of the consent agreement be shared with the Professional Regulation department's processes or committees unless this information is necessary to accommodate the lawyer pursuant to BC's *Human Rights Code.*

Fulfilling the terms of the consent agreement

61. In circumstances where the terms of the consent agreement include a treatment plan, monitoring and reporting will be an important element of supporting the lawyer transition back to a healthier practice and ensuring they comply with the agreement while doing so. If, for example, the agreement includes reporting requirements, it is expected that the terms will include a limited waiver of confidentiality that permits the Law Society to obtain the necessary information from treating professionals and

[27] A similar approach is taken with respect to the confidentiality of information and documents, reports or actions that form part of the Practice Standards Committee's consideration of a complaint. See Rule 3-23.

monitoring agencies to evaluate whether the lawyer has fulfilled the terms of the agreement.

62. As a matter of policy, it is also expected that details about the frequency and duration of, and payment for, treatment and monitoring will have been established as terms of the agreement. To ensure that the ADP does not create barriers for those lawyers experiencing financial hardship, it is proposed that in situations where a lawyer can demonstrate that they cannot bear the full costs of the treatment or monitoring that is required to address the health issue, options for cost-sharing are considered during the process of negotiating the terms of the consent agreement.

63. Ideally, the lawyer will satisfy the terms of the consent agreement, in which case the outcome will typically be the resolution of the complaint, requiring no further action by the lawyer or the Law Society.[28] In other cases, it may be necessary to amend the consent agreement prior to the terms being fulfilled. In some circumstances, public interest considerations may support the Law Society publicizing the outcomes of completed ADP consent agreements in a general and anonymous way.

64. Amendments to the consent agreement may be proposed by either party and are subject to the approval of the Executive Director. Initiating an amendment may be appropriate, for example, if there is a change in the lawyer's circumstances or the Law Society receives new information. An amendment may also be necessary if there is a breach of terms related to treatment that requires action on behalf of the parties, such as additional clinical assessments or changes to the treatment plan. Recognizing that relapse and the reoccurrence of symptoms is a common feature of many health conditions, permitting amendments to the terms of the original agreement should be the preferred approach for a breach related to the management of the health issue, provided that it is in public interest to do so.[29]

65. A material breach of the agreement can also result in the lawyer's participation in the ADP being terminated where that is in the public interest. In such cases, the matter will be returned to the Professional Regulation department for further action in accordance with its usual processes. Information relating to the lawyer's health condition that has been disclosed during the course of the ADP, however, will not be shared with the Professional Regulation department's staff or committees unless this

[28] In some circumstances, the public interest may require additional regulatory action following the completion of the ADP, which would be established in the terms of the consent agreement. It is not contemplated that the rules would permit the complainant to initiate a review of the decision to take no further action following the completion of the ADP or to otherwise challenge the decision to permit the lawyer to enter the ADP through the Complainants Review Committee.

[29] A similar approach is taken under Rules 3-7.2 and 3-7.3.

information is necessary to accommodate the lawyer pursuant to the *Human Rights Code.*

66. There may be instances where a lawyer finds that they are unable to adhere to the terms to which they agreed, particularly where the terms include conditions related to substance use disorders. In accordance with the "no risk" nature of the ADP, a lawyer who elects to terminate the consent agreement will not be subject to sanction for doing so. Rather, the matter will be returned to the regular discipline stream for further action. As a result, failure to fulfill the terms of the consent agreement will leave the lawyer in the same position that they would have been in had participation in the ADP not been attempted. In this regard, unsuccessful efforts to complete the ADP will not have negative regulatory implications for the lawyer, nor will it constrain the Law Society's ability to fulfil its public interest mandate through the regular discipline processes.

67. In the event that a disagreement arises as to whether the terms of the agreement have been fulfilled, the matter will be determined following an application to the President of the Law Society, and will be adjudicated by the President or their delegate.

68. Complainants will be notified when the lawyer successfully completes the program or, alternatively, if the matter is referred back to the Professional Regulation department for further action.[30]

69. Finally, to reflect that the program is an *alternative* to the regular discipline process, the lawyer's participation in the ADP should not form a part of their professional conduct record.[31] Some form of internal record keeping will, however, be necessary to support a data-driven evaluation of the success of the ADP, including the number and type of conduct issues referred to the ADP, the proportion of lawyers that successfully fulfill the terms of their consent agreement and whether those that participate in the ADP experience future regulatory interventions.[32]

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[30] This is similar to the approach taken under Rule 3-24 in which the Executive Director must notify the complainant in writing of the Practice Standards Committee's decision, but not the content of any report or the Committee's recommendations about the lawyer's practice.

[31] A number of alternative discipline programs in the United States take this approach, as does Nova Scotia's Fitness to Practice Program. This is also similar to the approach adopted for conduct meetings, which do not form a part of a lawyer's professional conduct record. The fact that a lawyer has undergone a practice review also does not form a part of their professional conduct record, although any resulting recommendations from the Practice Standards Committee do.

[32] Academic commentators strongly support program administrators maintaining internal records for statistical purposes and to provide a more complete understanding of the impact and effectiveness of the alternative process. See Fortney *supra* note 15 at 15.

Policy Considerations

70. To ensure that the Benchers have a clear understanding of the ADP, much of this report has been devoted to describing the operational aspects of the proposed process. In this section of the report, a series of policy considerations are identified to further support the Benchers' discussions and deliberations regarding the establishment of an alternative discipline process in BC.

Public interest

71. Section 3 of the *Legal Profession Act* recognizes that supporting and assisting lawyers in fulfilling their professional duties is one of the ways in which the Law Society can protect and uphold the public interest.[33] This support and assistance ought to extend to all practitioners, including those experiencing health issues.

72. Establishing alternatives to traditional disciplinary approaches in circumstances where a health issue has contributed to lawyer misconduct is recognized as an emerging best practice for legal regulators.[34] By creating a process that is specifically designed to facilitate the disclosure and treatment of health conditions and focus the regulatory response on remediation and rehabilitation, the ADP aims to put lawyers in a stronger, healthier position to meet their professional responsibilities. In this regard, the ADP has the potential to realize significant public interest benefits by reducing the likelihood that the problematic behaviour associated with the health issue will escalate or recur.[35]

73. The ADP's design ensures that public interest considerations inform all aspects of the process, including the initial eligibility decision and the negotiation and approval of the consent agreement. Additionally, once an agreement is approved, if information bears out that it is not in the public interest for the lawyer to continue in the ADP, the

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[33] Section 27 of the *Legal Profession Act* provides the authority for the Benchers to establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems. To date, this authority has been used to establish the Practice Standards program. Under section 27(2) of the Act, the Practice Standards Committee is tasked with making investigations into a lawyer's competence to practice law.

[34] The US National Task Force on Lawyer Wellbeing recommends that legal regulators adopt alternatives to discipline as a means of enhancing lawyer well-being and improving client service. See National Task Force on Lawyer Wellbeing, "The Path to Lawyer Wellbeing" (August 2017) at Recommendation 22.4.

[35] There are few empirical studies that assess the effectiveness of alternative disciple systems. A study of the Arizona alternative discipline system is frequently cited in support of such programs. Based on a review of ten years of data, the study concluded that there was a statistically significant difference in the number and severity of disciplinary charges between lawyers who had completed the state diversion program and those who had declined to participate in the program. See D.M. Ellis, "A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers" (2003) 52 Emory L.J. 1221 at 1229. The limitations of this study are explored in L.C. Levin, "The Case for Less Secrecy in Lawyer Discipline"(2007) 20 Geo. J. Legal Ethics 1 ("Levin").

matter will be returned to the Professional Regulation department to be addressed in accordance with those traditional processes.

74. The proposed ADP also aligns with the Law Society's commitment to proactive regulation, which is premised on the theory that the public is best served by a regulatory scheme that prevents problems in the first place, rather than one that focuses on issuing sanctions once problems have occurred.[36] Discipline does not make an ill lawyer well and, even in circumstances where health issues are treated as a mitigating factor at the penalty stage of a discipline hearing, the regulator has missed a critical opportunity to take steps earlier in its processes that may have improved the outcomes for both the lawyer and the public.

75. The revision of regulatory processes to support and promote mental and physical health is also identified as one of the Law Society's key strategic objectives and, to this end, the ADP assists the Law Society meet its strategic goals. Additionally, the ADP imbues many of the values identified in the Law Society's strategic plan, including taking an innovative and adaptive approach to regulation and being responsive to the changing needs of the profession.[37]

Perceptions of the profession

76. Commentators have observed that the greater the likelihood that a lawyer's involvement in an ADP is made public, the less likely practitioners are to choose the process over traditional discipline.[38] If eligible lawyers decline to participate in the alternative process, the extent to which the ADP realizes its public interest benefits will be greatly reduced.

77. On this basis, the ADP must foster a regulatory environment in which lawyers feel it is safe to disclose health information and engage in the process of crafting and fulfilling the terms of a consent agreement. By integrating informed consent into each stage of the process, it is expected that more lawyers will consider the ADP, knowing that if they are unwilling or unable to continue to meet the program requirements, the conduct issue, but not health-related information, will simply be returned to the Professional Regulation department for further action.

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[36] The Law Society oversees a number of proactive regulatory initiatives that support lawyers and firms in improving the services they provide to clients, including the practice advice, continuing professional development and law firm regulation programs.
[37] Law Society of BC Strategic Plan 2021-2025.
[38] See for example Levin *supra* note 35.

78. As discussed earlier in this report, the ADP's actual and perceived independence from the discipline rules, processes, staff and committee will be critical to the program's acceptance by the profession as an alternative to traditional discipline. Establishing strict limits on information-sharing within and beyond the ADP is expected to diminish uncertainties regarding the confidentiality of the process and mitigate fears about the potential disciplinary consequence of providing health information to the Law Society.

79. The ADP must also be (and be seen to be) entirely separate from the Law Society's Practice Standards program. Housing the ADP within Practice Standards is at odds with the guiding principles of voluntariness and confidentiality given that the Practice Standards Committee is authorized to share health information obtained during its processes with the Discipline Committee and issue orders requiring lawyers to undergo psychiatric, psychological or other clinical assessments or counselling. Additionally, the mandate of the Practice Standards Committee is to address competency concerns.[39] As a regulatory initiative that strives to improve mental health within the profession, the ADP must not be administered in a manner that suggests that lawyers experiencing mental health or substance use issues are necessarily less competent. Although some health conditions may generate concerns about competency, care must be taken to ensure that the ADP does not conflate all health challenges with incompetence.[40]

80. There are, however, some uncertainties as to whether the ADP will be effective in combatting stigmatizing views about mental health and substance use issues or the self-stigma that can arise in individuals living with these conditions. On the one hand, the ADP strives to acknowledge the impacts that mental health and substance use issues can have on conduct, to encourage lawyers to share this information with the Law Society and to address the health issue in a data-driven, evidence-based fashion. On the other hand, the act of creating a specialized process, and particularly one involving strict confidentiality assurances and the creation of a separate process for lawyers with health-related conduct issues, does create a possibility that the ADP will further entrench, rather than reduce, the stigma surrounding mental health and substance use issues.

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[39] See section 27 of the *Legal Profession Act.* See also Law Society Rule 3-16(b).

[40] The *Legal Profession Act* recognizes a difference between conduct and competency issues. For example, section 26(2) of the Act authorizes the Benchers to make rules authorizing an investigation into the conduct *or* competence of a lawyer, and section 36(f) provides that the Benchers may authorize a hearing into the conduct *or* competence of a lawyer by issuing a citation. Similarly, the Law Society Rules recognize that discipline violations can be caused, among other things by misconduct *or* the incompetent performance of duties.

81. Clear and transparent communications with the profession about the rationale for, and operational details of, the ADP will go some ways to improving members' perceptions of the program. This messaging should strive to reduce the stigma surrounding mental health and substance use issues, which may otherwise prevent lawyers that experience these health concerns from considering the ADP.

Public perceptions

82. Consideration of the public's perception of the ADP is also important. A lack of transparency about what occurs within the ADP has the potential to negatively impact views about the program's legitimacy and fairness and the extent to which it fulfills the Law Society's public interest mandate. The ADP's emphasis on lawyers' rehabilitation and reducing the likelihood of future misconduct may also be criticized as overlooking the more immediate harms experienced by clients or others affected by a lawyer's conduct, or limiting opportunities for complainants to provide input into the regulatory process.

83. To address these concerns, communications with the profession and the public should emphasize the public interest objectives of the alternative discipline process and confront misconceptions that the ADP "protects" practitioners from discipline or otherwise limits the extent to which subject lawyers take responsibility for their actions.

84. Rules should also be established to ensure that complainants are provided with adequate notice of both a lawyer's initial referral to the alternative process and whether they have successfully completed the ADP. Additionally, as described earlier in this report, the impact of the alleged conduct on the complainant or another person is a factor that is considered in determining a matter's initial eligibility for the ADP, as well as during the final approval of a consent agreement by the Executive Director, and is expected to carry particular weight in circumstances where the complainant or others have experienced harm. Where appropriate, the terms of a consent agreement may also provide complainants with additional opportunities for input, or establish restitutionary steps or apologies agreed to by the lawyer.

85. Consideration may also be given to the merits of publicizing the outcomes of completed consent agreements in a general and anonymous way, akin to the publication of the outcome of conduct reviews, to demonstrate to the public how the

ADP achieves its objectives.[41] Evaluations of the pilot project must also be publicly available, while ensuring that lawyers' privacy and confidentiality are protected.

Program impacts and costs

86. The long-term regulatory and budgetary impacts of the ADP will greatly depend on the number and type of conduct issues that are referred to the alternative process over time. Based on the uncertainty created by these and other variables, the Task Force recommends that the ADP is initially established as a three year pilot project, commencing no later than September 2022. This will enable the Law Society to undertake a preliminary assessment of the ADP's effectiveness and costs prior to making commitments as to the program's permanence as an alternative process.

87. To ensure that an assessment of the pilot project is data-driven and evidence-based, information will be collected in relation to a number of key metrics, including: the number matters that are eligible for, and referred to, the ADP; the types of health and conduct issues for which referrals are sought and granted; the proportion of consent agreements that are successfully completed; the timeliness of the process; the extent to which lawyers and complainants are satisfied with the regulatory outcomes; and the financial and human resources required to support the process. Given the relatively short duration of the pilot project, it is expected that limited data will be available with respect to recidivism rates among ADP participants.

88. It is difficult to accurately forecast the uptake of, and expenses associated with, the pilot project. The frequency with which mental health or substance use issues arise in the course of the Professional Regulation department's regular processes is likely a poor proxy for the ADP's potential use, given the limited number of lawyers that currently share health information with the Law Society. However, based on a review of data over the course of the past ten years, the Professional Regulation department estimates that several lawyers may be eligible to participate in the ADP in the first year of the pilot. It is anticipated that the number of participants will increase over time as awareness and acceptance of the ADP grows and lawyers become more comfortable in disclosing the required health information to the Law Society.

89. The pilot project's costs will also be impacted by the complexity and severity of health issues for which referrals are sought. The resources required to support the

[41] A similar approach is taken with respect to the publication of conduct review summaries under Rule 4-15 which must not identify the lawyer or complainant unless that person consents to being identified.

drafting, approval, monitoring and enforcement of a consent agreement will vary considerably depending on the nature of the health and conduct issues.

90. The foreseeable, short-term budgetary implications of the pilot project include the costs associated with developing new rules, policies and procedures for the ADP, hiring ADP counsel and ensuring that both counsel and the Executive Director have access to the necessary consultations with health experts and other professionals during the negotiation and approval of the terms of the consent agreement.

91. It is anticipated that a proportion of these expenditures will be accounted for through existing staff resources, while others will require the allocation of additional funds. Although the uncertainties associated with the number and type of matters that may be referred to the ADP make it difficult to predict the budgetary implications of the pilot, it is likely that the costs will be at least $110,000 per year. As a result, the total costs for the ADP for the duration of the pilot are anticipated to be at least $330,000. These costs may be offset to some degree by the savings associated with channeling some matters away from the Professional Regulation department's processes. However, in advance of the pilot project, it is not possible to quantify the scale of these savings, if any.

92. The Benchers will be provided with interim and final reports analyzing the impacts of the pilot and, following a consideration of these reports, would be expected to make a final decision about the permanence of the ADP by the end of 2025, which will necessarily involve further information about the long-term cost of supporting the alternative discpline process.

Recommendation

93. The following recommendation is presented to the Benchers for discussion and decision:

No later than September 2022, the Law Society will implement an alternative discipline process ("ADP") to address circumstances in which there is a connection between a health condition and a conduct issue that has resulted in a complaint investigation. The ADP will comport with the purpose, principles, design features and policy rationale described in the Mental Health Task Force's September 2021 recommendation report and commence as a three year pilot project. Following an interim and final review of the pilot project in 2023 and 2025, respectively, the matter will return to the Benchers for a final determination as to whether to establish the ADP as a permanent regulatory program.

Conclusion and next steps

94. Over the last four years the Mental Health Task Force has recommended, and the Benchers have unanimously approved, a suite of educational and regulatory initiatives designed to improve mental health within the profession. Building on this work, the Task Force now recommends that the Benchers approve the introduction of an alternative discipline process in the form of a three year pilot project, as means of improving the Law Society's regulatory response in situations where a health issue has contributed to a lawyer's conduct issue.

95. Deeply informed by the principles of voluntariness, confidentiality, no-risk and the protection of the public, the proposed ADP takes an innovative and proactive approach to professional regulation. The scheme is also comprehensive and complex, as evidenced by the volume of material in this report devoted to describing the design elements of, and policy rationale for, the alternative discipline process.

96. By creating a regulatory environment that promotes the disclosure of health conditions that have impacted on a lawyer's conduct, and customizing the regulatory response in a manner that focuses on supporting the lawyer and the Law Society in addressing the underlying health issue, participation in the ADP reduces the likelihood that the problematic conduct will escalate or recur in the future. This, in turn, enhances the protection of the public.

97. To achieve these goals, the ADP must balance the tensions between transparency and confidentiality, certainty and flexibility, due process and timeliness. The Task Force is of the view that the proposed process strikes this balance. However, given the significant resources required to develop and implement the ADP, it would be prudent for the Law Society to test the operational aspects of the process and evaluate its impacts, based on data and best-available evidence, in advance of making final decisions on the permanence of the ADP.

98. If the recommendation contained in this report is adopted by the Benchers, the matter will be referred to the Act and Rules Committee to develop the necessary rules. Work will also commence on creating the guidelines and procedures identified in this report, which must be in place prior to implementing the ADP. Early and ongoing communication with the profession and the public regarding the rationale for, and benefits of, the ADP will also be critical in raising awareness and acceptance of the program.

The Law Society of British Columbia

Recommendations Concerning Remuneration and Hours of Work for Articled Students

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Lawyer Development Task Force

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Date: September 24, 2021

Prepared for: Benchers

Prepared by: Policy and Planning Staff on behalf of the Task Force

Purpose: For Decision in Principle

Executive Summary

1. In recent years, concerns have been raised about the existence of, and problems associated with unpaid and underpaid articles. The Law Society has been considering these issues from time to time, including past recommendations to the Benchers that the Law Society continue to gather information on the working conditions of articled students prior to determining the appropriate approach on remuneration for articles to ensure that policy decisions in this regard are evidence-based. More recently, at the Law Society's October 2020 Annual General Meeting ("AGM"), a Member Resolution was approved that raised a number of concerns regarding articled students' working conditions, and that directed the Benchers to address these issues by ensuring that articling agreements are consistent with section 16 and Parts 4 and 5 of the *Employment Standards Act* ("*ESA"*).

2. The Lawyer Development Task Force has undertaken a comprehensive, evidence-based examination of articled students' wages and hours of work, analysing a large body of survey data and evaluating the potential implications of various approaches to addressing concerns related to these issues. Many of the rationales for establishing standards for mandatory levels of compensation and limits on hours of work during articles are unified by themes of ensuring fairness and preventing exploitation, which are matters that the Law Society can address through its regulatory powers.

3. With this in mind, the Task Force supports taking some action to address the issue of unpaid and underpaid articles and excessive hours of work. At the same time, however, the Law Society's statutory mandate requires the Benchers to consider the negative implications that may arise from a policy decision to mandate remuneration and place limits on hours of work during articling, particularly as related to the public interest.

4. On this basis, the Task Force recommends that the Benchers approve, in principle, the introduction of minimum levels of financial compensation and maximum hours of work for articled students, with limited exceptions, and that the details of the new standards are developed by the Law Society following additional consultation with the profession in the coming year.

5. The Task Force is also concerned, however, that the evidence reviewed by the Task Force to date suggests that introducing these requirements would reduce the availability of articling positions, thereby creating barriers to licensure for some students. As articling is currently the only means for students to complete the experiential training portion of the licensing process in BC, remuneration standards should not be considered in isolation from the issue of the availability of articles and the development of alternative pathways to licensure. In order to avoid the foreseeable, negative consequences arising from the introduction of mandatory levels of financial compensation, the Task Force recommends that these standards are not implemented until the Law Society has established at least one

alternative to articling, through which candidates' ability to fulfill the experiential training portion of the licensing process will no longer entirely be dependent on the availability of articles.

Proposed Resolution

6. The Benchers adopt the recommendations of the Lawyer Development Task Force that:

> **Recommendation 1:** The Benchers endorse, in principle, the Law Society establishing limits on the number of hours of work during articles, with limited exceptions. Developing a specific formula or method for calculating the limits on hours of work, and identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2022.
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> **Recommendation 2:** The Benchers endorse, in principle, the Law Society establishing minimum levels of financial compensation during articles, with limited exceptions. Developing a specific formula or method for calculating the minimum level of compensation, as well as identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2023.
>
> **Recommendation 3:** To address the potential reduction in articling positions resulting from establishing standards for financial compensation, and to ensure that the introduction of the requirement does not create barriers to licensing for some students, the new standards for financial compensation will not be implemented until at least one additional pathway to licensure is in place, which the Task Force expects to occur by September 2023.

Background and Process

7. At the Law Society's October 2020 AGM, a Member Resolution was approved that directed the Benchers to ensure that articling agreements are consistent with section 16 and Parts 4 and 5 of the *ESA*.[1] The Resolution states:

[1] The Member Resolution was carried with 1,567 votes in favour, 1,163 against and 187 abstentions.

Be it resolved that membership directs the Benchers:

To amend the appropriate sections of the Law Society Rules and/or Code of Professional Conduct within 12 months of the date of this resolution, requiring that articled student agreements provide articled students with at least such rights and protections as are guaranteed under section 16 and Parts 4 and 5 of the Employment Standards Act, RSBC 1996, c 113, and ensure that articled students are able to seek financial redress for practices that contravene the amended Law Society Rules and/or Code of Professional Conduct.

8. Following the AGM, the Law Society disseminated a survey to articled students, newly called lawyers and law firms that had recently hired articled students that sought to gather information on matters relevant to articled students' working conditions. In January 2021, the President asked the Lawyer Development Task Force to review the results of the survey and to return to the Benchers, no later than September 24, 2021, with recommendations.

9. Over the last six months, the Task Force has reviewed and discussed a comprehensive set of materials and issues relating to the matter of articled student remuneration and hours of work. This work included an analysis of the scope and application of the relevant provisions of the *ESA*; a review of the Articling Agreement, Law Society Rules and *Code of Professional Conduct for British Columbia* ("*BC Code"*); and a consideration of other provinces' employment standards legislation, articling guidelines and agreements, and policy decisions on remuneration. The Task Force also reviewed a large body of data produced by the Law Society's recent surveys on articled student remuneration and days and hours of work, and met with the proponents of the Member Resolution.

10. This foundational work has informed the Task Force's evidence-based approach to identifying problems associated with articled student remuneration and hours of work, and to consider the potential implications of different approaches to addressing these concerns, as discussed in this recommendations report.

The Problem

11. In order to be called to the bar in BC, licensing candidates must complete a period of transitional training following law school. Currently, the only option for obtaining the requisite experiential training is through the Admission Program, which consists of articles and the Professional Legal Training Course. Students cannot be admitted into the Admission Program unless they have secured articles.

12. The Law Society does not guarantee that all students will be able to obtain an articling position, nor does it directly regulate the employment relationship between a student and

the firm once articles are secured. Although students and principals must sign the Law Society's Articling Agreement, which addresses the nature of the relationship between the principal and student, the content of articles and reporting requirements, the Articling Agreement does not include provisions relating to remuneration, hours of work or other matters relating to students' working conditions. Similarly, the Law Society Rules and the *BC Code* provisions governing articles do not address remuneration, or hours and days of work.

13. In recent years, concerns have been raised about the existence of, and problems associated with, unpaid and underpaid articles. Anecdotal reports of students articling for low or no pay and, in extreme cases, paying their principal, led to a more detailed examination of these issues by the Lawyer Education Advisory Committee in 2015. Following its review, the Committee recommended, and the Benchers accepted, that principals be encouraged to pay reasonable wages, and that the Law Society continue to gather information on remuneration, and then determine whether to develop a policy on minimum payment for articles.

14. Developing a policy on articled student remuneration was subsequently identified as an organizational priority in the Law Society's 2018-2020 Strategic Plan. In 2019 and 2020, student remuneration and hours of work during articles were explored in more detail in a series of Law Society surveys. These results provided the Law Society with its first statistically significant data set regarding the working conditions of articled students. As described in more detail in the next section of this report, the results confirm that the majority of students receive a salary during their articles and that monthly earnings vary considerably. The results also indicate that students devote significant amounts of time to their articles, and that based on their monthly salaries and hours of work, many students earn less than the statutory minimum wage. Additionally, the survey results did bear out that a small minority of positions are unpaid, and that, in a few of these cases, students are paying for costs associated with their articles.

15. The Law Society sets regulatory requirements for entry into the legal profession, and these requirements include completing the articling process. The Law Society therefore has the ability to examine and address these issues, and in doing so, ensure that public interest considerations are paramount when weighing various policy options. The discussion and recommendations that follow aim to move the Law Society's policies toward striking this balance.

Research and data analysis

16. The subject of this report addresses issues provided for under section 16 and Parts 4 and 5 of the *ESA*. This requires an understanding of the scope and application of these provisions.

17. Section 16 of the *ESA* addresses minimum hourly wages. Under subsection (1), employers covered by the Act are required to pay an employee at least the minimum wage as prescribed in the regulations, which is $15.20 per hour as of June 1, 2021.

18. Part 4 of the *ESA* addresses hours of work and overtime. These provisions require that employers ensure:

    - an employee is paid overtime wages of 1 ½ times their regular wage for time over eight hours of work, and double for time over 12 hours and 1 ½ times their regular wage for time over 40 hours a week;
    - an employee has at least 32 consecutive hours free from work each week, or is paid 1 ½ times their regular wage for time worked during the 32 hour period the employee would otherwise be entitled to have free from work;
    - an employee has at least eight consecutive hours free from work between shifts;
    - an employee is not required or directly or indirectly allowed to work excessive hours or hours detrimental to the employee's health or safety;
    - no employee works more than five consecutive hours without a meal break of at least half an hour;
    - an employee working a split shift must be allowed to complete the shift within 12 hours of starting work;
    - an employee that reports for work must be paid a minimum of two hours at their regular wage, or if previously scheduled to work more than eight hours that day, is paid a minimum of four hours at their regular wage; and
    - at the employee's request, a time bank for the employee may be established and credited with overtime wages.[2]

19. Part 5 of the *ESA* addresses statutory holidays. These provisions require that an employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday, must be paid an amount equal to at least an average day's pay determined by a formula. Additionally, an employee who works on a statutory holiday must be paid 1 ½ times their regular wage for the time worked up to 12 hours and double their regular wage for any additional time.

[2] This Part also permits the employer and employee to enter into an averaging agreement covering up to four weeks.

20. Most professionals are excluded from the entirety of the *ESA*, including lawyers and articled students.[3] In the most recent independent review of the Act, several rationales for exempting self-governing professions were identified, including their self-governing nature, the fact that individual professionals exercise a high degree of autonomy in decision-making in their work, and that strictly controlled hours are inconsistent with professional responsibilities when the needs of clients and patients, for example, are urgent and arise unpredictably.[4]

21. This approach is relatively consistent with that of other Canadian jurisdictions, where lawyers and articled students are excluded from all or part of the applicable provincial employment standards legislation. Provinces such as Manitoba and Ontario exclude articled students from provisions relating to hours worked and payment. Other provinces, including Alberta, Saskatchewan and Nova Scotia, exempt articled students only from overtime-related provisions, but not from statutory minimum wage standards. BC's approach to exempting legal professionals and articled students from the *ESA* is, therefore, not unique.

22. Exemption from provincial employment standards legislation does not, however, prevent legal regulators from establishing their own rules and policies on remuneration and hours of work for articled students. Nevertheless, with the exception of a recent policy decision by the Law Society of Ontario ("LSO"), the Task Force is not aware of any Canadian law society that has established minimum standards for payment during articles in their rules, articling agreements or codes of conduct, although it is acknowledged that minimum wage legislation of general application applies to articled students in some provinces. Many law societies are also silent on the issue of wages in the articling guidelines, recruitment procedures and handbooks provided to principals and articled students.

23. The LSO's recent examination of the issue of mandatory payment during transitional training, which occurred in the context of broad reforms to its licensing process, is

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[3] Pursuant to section 3 of the *ESA*, the Act does not apply to employees excluded by regulation. A list of exclusions are identified in section 31 of the Employment Standards Act Regulation, B.C. Reg. 396/95. Other professions exempted from the *ESA*, in its entirety, include architects, most chartered accountants and their articled students, chiropractors (including those registered as fourth-year chiropractic students entering preceptorship programs), dentists, professional engineers and engineers-in-training, licensed insurance agents and adjusters, land surveyors and articled pupils, registrants of the College of Physicians and Surgeons of BC (including residents), naturopaths, optometrists, licensed real estate agents, persons licensed under s. 35 of the *Securities Act*, veterinarians and professional foresters. Other classes of employees are also excluded from the *ESA*, either in its entirety or from specific sections. For example, nursing students, managers, teachers and university faculty are excluded from the Act's hours of work and overtime provisions. Employees covered by a collective agreement may also be excluded from certain parts of the *ESA*.

[4] The British Columbia Law Institute, "Report on the Employment Standards Act"(December 2018).

instructive.[5] When the LSO established the Law Practice Program ("LPP") in 2018 as a new, permanent pathway to licensing, it included the introduction of a required salary for both articled and LPP candidates in accordance with LSO requirements, with limited exceptions.[6] Although concerns were raised that mandatory remuneration could reduce the number of available transitional training positions, and that some clinics, public interest organizations and sole practitioners may be unable to comply with the new requirements the introduction of a required salary for articling and LPP placements — to be calculated by a formula that would be developed following additional work — was approved. It was also proposed that some principals and work placement supervisors may be eligible to apply for an exemption in certain circumstances. With the disruptions created by the pandemic, however, work on implementing this policy decision has not progressed.

24. In considering the issue in British Columbia, the Law Society needs to be mindful of what is happening in other jurisdictions, but also must primarily be guided by the Law Society's strategic objectives and statutory mandate and base its policy decisions on the best available evidence, consultation and, ultimately, what is in the public interest.

25. In line with this approach, the Task Force has reviewed the large body of survey data on articling remuneration and hours and days of work collected by the Law Society in 2019[7] and 2020.[8] Although the survey sample sizes and questions varied, the results were relatively consistent. With respect to financial compensation, the data suggest that the large majority — approximately 97% — of articling positions in BC are paid, including up to one-third of those surveyed reporting salaries of more than $4,000 per month.

26. Approximately one quarter of respondents reported earning $2,500 or less per month during articles. This equates to an annual salary of $30,000 or less, which approximates payment at or below the "minimum wage" under the *ESA*.[9] Additionally, approximately

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[5] This issue first arose following an LSO survey that raised concerns that some employers were taking advantage of candidates' need to fulfill their transitional training requirement by employing law school graduates for minimal, or in some cases, no compensation.

[6] Law Society of Ontario, Professional Development and Competence Committee Report "Options for Lawyer Licensing" (December 2018).

[7] The issue of articling remuneration was addressed as part of the 2019 Admission Program survey distributed to all one to three year calls (call years 2015, 2016, 2017). Respondents were asked a range of questions about working conditions as well as whether the Law Society should be involved in setting minimum standards of financial compensation for articled students.

[8] Following the voting on the Member Resolution at the 2020 AGM, the Law Society conducted two online surveys. One was sent to all current articled students and lawyers who had articled in the past three years (call years 2018, 2019 and 2020), and the other to the designated representatives of firms that currently have articled students or have hired an articled student in the past three years.

[9] As of June 1, 2021, the minimum wage in BC was set at $15.20 per hour. Therefore, $2,432 is the minimum amount of compensation for a four week period of work for employees for whom the *ESA* applies.

three percent of survey respondents did not receive a salary during their articles.[10] Limited data is available as to who is taking unpaid positions, although the 2019 survey results suggest at least half came into the Admission Program with an NCA Certificate of Qualification,[11] a cohort of candidates that typically includes a higher proportion of individuals from equity-seeking groups.[12] Four respondents also reported paying for costs associated with their articles, including covering disbursements, travel costs, office space and other overhead.[13]

27. With respect to hours of work, the surveys indicate that almost all articled students work what would be considered "overtime" under the *ESA*. Almost all respondents reported working eight or more hours per day during articles, and nearly half worked 10 hours per day or more, and in excess of 50 hours per week.[14] More than one-third of students surveyed also reported working six or more days per week and more than half report working on statutory holidays.[15]

28. The Task Force also reviewed the qualitative data from the 2019 and 2020 surveys, which included over 500 written comments. These remarks indicate support within the profession for the Law Society setting minimum standards for financial compensation during articles, as well as identifying concerns about the potential for negative consequences arising from the introduction of such a requirement, including a reduction in the number of available positions and changes to the articling experience if some employers are unable to meet the new standards.

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[10] In the 2019 and 2020 surveys, 14 respondents and 26 respondents, respectively, reported receiving no payment during articles. These figures are reasonably consistent with the survey results of several other law societies, including Ontario, Alberta, Manitoba and Saskatchewan, which found that between one and four percent of articling positions are unpaid.

[11] The National Committee on Accreditation (NCA) assesses the legal education and professional experience of individuals who obtained their credentials outside of Canada or in a Canadian civil law program. The Certificate of Qualification is issued once a candidate has finished the work required by the NCA, and shows that a candidate's knowledge of Canadian law is similar to the knowledge of those who obtained their law degree through an approved Canadian law school program.

[12]The remainder of the unsalaried respondents did not answer the survey questions about their path of entry into the Admission Program. No questions were asked in the 2020 survey about students' path of entry.

[13] The 2019 survey included a question as to whether students paid for their articles and the nature of that payment, if any. No questions were asked in the 2020 survey as to whether students paid for their articles.

[14] Notably, in the 2020 survey, employers consistently reported higher levels of compensation and less time spent working than did recently and newly called articled students.

[15] Questions about work on statutory holidays were not included in the 2019 survey.

Discussion

29. Many of the policy rationales for establishing standards for mandatory minimum compensation during articles are unified by themes of ensuring fairness and preventing exploitation. Given that candidates for admission must complete articles in order to be called to the bar, the final stage of a student's pathway to licensing is, to a large degree, influenced by, and dependent on, their principal. This dynamic has the potential to create power imbalances that can, unfortunately, lead to exploitative working conditions including students accepting positions for limited or no pay, or agreeing to work excessive hours.

30. Lack of payment can also create barriers to entry into the profession for those who cannot afford to go with little or no income for the duration of the articles. Some qualified individuals simply cannot accept positions that do not provide the level of compensation necessary for them to repay student loans or otherwise make ends meet. If paid positions are unavailable, these candidates will be unable to complete the licensing process.

31. However, some students also report positive experiences with principals who, because of the nature of their practice, could afford to pay them very little or not at all, but were nevertheless willing to take on the responsibilities and provide the educational experiences necessary for the student to complete their training.

32. The survey data reveals that there is a recognition within the profession that the legal community has an ethical obligation not to use articled students as a source of cheap, or free, labour. Certainly, articled students can and do provide valuable work that contributes to the success of their employers, and typically, firms charge their clients, at least in part, for the services conducted by their students. But it must also be remembered that articles are intended to serve a teaching and learning function, and that as a result, it can be expected that the work produced by articled students may not always be valuable or profitable for the employer. Nevertheless, fairness principles would suggest that a principal charging a third party for services performed by their student should pay the person doing the work.

33. As the Admission Program is a Law Society requirement, ethical considerations would suggest that the Law Society has some responsibility to minimize opportunities for students to be exposed to harmful working conditions within the licensing program it has created.

34. With this in mind, the Task Force has concluded that these policy considerations support taking some action to address the issue of unpaid and underpaid articles and to consider how to address the question of hours of work. At the same time, however, the Law Society's statutory mandate requires the Benchers to consider the negative implications that may arise from a policy decision to mandate remuneration and limits on hours of work during articling, particularly as related to the public interest.

35. The introduction of a requirement that students be paid for articles would not adversely affect many employers, as most pay their students. However, the survey results suggest that establishing a requirement that articled students are paid the statutory minimum wage as prescribed by the *ESA* could affect a number of law firms that have recently been providing articling positions.[16]

36. Additionally, a large majority of students work more than eight hours a day and more than 40 hours per week.[17] Therefore, if the *ESA* provisions regarding the minimum levels of mandatory payment for overtime were also adopted, almost all employers that hire articled students would be required to pay overtime wages, calculated at 1 ½ times the base wage. These additional wages will be significant for many employers.

37. The potential financial implications of introducing wage protections for articled students can be expected to result in some employers – particularly small firms and sole practitioners – deciding that they can no longer afford to offer articling positions, or to reduce the number of positions. Notably, the 2019 survey data indicates that of those firms and other legal employers that hired articled students in the past three years, one-quarter will not be hiring students in 2021. Although it is not possible to discern the relative impacts of the intent expressed through the Member Resolution, the COVID-19 pandemic and other factors on hiring decisions, the data suggests that a reduction in articling positions in the coming years is likely.

38. The Task Force understands, therefore, that the Benchers must exercise caution in making policy decisions that have an expected outcome of triggering a contraction of the articling market, particularly at a time when the impacts of the pandemic on the profession and the legal marketplace are uncertain and evolving. Under the current licensing regime, in which articling is the only option for obtaining the necessary experiential training to be called to the bar, a shortage of articling positions will create additional obstacles to entering the profession for some. This result is problematic, particularly in the context of the Law Society's efforts to reduce barriers to entry by, for example, developing alternatives to articling.

39. Introducing new standards for financial compensation will also likely have a disproportionate impact on particular practice settings, including legal aid and public interest advocacy firms, as well as legal clinics and non-profit organizations that provide

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[16] See the survey results described at para. 26.

[17] As detailed in para. 27, the survey results indicated that that approximately half of students work more than ten hours a day and/or more than 50 hours per week, and up to one-third work six or more days a week.

services to vulnerable or disadvantaged members of the public. If these employers are unable to meet the new requirements, a loss of articling positions and future lawyers in these areas of law can be expected. It is also possible that imposing mandatory salary requirements could affect the ability, or willingness, of employers to pay that salary while the student is in the Professional Legal Training Course, or to pay the cost of the course, both of which most employers currently agree to do.

40. Employers could avoid some of these financial implications by ensuring that articled students do not work overtime. There is concern, however, that curtailing students' work to fit within a standard eight-hour day, 40-hour week model would fundamentally alter the articling experience for many in a number of ways.

41. First, restricting students' hours may fail to adequately prepare new lawyers for the realities of practice. It would greatly misrepresent how lawyers have to work at certain points in time, such as in trial preparation or at trial, or in the lead up to the closing of a transaction. Clients' needs frequently demand attention outside of the standard work week contemplated in the *ESA*. Although there should not be an expectation that students work excessive hours for marginal levels of compensation, the professional duties owed to the client may require working additional hours when needs arise. Recognition that the nature of legal work demands flexibility around rates of pay and hours of work is, in fact, one of the reasons articled students and lawyers (and most other professionals) are excluded from employment standards legislation.

42. Second, a loss of overtime could be expected to include the loss of training experiences during articles that are of low economic value for firms, but high educational value for students, such as observing court proceedings undertaken by leading counsel. Training, of course, is fundamentally integral to the purpose of articling and an essential element of developing competence in entry-level lawyers.

Assessment

43. The Task Force has weighed the policy considerations associated with, and the implications of, various options for addressing the issues raised by the Member Resolution and the survey data. These options include bringing the Articling Agreement and the Law Society Rules into alignment with the standards set in the *ESA*; instituting measures that encourage, but do not require, employers to provide their students with adequate levels of pay and hours of work; funding unpaid and underpaid articling positions; and devising an alternative method for establishing a level of minimum compensation and/or regulating articled students' hours of work.

44. Although the Task Force supports some of the rationales articulated for imposing wage and hour requirements, it does not recommend that, at this time, the Law Society introduce new requirements that are consistent with section 16 and Parts 4 and 5 of the *ESA* on the basis that the Task Force is concerned that doing so is likely to have significant impacts on the current availability of articles. Specifically, implementing statutory minimum wage requirements for all hours worked is expected to reduce the number of articling positions as the result of some employers' inability to provide the required levels of compensation. Should the reduction in the number of positions result in students being unable to secure articles, this will create more barriers to entry into the profession than exist under the current model. Furthermore, the strict regulation of hours of work would also be likely to result in principals providing students with fewer non-remunerative learning experiences.

45. The Task Force recommends, however, that the Law Society does more than simply encourage employers to provide articled students with reasonable remuneration. To date, this approach has not adequately addressed concerns about unpaid and underpaid articles. This option also fails to address the concerns associated with excessive hours of work, which are often linked to insufficient remuneration. Something more than encouragement seems to be required at this stage.

46. The Task Force also does not support a model in which the issue of unpaid and underpaid articles is addressed through the Law Society subsidizing or otherwise funding these positions on the basis that providing financial support to legal employers to hire students is outside the scope of the Law Society's regulatory functions, and would engage a myriad of fairness issues.

47. As described in further detail below, the Task Force members support, in principle, the introduction of requirements for minimum levels of financial compensation and maximum hours of work for articled students. The Task Force recognizes, however, that introducing these standards is likely to reduce the availability of articling positions. On the basis that articling is currently the only means for students to complete the experiential training portion of the licensing process in BC, wage and hour requirements should not be considered in isolation from the issue of the availability of articles. The Task Force therefore recommends an approach that improves articled students' working conditions while taking care to mitigate the reduction in articling positions that may result from the introduction of a new wage requirement.

48. Specifically, to address the concerns raised in the recent survey data, the Law Society could establish some minimum levels of financial compensation for articled students.

49. Additionally, the Law Society could establish limits on the number of hours articled students are required to work, although the maximum would likely be higher than the standard hours of work established by the *ESA* in order to address the realities of legal

practice and to ensure that the training experience is not fundamentally altered. As a result, employers would not be required to compensate students for all time worked outside of standard hours of employment. However, limits would be established that protect students from excessive demands.

50. Recognizing the diversity of working environments in which articling positions are offered, and to ensure that the new standards retain the necessary flexibility to address unconventional employment arrangements, the Task Force recommends that a process is developed by which employers and students may apply to the Executive Director for an exemption from the new wage and hour standards. For example, some legal employers, including those operating within non-profit, legal aid and public interest advocacy sectors may be eligible to apply for a discretionary exemption from the standards to ensure that these settings are able to continue to offer articling positions.

51. The specific method or formula for establishing the standards for minimum payment and maximum hours of work will be developed following further consultation with the profession. The circumstances under which an exemption from the new standards may be sought, as well as options for enforcing these requirements, will also be explored.

52. Following this consultative process, the matter will be returned to the Benchers for a final decision. As employers must enter into articling agreements with students in advance of the commencement of articles, a sufficient period of notice must be provided to the profession prior to the introduction of the new requirements.

53. Implementing these new requirements would help to address concerns about poorly paid articles and unregulated overtime, thereby reducing opportunities for exploitation and barriers to licensing for some candidates. This approach also addresses a number of other issues raised in the Member Resolution, including the ethical obligation to ensure that students are compensated for the valuable work they provide to firms and to minimize students' exposure to working conditions and financial pressures that can negatively impact on mental health.

54. The Task Force is cognizant that there is a level of opposition within the profession to the Law Society becoming involved in the employment relationship between firms and students. It is also aware that instituting some level of mandatory remuneration is very likely to create extra financial burdens for some employers and that this could affect the number of articling positions available. In this regard, the Benchers must guard against making a policy decision intended to improve the fairness of the licensing process, only to inadvertently create additional barriers to licensure by reducing the supply of articling positions.

55. In order to avoid foreseeable, negative consequences arising from this proposal, the Task Force has concluded that the optimal approach is to coordinate the implementation of the new standards for financial compensation with the introduction of alternatives to articling, through which candidates' ability to fulfill the Law Society's experiential training requirement will no longer depend entirely on the availability of articles. It is contemplated that providing is at least one alternative pathway to licensure will mitigate concerns that the new standards will reduce the number of training positions.

56. Work on developing additional pathways to licensure remains a priority for the Task Force, and options on alternatives to articles will be presented to the Benchers by the Task Force at a later date. If one or more alternative pathways are approved in principle by the Benchers, considerable time and resources will be required to develop and implement the new experiential training programs. The Task Force anticipates, however, that at least one alternative may be in place by September 2023.

57. The Task Force recommends that the new standards for financial compensation are not introduced until at least one additional pathway to licensure has been established. Ensuring that the implementation of these standards is contingent on, and synchronized with, the introduction of alternatives to articles is important to mitigate the potential impact of the wage requirements on the availability of articles and thus, the ability of candidates to obtain the necessary experiential training to complete the licensing process. In this regard, linking the implementation of the financial compensation standards with alternatives to articles is not reflective of equivocation or delay; rather, it is a necessary step in coordinating inter-related and complimentary Law Society initiatives.

58. In contrast, a minority of the Task Force recommends that if alternatives to articling are not in place by September 2023, the Law Society should proceed with the implementation of the standards for financial compensation to ensure that the introduction of these new requirements is not deferred for an indeterminate period of time.

Recommendations

59. Three recommendations are presented to the Benchers for discussion and decision.

60. The Task Force recommends the following in relation to hours of work during articles:

> **Recommendation 1:** The Benchers endorse, in principle, the Law Society establishing limits on the number of hours of work during articles, with limited exceptions. Developing a specific formula or method for calculating the limits on hours of work, and identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will

occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2022.

61. The Task Force recommends the following in relation to *developing* the standards for financial compensation during articles:

> **Recommendation 2:** The Benchers endorse, in principle, the Law Society establishing minimum levels of financial compensation during articles, with limited exceptions. Developing a specific formula or method for calculating the minimum level of compensation, as well as identifying the circumstances under which employers and students may be eligible for a discretionary exemption from the new standards, will occur following additional consultation with the profession and will be referred back to the Benchers for final approval no later than September 2023.

62. The Task Force recommends the following in relation to *implementing* the standards for financial compensation during articles:

> **Recommendation 3:** To address the potential reduction in articling positions resulting from establishing standards for financial compensation, and to ensure that the introduction of the requirement does not create barriers to licensing for some students, the new standards for financial compensation will not be implemented until at least one additional pathway to licensure is in place, which the Task Force expects to occur by September 2023.

63. In coming to this recommendation, the Task Force also discussed an additional provision that was proposed by a minority of the Task Force namely, that if alternatives to articling are not in place by September 2023, the Law Society will proceed with the introduction of the new standards for financial compensation. Ultimately, this version of the recommendation was not supported by the Task Force in a vote. If that set of circumstances occurs, the Benchers of the day should determine what to do on the basis of then-current information.

Budgetary Implications

64. The recommendations will require a commitment of additional financial and human resources from the Law Society. Foreseeable, short-term budgetary implications are largely limited to the costs associated with commencing a profession-wide consultation and any additional focus group work. However, the costs of implementing specific new standards for remuneration and hours of work, once developed, are more uncertain and will depend upon the details of those proposals, including the degree to which additional regulatory oversight is required. It is not possible at this stage to forecast the expense of such a

program. An assessment of budgetary implications will be included in the final report on the proposal when it is made.

65. In the meantime, the cost of developing the proposal further is largely accounted for through staff resources that are already assigned to the Task Force.

Conclusion and next steps

66. The relatively high-level nature of the Task Force's recommendations aims to strike a balance between demonstrating the Law Society's commitment to addressing the issues of student remuneration and hours of work, without prematurely endorsing a specific standard or formula for either issue during articles. This approach is intended to provide the profession with a clear signal about the Law Society's policy direction on the issues, while providing opportunities for further consultation on, and examination of, the potential implications of introducing specific requirements. The consultation should extend to all practising lawyers and their legal employers, current articled students and other stakeholders.

67. If the proposed recommendations are adopted by the Benchers, the matter will return to the Lawyer Development Task Force to oversee broader consultation with the profession on matters including the appropriate level of compensation during articles, limits on working hours, eligibility for exemptions from the standards and the enforcement of the new requirements.

The Law Society of British Columbia

Memo

To:	Benchers
From:	Staff
Date:	October 6, 2021
Subject:	Access to Justice Committee report on non-adversarial family law and supporting materials

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At the September Benchers meeting, during the discussion of the Access to Justice Advisory Committee report on non-adversarial family dispute resolution, a request was made for additional materials to be made available to provide further context for the report. Attached to this memorandum is the report to the Benchers, as well as the written materials the Committee considered, and the PowerPoint presentation of Jane Morley, QC regarding the work Access to Justice BC is undertaking regarding adverse childhood experiences and family law.

/DM

/Attachments

The Law Society of British Columbia

Increasing Access to Non-Adversarial Resolution of Family Law Matters

Access to Justice Advisory Committee:
Lisa J. Hamilton, QC (Chair)
Paul Barnett
Jennifer Chow, QC
The Honourable Thomas Cromwell
Lisa H. Dumbrell
Mark K. Gervin
Jamie Maclaren, QC
Kevin B. Westell

September 23, 2021

Prepared for:	The Benchers
Prepared by:	Policy and Planning Department
Purpose:	Discussion and Decision

Table of Contents

Committee Process

1. At the beginning of the year, the President asked the Committee to consider how the Law Society might advocate for greater access to non-adversarial dispute resolution in family law matters.

2. The Committee discussed the topic at its meetings from January through July 2021. This included meeting with Jane Morley, Q.C., who is involved in Access to Justice BC's Transforming the Family Justice System Collaborative ("TFJS Collaborative"),[1] Stephen McPhee, Q.C., Chair of the CBA BC's Family Law Working Group, and Kerry Simmons, Q.C. Executive Director of CBA BC Branch in May, and with Nancy Carter, Q.C. Executive Director, and Darryl Hrenyk, Legal Counsel, at Family Policy, Legislation and Transformation Office of the Ministry of the Attorney General in June, to discuss a range of concepts under the broad heading of "non-adversarial family law." The Committee is grateful for their participation in this process.

3. In addition, the Committee considered materials authored by Nancy Cameron, Q.C., J.P. Boyd, Q.C., Ms. Morley, the CBA BC and CBA National branches, and Access to Justice BC, as well as policy memoranda from staff.[2]

4. The Committee received staff support from Michael Lucas, QC., Jason Kuzminski and Doug Munro, and administrative support from Amanda Kerr.

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[1] The TFJS Collaborative is an initiative of A2JBC to create "a cross-sectors collaborative to transform the family justice system in BC by focusing it on achieving family well-being", see: Family Justice Collaborative - Access to Justice BC.

[2] This included, Access to Justice BC, "Report of the Working Group on an A2JBC Family Justice Leadership Strategy" (November 2020) ("A2JBC Family Justice Report"), CBA BC "Agenda for Justice 2021, CBA National, CBA Task Force Report on Justice Issues Arising From COVID-19, "No Turning Back" (February 2021), John-Paul E. Boyd, QC, memorandum dated January 6, 2020, "Potential amendments to the FLSC Model Code of Professional Conduct", and Nancy Cameron, QC, "Transforming the family justice system by focusing on family well-being."

Executive Summary

5. The Access to Justice Advisory Committee was tasked with making recommendations about how the Law Society might advocate for greater access to non-adversarial dispute resolution in family law matters.

6. Through its research and consultation the Committee learned about the effect Adverse Childhood Experiences ("ACEs") have on the developing brain, and long term wellness. Being subject to adversarial family disputes can be an ACE and can exacerbate existing ACEs. The data that has been collected, when considered alongside the long-recognized belief that adversarial family law dispute resolution can be harmful to those involved, requires the Law Society, lawyers, the government, courts, and other justice system stakeholders to recalibrate how family disputes are resolved in order to minimize harm and promote well-being.

7. The report contains a series of recommendations divided into two general categories based on the Law Society's Access to Justice Vision:[3] 1) matters the Law Society can control, and 2) concepts the Law Society can influence through advocacy, collaboration and consultation.

8. Central to this report is examining a policy that would align the Law Society with the long term goal of increasing the number of non-adversarial resolution options in the family law justice system while ensuring that such options are properly supported by government, the courts, lawyers, and funded agencies such as Legal Aid BC.

Resolution

9. The Committee recommends the following resolution be adopted by the Benchers:

   THAT the following recommendations of the Access to Justice Advisory Committee relating to increasing access to non-adversarial family law processes be adopted:

   > **Recommendation 1:** The Law Society will align its family law access to justice policy development and strategic initiatives with A2JBC's object of reforming family justice services based on data about ACEs, and join the TFJS Collaborative;
   >
   > **Recommendation 2:** The Law Society will explore how to use its communications tools to better educate stakeholders about ACEs;
   >
   > **Recommendation 3:** The Law Society will explore ways to use its communications tools to better educate policy makers and the public about the benefits of resolving

[3] Included for reference at Appendix 1.

family problems in a non-adversarial manner, including making available information about available services that support non-adversarial dispute resolution;

Recommendation 4: The Law Society will generate and support the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;

Recommendation 5: Law Society staff will review ways the Lawyer Directory can be improved to provide the public more easily accessible information about what services are provided by Law Society lawyers accredited as mediators, arbitrators and parenting co-ordinators, and report to the Benchers with options for improving the Directory;

Recommendation 6: The Law Society's will explore how to use its communications tools to inform the public of the services that are available to support children whose families are navigating the family justice system;

Recommendation 7: The Benchers will encourage the Executive Director to consider which staff would benefit from training in ACEs and the statutory duties of family law lawyers;

Recommendation 8: The Law Society will explore with the government, the courts, lawyers and other justice system stakeholders, including the Canadian Bar Association and Trial Lawyers' Association of BC, the types of change required to incorporate options for non-adversarial processes, taking into account current and emerging data on ACEs;

Recommendation 9: The Law Society will explore with the government, in particular the Ministries of Education and Health, the creation of courses and content in high-school about law, civic rights and responsibility, and particularly with respect to family law, educate students about non-adversarial family law options and about ACEs;

Recommendation 10: The Law Society will work with Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC to support proper funding for non-adversarial dispute resolution options for family law issues;

Recommendation 11: The Law Society will explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary approach to helping families resolve family disputes.

Recommendation 12: The Law Society will explore with the Provincial and Federal Government the possibility of creating tax credits or deductions for people who access private, non-adversarial dispute resolution for resolving family law issues.

Terminology

10. In this Report, the Committee uses the term "family law" to refer to matters that arise under the *Divorce Act* and *Family Law Act* such as child support, spousal support, parenting time, guardianship and parenting responsibilities, or asset and debt division. "Family law" in the context of this report is not meant to include MCFD matters or adoption.

Background

11. The Law Society has long recognized that family law problems occupy a unique position of importance to the public and, consequently, to the administration of justice. From 2006 to 2012 the Law Society's Family Law Task Force worked on a range of matters to improve the quality of service and access to justice for individuals facing family law issues. The Law Society's Legal Aid Task Force prepared "A Vision for Publicly Funded Legal Aid" (March 2017) that highlighted the importance of better supporting family law dispute resolution and the professionals who serve them within the legal aid system. Furthermore, every year since 2014, the Law Society's $60,000 access to justice fund, administered by the Law Foundation, has been allocated to support matters related to family law, children, or the delivery of services such as unbundled independent legal advice to support family law mediation.

12. This report continues that focus on family law problems and proposes recommendations for the Benchers consideration that the Law Society could implement to reform the resolution of family law disputes.

The Problem

Adversarial Family Law Processes May Not Engender Lasting Resolutions Where a Continuing Relationship between the Parties is needed

13. The problems associated with resolving family disputes through an adversarial system are well known and have been the subject of discussion amongst family lawyers, legal researchers and academics for many years. Chief amongst the problems is that many people engaged in a family law dispute need to maintain some form of an ongoing relationship with the other party to the dispute. The classic example is the need for parents to continue to work together to raise children. Approaching these disputes in an adversarial manner entrenches a resolution process that creates "winners" and "losers," and is often less likely to result in resolution that both sides can live with.

14. Change is taking place. British Columbia has seen the rise of collaborative family law, family law mediation, the advent of parenting coordination, as well as the efforts to reform family law and court processes. The Provincial Court in particular has been at the forefront of reform, embracing innovative pilot projects and placing mediation at the front-end of the court process.

The provincial government has created justice access centres, support recalculation programs, and family justice centres to name but a few initiatives. But despite these developments, change occurs slowly.

15. Family law lawyers know the benefits of non-adversarial options for resolution of family law matters and in fact have duties under the *Divorce Act* and the *Family Law Act* to recommend such options where appropriate.[4] However, many members of the public are not represented by lawyers and are not aware of the benefits of non-adversarial processes, nor the potential for harm caused by adversarial processes.

16. Another significant problem is that the majority of current funding goes towards adversarial systems and services. Proper funding is critical in order to increase access to non-adversarial options for resolving family disputes. It would create an even greater problem to shift from a funded adversarial model to an underfunded non-adversarial model.

Adversarial Family Law Processes can generate Adverse Childhood Experiences

17. During its research and consultation the Committee learned about the effect that Adverse Childhood Experiences ("ACEs") can have on the developing brain and long term wellness. Being subject to adversarial family disputes can be an ACE and can exacerbate existing ACEs.

18. The Committee's interest in ACEs came from research conducted by Access to Justice BC ("A2JBC")[5] regarding the impact of ACEs on brain development. Based on a review of available scientific evidence, the A2JBC Family Justice Report observed:

> *The research on [ACEs] identifies ten childhood experiences that potentially create toxic stress and risk negative immediate, long-term and intergenerational impacts. Divorce and parental separation is an ACE, as are other family justice related issues such as child neglect (physical and emotional) and abuse (physical, emotional, sexual), and household dysfunction including mental illness, substance abuse violence and incarceration.*
>
> *The more ACEs experienced by children, the higher the risks of immediate and future negative outcomes. The presence of adverse social conditions*

[4] Non-adversarial family law processes may not be appropriate where a family law dispute resolution professional has screened for family violence and has determined that a particular non-adversarial process is inappropriate (pursuant to obligations in the *Family Law Act* regulations and the *Divorce Act*).

[5] The Law Society has been a participating member of A2JBC since its inception and attempts to align its policy development regarding access to justice with the policy development of A2JBC, when appropriate.

> *and historical trauma also increase risks and lead to intergenerational impacts.*
>
> *The news is not all bad, however. Resilience, inherent in all of us and strengthened through healthy brain development, helps with the management of stress. There is something that can be done to ameliorate the negative impact of ACEs: negative experiences can be reduced, resilience strengthened and positive supports provided.* [Internal reference omitted][6]

19. It is not surprising that, when people who, as children (whether past or in the present) have experienced ACEs are involved in a protracted, adversarial family law dispute, they experience new ACEs related to the court process, and their existing problems that arose from prior ACEs are magnified. Consequently, the existing adversarial model for resolving family problems can harm the developing brain of children and can lead to long term health and societal problems. An adversarial dispute resolution model can also have traumatic effects on adult participants who previously experienced ACEs.

20. In recent years the legal community has begun to better understand how legal, social, economic and health problems are connected. The data on ACEs reinforces an important aspect of this interconnectedness. The Committee has concluded that it is not enough for lawyers and other justice system stakeholders and policy-makers simply to take notice of the data and the interconnection. Rather, such actors must change their behavior based on that knowledge. Otherwise, we are failing to advance the public interest.

Evaluation Criteria

21. The Committee explored a range of ideas when analyzing what the Law Society can do to promote greater access to non-adversarial dispute resolution services for family law issues. It analysed those ideas against the policy goals and mandate of the Law Society, as well as in regard to specific organizational considerations.

Unified Family Courts

22. Early on in its work, the Committee considered whether British Columbia might develop a modernized, unified family court ("UFC"), which brought together a specialized bench and technology similar to that found in the Civil Resolution Tribunal and emerging artificial intelligence to help manage family law problems more effectively. Ultimately, the Committee decided against pursuing this line of inquiry for several reasons. The main reason is that a UFC would still likely be an adversarial model of dispute resolution, and that is not what the

[6] A2JBC Family Justice Report" at page 6.

Committee is tasked with considering. In addition, unless the UFC was truly transformative in the sense it was a fully utilised and funded non-adversarial option, the Committee is of the view it would represent an incremental, but insufficient, improvement. The Committee concluded that something more transformative is required.

Particular Organizational Evaluation Criteria

23. To address the issue, the Committee explored whether there are additional factors, beyond those that informed the development of the Strategic Plan, to support increased forms, and use, of non-adversarial dispute resolution, and then focused on what can be done to *advocate for greater access to non-adversarial dispute resolution in family law matters*.

24. Some factors that are relevant to the Committee's analysis are set out below.

- The public interest is served by society having dispute resolution mechanisms and laws that support the ability of people to function effectively, to avoid legal problems where possible, and to manage such problems efficiently when they arise so people can live full and productive lives. As suggested above, resolving family problems in an adversarial manner often prolongs conflict and causes ongoing harm to those involved. Family law lawyers know this. However, the general public is not as aware. Consequently, the public interest supports the idea of the Law Society using its authority to bring about and influence constructive change by supporting non-adversarial systems of solving or preventing family disputes whenever appropriate.

- The cost/benefit of a move away from adversarial family models to greater utilisation of non-adversarial resolutions is difficult to quantify in the abstract. Change, especially the type of systemic change required to shift to non-adversarial dispute resolution, will cost money. It is possible in the short term there will be greater costs in order to create adequate systems, modify existing systems, and educate the public involved in the various system changes. However, it is anticipated that in the long run cost savings would be realized by decreasing the adversarial aspect of matters, which can lead to repeat and chronic use of court processes and endless disputes. In addition, in light of the data on ACEs, the Committee is of the view that there is an even greater societal saving/benefit that can result by reducing the mental health issues caused to those who would otherwise have to resolve family disputes in an adversarial system.

- The Committee is of the view that public relations as well as relations with lawyers in general and family lawyers in particular should not be harmed by the Law Society advocating for non-adversarial family law dispute resolution. Most family law lawyers are well aware of the benefits of resolving matters in a non-adversarial manner early on in a file in order to prevent harm. Family law lawyers will be an excellent resource in terms of advancing and implementing reform as they have on-the-ground experience.

25. The Committee notes that recommendations may require an equity, diversity and inclusion analysis before implementation. The Committee also notes that access to justice issues do not arise equally in society. We know from research such as that of Dr. Ab Currie,[7] that people who identify with various equity-seeking groups are more likely to experience more than one serious, difficult to resolve legal problem over a three year period than the national average. And the barriers to accessing services and justice can be more acute for members of equity-seeking groups. It is important, therefore, that a move towards more non-adversarial models of family law dispute resolution does not embed and perpetuate existing systemic biases and barriers to their access.

Analysis

26. The Committee considered how the Law Society might best advocate for or promote non-adversarial resolution of family law disputes. Consistent with the Law Society's Vision for Access to Justice, the Committee categorized options into ideas the Law Society can control and ideas the Law Society can influence and participate in.

27. The ideas considered by the Committee that the Law Society can control include:

- Endorse A2JBC's approach to ACEs and align the Law Society's family law policy development with the object of reducing the harm caused to families by adversarial dispute resolution by joining A2JBC's TFJS Collaborative;
- Use the Law Society's communications tools to better educate lawyers and particularly the public about ACEs;
- Use the Law Society's communications tools to better educate the public and other stakeholders about the benefits of resolving family problems in a non-adversarial manner, including making available information about existing services that support non-adversarial family law dispute resolution;
- Generating and supporting the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;
- Use the Law Society's communications tools to inform the public regarding the services that are available to support children whose families are navigating the family justice system;

[7] See, for example, Ab Currie, "The Legal Problems of Everyday Life: *The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*" (Ottawa: Justice Canada, 2009).

- Encourage the Law Society to provide staff who investigate family law complaints with training on the statutory obligations mentioned above, as well as training regarding ACEs.

28. The Law Society can work with the following groups to advance non-adversarial resolution of family disputes:

    - **Lawyers** –family law lawyers work hard to help their clients resolve matters in a non-adversarial way where appropriate. The Law Society can reach out to family law lawyers to get a better understanding of what the Law Society can do to help these lawyers continue this important work, and advocate for necessary change;

    - **Government** – the Law Society can consider supporting government efforts to develop programs that are designed to promote non-adversarial family law resolution, and to help inform the public about such programs; The Law Society can also work with the government, in particular the Ministries of Education and Health, to explore the creation of courses and content in high-school about law, civic rights and responsibility, and with respect to family law, educate students about non-adversarial family law options and about ACEs;

    - **Government and the courts** – the Law Society can liaise with government and the courts in order to explore ways to increase options for non-adversarial resolution of family disputes, taking into account current and emerging data about ACEs;

    - **Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC** – the Law Society can engage in advocacy to support proper funding for non-adversarial dispute resolution options for family law issues;

    - **Medical and social health professionals** – recognizing the interconnection of law, health and social well-being, the Law Society can explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary, non-adversarial approach to helping families resolve family disputes. A2JBC is interested in hosting joint session with doctors and the Law Society in the fall of 2021 or early 2022 regarding family justice transformation and ACEs.

Aligning Future Policy Development around ACEs and Communication on ACEs to the Profession and Public

29. If the system for solving family disputes is harmful, it is incumbent on the Law Society to work within its statutory mandate to advance the public interest in the administration of justice by finding ways to reduce harm caused to families.

30. The Committee believes that the evidence about ACEs collected by A2JBC is cogent. Hence, the Committee recommends that the Law Society endorse the objective of working towards a change in how family law disputes are resolved, taking into account current and emerging data regarding ACEs. The Committee also recognizes that such change will require the coordinated efforts of government, the courts, lawyers and others (including those in the medical and social sciences). The Committee is therefore not asking the Benchers to adopt a solution, but, rather, is recommending the Benchers to commit the Law Society to support efforts within the justice system where better solutions are identified and pursued.

31. The recommendation has the object of reducing harm and will inform the nature of future work at the Law Society. For example, the Law Society can consider how it might augment lawyer education (whether through PLTC or continuing professional development) to better equip lawyers to help clients who have, or may otherwise, experience ACEs. A decision to align with the objectives identified by A2JBC would also influence how the Law Society advocates with government and the courts regarding substantive and procedural changes to the justice system with respect to family law disputes.

32. The Committee believes that the research on ACEs reinforces the need to work towards reform to develop a system that reduces harm to families, and creates functional results.

33. The Committee therefore believes the Law Society should develop future policy and regulatory reform related to family law in a manner that has the object of reducing harm to participants, and reflects current and emerging data on ACEs.

34. As a starting point, the Law Society can explore using its Communications tools to better inform lawyers and particularly the public about ACEs and the TFJS Collaborative. The Committee anticipates that initial efforts would focus on the policy reasons to resolve matters in a non-adversarial manner where appropriate, and the information on ACEs would provide parties a broader framework for understanding why it is important to pursue less-adversarial solutions.

Modifications to the Lawyers Directory

35. As part of its discussion about how to make information more available to the public, the Committee considered potential modifications to the Lawyer Directory. At present, the Lawyer Directory permits lawyers who are Law Society-accredited family law mediators, arbitrators or parenting coordinators, to have that designation listed by their entry in the directory. The Committee considered whether the Law Society should expand on this by allowing other practice preferences and classification to be listed, as well as improve the search functionality of the Directory so people could search based on services and not just by name.

36. The Committee recognizes there may be discrete policy and practical matters associated with reforming the Lawyer Directory, so at this stage the Committee is of the view that staff should

explore ways to improve the content and functionality of the Directory, and advise the Benchers on next steps. Trying to find ways to improve the public's access to information about different ways of resolving family law problems is important, and the Lawyer Directory is a resource within the Law Society's control that might prove useful.

At least one Member of the Discipline Committee and Staff working in investigations having a background in family law practice and ACEs

37. While discussing changes the Law Society might make to its processes to move towards a culture of non-adversarial family law dispute resolution, the Committee discussed the relation between regulation and that policy objective. The Committee explored the idea that there should always be at least one family law lawyer on the Discipline Committee, as well as the idea of Law Society creating opportunities for staff to receive training in ACEs and statutory obligations of family law lawyers, are related.

38. The Committee sought input from senior staff in the Professional Regulation Department. With respect to the idea of requiring the Discipline Committee composition to include at least one family law practitioner, the Committee heard that a review of complaints and files that proceeded to the Discipline Committee revealed a low incidence of matters where input from a family law lawyer at the Discipline Committee was determinative. The Committee recognizes that the President, when appointing the Discipline Committee, needs to balance the representational skills and experiences of its members to achieve a range of functions, and prescriptive requirements from various practice areas could become limiting.

39. The Committee accepted the feedback of staff and do not recommend pursuing this option.

40. Concerning the question of whether staff hired to investigate complaints have training in the substantive legal obligations of family lawyers as well as training on ACEs, the Committee notes that some staff already have family law backgrounds and staff lawyers communicate with each other when needing help with analysis of issues. Many staff in Intake and Early Resolution also have training in trauma-informed practices.

41. Qualifications and training of staff is an operational matter for the Executive Director to address. Therefore, the Committee hesitates to make a recommendation in the form of a directive. However, in keeping with the policy objects of shifting towards a culture of non-adversarial family law, the Committee believes the Law Society can take a leadership role by ensuring its staff receive current training on the issues, similar to the Law Society's commitment to providing staff training on mental health matters. The Committee suggests that the Benchers encourage the Executive Director to explore suitable opportunities to keep staff up to date on the type of training the Society will expect of family law practitioners regarding ACEs and non-adversarial dispute resolution.

Matters outside the Law Society's sphere of control

42. With respect to matters that are beyond the Law Society's authority to control, the analysis of most options will depend on the nature of consultation and collaboration engaged in.

43. If non-adversarial processes are ever to become a primary method of resolution of family law disputes, it is essential to engage the courts, the government and the legal profession in the discussion. While the Law Society cannot control the process, it can start by making the policy declaration that it believes the shift in how family disputes are resolved is necessary, and commit to working with government, the courts and the profession to bring about the necessary change.

44. One concept the Committee favours, which requires a few additional comments, is the idea (already engrained into the current Law Society Strategic Plan) of collaborating with the Ministries of Health and Education regarding high-school course content.

45. On several occasions over the past 15 years the Committee has discussed the potential for the Law Society to influence the high school curricula to teach students basic legal life skills and knowledge about the main legal issues they will likely experience in their lives. Education about legal issues, rights, responsibilities and services that exist to help people navigate the legally complex world is an important part of helping people have access to justice and requires moving beyond the traditional conception that access to justice only occurs in court or on the doorstep to court. The Committee believes there is merit in the Law Society working with government to introduce essential legal life skills, including a focus on non-adversarial family law resolution, into the high school curriculum. This could include expanding the curriculum beyond "Law 12" to explore opportunities through social studies or related courses from Grades 8-12.

46. The Committee also discussed the importance of exploring with the Provincial and Federal governments the possibility of creating tax credits or deductions for people who try to resolve matters using private, non-adversarial dispute resolution models. The Committee is of the view that such tax credits or deductions would improve access to justice by reducing some of the financial burden that exists due to the fact that government does not currently fund non-adversarial family law dispute resolution. The Committee considers that family law mediation, including the mediation aspect of a Med-Arb arrangement, should be eligible for tax credit or deduction. The details of a submission to governments on this concept would need to be worked out. At this stage, the Committee is recommending the policy directive and that the creation of such a submission, or outreach, take place.

47. The Committee is of the view each of the options listed above regarding collaboration and outreach are worth exploring, recognizing that the Benchers will have opportunities down the road to make determinations regarding policy issues that may arise, and that the Executive Director will retain oversight and decision-making authority regarding any operational matters.

Resource Implications

48. Some of the recommendations the Committee proposes will have resource implications for the Law Society. The main impact will be allocation of staff and funding towards developing communications content to support non-adversarial family law dispute resolution, including better educating lawyers and particularly the public about what services are available and the need for change. In addition, recommendations related to continuing professional development and PLTC will also impact staff and funding. At this time, the resource impact cannot be estimated. If the Benchers accept the Committee's recommendations, the development of specific proposals will fall to the Executive Director and staff to prepare a resource analysis for consideration by the Benchers before making a final recommendation regarding implementation.

Recommendations

49. The Committee asks that the Benchers adopt the following recommendations as part of the Law Society's efforts to advocate for greater use of non-adversarial family law resolution services and systems:

> **Recommendation 1:** The Law Society will align its family law access to justice policy development and strategic initiatives with A2JBC's object of reforming family justice services based on data about ACEs, and join the TFJS Collaborative;
>
> **Recommendation 2:** The Law Society will explore how to use its communications tools to better educate stakeholders about ACEs;
>
> **Recommendation 3:** The Law Society will explore ways to use its communications tools to better educate policy makers and the public about the benefits of resolving family problems in a non-adversarial manner, including making available information about available services that support non-adversarial dispute resolution;
>
> **Recommendation 4:** The Law Society will generate and support the creation of content for continuing professional development and PLTC around ACEs and non-adversarial family law dispute resolution;
>
> **Recommendation 5:** Law Society staff will review ways the Lawyer Directory can be improved to provide the public more easily accessible information about what services are provided by Law Society lawyers accredited as mediators, arbitrators and parenting co-ordinators, and report to the Benchers with options for improving the Directory;

Recommendation 6: The Law Society's will explore how to use its communications tools to inform the public of the services that are available to support children whose families are navigating the family justice system;

Recommendation 7: The Benchers will encourage the Executive Director to consider which staff would benefit from training in ACEs and the statutory duties of family law lawyers;

Recommendation 8: The Law Society will explore with the government, the courts, lawyers and other justice system stakeholders, including the Canadian Bar Association and Trial Lawyers' Association of BC, the types of change required to incorporate options for non-adversarial processes, taking into account current and emerging data on ACEs;

Recommendation 9: The Law Society will explore with the government, in particular the Ministries of Education and Health, the creation of courses and content in high-school about law, civic rights and responsibility, and particularly with respect to family law, educate students about non-adversarial family law options and about ACEs;

Recommendation 10: The Law Society will work with Government, Legal Aid BC, the Association of Legal Aid Lawyers and the Law Foundation of BC to support proper funding for non-adversarial dispute resolution options for family law issues;

Recommendation 11: The Law Society will explore opportunities to consult with and collaborate with professionals in health and social services fields to support a multidisciplinary approach to helping families resolve family disputes.

Recommendation 12: The Law Society will explore with the Provincial and Federal Government the possibility of creating tax credits or deductions for people who access private, non-adversarial dispute resolution for resolving family law issues.

Subsequent Steps

50. The subsequent steps that are required are predicated on which recommendations the Benchers adopt. Obviously, a number of the recommendations require resource allocation, time commitment, and possible costs. In the abstract it is difficult to assess the likely requirements or impacts of each recommendation on resources.

51. The Committee is of the view that it is important to frame these unknowns within the observation that the type of transformational change that is contemplated will take some time to be fully realized. A consequence of this is that the Executive Director will retain discretion as how best to allocate resources as this work unfolds over the coming years, so that work is undertaken in a manner that is both consistent with the policy objective to be achieved but within the broader operational and strategic demands of the organization. What is important is that the Law Society commits to the journey, not that the work all needs to be completed in a calendar year or even a Strategic Plan cycle.

/Appendix

Appendix:

Access to Justice Vision for the Law Society of British Columbia

Preamble

Meaningful Access to Justice means that our justice systems, and the legal services that support them, are available, affordable, understandable and effective. Meaningful Access to Justice not only provides essential service to the people who must resort to our legal systems, but also sustains the rule of law on which our democracy depends. Without Meaningful Access to Justice, people do not receive the legal help that they need and public confidence in the rule of law and indeed, in democracy itself may falter.

The Law Society believes that:

1. Democracy depends on the rule of law and Meaningful Access to Justice is necessary to maintain it;

2. Meaningful Access to Justice can be achieved through several means, including the vindication of legal rights through our formal and informal dispute resolution systems, through law reform, and through political reform;

3. Legal service providers, including lawyers who are authorized to provide legal services for a fee, have an obligation to make their services appropriately accessible to the public;

4. Access to legal services has a regulatory component, and the Law Society should take appropriate steps to allow for legal markets and services to develop to address those needs;

5. Meaningful Access to Justice requires digitization of justice systems and legal services, as well as transformation of how those systems and services are delivered in order to reduce or eliminate the barriers identified below;

6. As the justice systems and legal services are modernized, particularly through technological solutions, it is important to ensure the solutions do not create new systemic barriers to Meaningful Access to Justice. This requires thoughtful design at the creation phase of any new approach to achieve the goal of equal access for all.

7. There are many barriers to Meaningful Access to Justice, including:
    - how our laws are developed - particularly their scope and complexity;

- how law is implemented, enforced, interpreted and how disputes are resolved;
- how our rules governing practice may prevent lawyers from creating new business models, new partnerships, new services and products, and keep out potential innovators who have made other industries more efficient, effective and resilient;
- the cost of delivering legal services;
- how lawyers direct their services, and how the government funds or does not fund legal services;
- how geographical barriers affect access to legal services and the justice system;
- historic disadvantages due to individual circumstances, including but not limited to economic means, education, race, religion, language skills, sexual orientation, disability, and gender; and
- the systemic barriers people face in accessing the systems and services that exist for managing and resolving legal problems.

The Vision

The Law Society plays an important role in reducing barriers to and enhancing Meaningful Access to Justice in British Columbia. The Law Society will address barriers to Meaningful Access to Justice by:

1. reviewing its regulatory and strategic policy, as needed, and making the necessary changes to reduce or remove barriers that are within the Law Society's authority to control guided by its statutory obligation to ensure the public is well-served by competent and ethical legal professionals;

2. understanding the nature of the barriers that lie outside the Law Society's authority to control and by exploring whether the Law Society has a role to play in helping people and groups overcome those barriers, whether by lending its voice to law and policy reform or by other advocacy efforts;

3. applying Access to Justice BC's Triple Aim measurement framework (which requires improving access to all British Columbians, including groups with particular interests, improving user experience, and improving costs in proportion to the benefits) to the Law society's development of strategic and regulatory policy;

4. analyzing available data and taking an objective, evidence-based approach to the Law Society's decisions and engagement with others in the justice sector;

5. listening to and learning from the diversity of perspectives of British Columbians; in particular, by understanding how some groups are particularly disadvantaged or face acute barriers to accessing justice, and by striving to develop policy that is responsive to those realities;

6. demonstrating leadership to help British Columbians achieve Meaningful Access to Justice. This leadership may include spearheading policy and rule reforms, and supporting government and other justice system stakeholders in developing new and innovative services. The Law Society recognizes that, from time to time, it will be necessary to advance transformative changes to our laws, legal system and related services.

While the Law Society recognizes that the challenges of access to justice and the barriers people face often manifest themselves as the problems of individuals, they are, in fact, shared problems in our society. Recognizing this, the Law Society commits to advance its Access to Justice Vision in a collaborative and constructive manner, with the Society's public interest mandate at the heart of its efforts.

Transforming the family justice system by focussing on family well-being.

Nancy Cameron, QC

Transformation is not a word easily embraced by the justice sector. Transformation, coupled with the phrase, “we have no idea what this will look like,” is enough to frighten anyone who has spent their career working in the dependably rule-bound status quo, of the current justice system. We are all comfortable with and we value the dependability and safeguards of judicial independence, precedent, and the Rule of Law.

Some of you may be thinking, “If transformation means caterpillar to butterfly, let us stay with the dependable, many-legged, caterpillar and leave the butterfly to the social workers, counsellors, and psychologists.

Why would we, the justice sector, step into a leadership role in this transformation? Why loosen our grip on what we know in order to encourage a transformation of the family justice system by focussing on family well-being?

Twenty two years ago, I had one of the most profoundly troubling cases of my career. My client’s husband had made death threats against her. After she left, he stalked her, despite a restraining order, and he quickly alienated her two sons from her. The alienation was swift and severe. It extended to her entire side of the family, He also cut off contact between the boys and their surrogate grandmother, who was the former nanny of the children. The trial judge found that the youngest (who was 13) was at significant psychological danger if left in the father’s home. Concurring with the psychologist, he found the child’s well-being and best interests could only be met if he were ordered to live with the mother. The child ran away, and the Court of Appeal reversed the order. The SCC denied the mother’s leave to appeal, but in a rare show of support for her position, awarded her costs.

My client had a masters degree in nursing. When I left the Court of Appeal with my client, she said to me, “Does the court keep any data? Do they have anyway of tracking to see how cases turn out?” I of course had to tell her the answer was no.

Over the years, former clients have contacted me to let me know how things turned out. Those of us who work in this field, often say, “Children vote with their feet.” But I have also seen the damage that does to children, when they become the centre of the conflict.

Twenty two years went by before I received an email from my client, letting me know that her son, now 35, had reached out to her and they have met. They are now re-building their relationship.

But every single one of you that is a parent can only imagine, “what would it feel like to have my relationship with my child severed for 22 years? And what would it mean for that child?”

Of course she feels frustration and anger with the system. The psychologist in that case, who not only appears as an expert witness in family matters but also in criminal matters, told me that what he hears from the public is a much higher degree of frustration with the family justice system than with the criminal justice system.

Courts have power. We depend on them to exercise that power, when needed. It is a blunt tool. Sometimes it works. But for the most part, it is insufficient for the complex and deeply human needs of the families that come to the justice system for help. Too often, the courts have not been able to use their power effectively to moderate the actions of a bully. The necessary systems operate in too many silos to be able to do that effectively, or, as in the case I just spoke about, the courts sometimes lament, “there is really nothing we can do.”

Dr. Martin Luther King Jr., speaking at the Southern Christian Leadership Conference in 1967, spoke about the relationship between power and love, and said:

“One of the great problems of history is that the concepts of love and power have usually been contrasted as opposites - polar opposites – such that love is identified as a resignation of power and power with a denial of love...What is needed is a realization that power without love is reckless and abusive, and love without power is sentimental and anemic. Power at its best is love, implementing the demands of justice, and justice at its best is love correcting everything that stands against love. ”

I have thought about these concepts often lately, and what they mean for those of us who work in the family justice system. When we look at the power that is so deeply entrenched in the courts, it is usually seen as “power over”. But, as my client would tell us, “Power over”, in the context of the family justice system, does not work. What is needed, in the context of the family justice system, is “power to”. This is the generative side of power, supported by love, which is our striving for unity. How we do this is not easy. It is difficult to grasp intellectually, let alone put into action, yet it is in this place that transformation thrives.

It is not the fault of the justice system that families come to it for assistance when they are at their most vulnerable and most stressed. But if we can transform the system, if we can look to the generative side of power, power infused by love, in a way that supports family well-being, is that not the obligation of leaders in the justice system?

Some of these changes are already happening. Lawyers, financial professionals and mental health professionals have helped thousands of families in British Columbia resolve matters in the Collaborative Process, where everyone agrees not to use adversarial methods and the whole family is supported not only in dispute resolution,

but also dispute containment and the avoidance of future disputes. Mediation has likewise helped thousands of British Columbia families. And now the Provincial Court is courageously trying out the Early Resolution provisions of the new Provincial Court rules. These have been in force in Victoria and in two weeks will roll out in Surrey.

We are lucky. We live in a time in where neuro-scientists are rapidly learning more and more about how our brains – those one billion neurons - work. Dr. John Gottman's research has shown that infants as young as three months react to parental conflict by showing lower abilities to concentrate, less joy, less ability to calm, and higher heart rates. Another Gottman research project followed three and four year olds for 24 hours, testing their urine every hour for cortisol levels. Those children whose parents expressed more marital hostility at home had significantly higher levels of cortisol in their urine than those children with less conflict in their homes. Gottman says, "When we're stressed, we regress." It is rumoured that he has gone so far as to say he can closely predict which couples will stay together by looking at the urine samples of their children. I find this stunning. And since we know that separation is an extremely stressful time for families, and that court processes exacerbate this stress, how can we possibly ignore the consequences this has on the children?

We have learned that Adverse Childhood Experiences can have significant, long term, detrimental effects on health and well-being, long after childhood is over.

We have also learned that trauma can be inter-generational. Epi-genetics has taught us the powerful consequences the environment can have on gene expression, and that these consequences can be passed on from one generation to the next.

We have arrived at that point in history where we need to make an intentional choice: do we continue to be the cautious caterpillar, a justice system married to an adversarial process for families, to an ethic of rights and obligations, or do we choose to take a leadership role and be informed by what neuro-science is telling us? Do we choose to take this knowledge and create a system that decreases, rather than increases, the stressors families are under? Do we choose to use the knowledge of brain science to embrace an ethic of care, and incorporate an ethic of care into the family justice system?

I am going to take a few minutes to talk about two different models of resolving moral dilemmas; Lawrence Kohlberg's ethic of justice, or rights and obligations, and Carol Gilligan's Ethic of Care.

In 1958, Lawrence Kohlberg, developed a moral taxonomy to describe six stages of moral development. He used male subjects to develop this taxonomy. His fourth stage he called Law and Order, with behaviour prescribed by laws, rules, performing one's duty, maintaining order and avoiding guilt. The fifth stage he called Social Contract/Legalistic, wherein the individual understands the relative nature of personal values and opinions, and behaviour is determined on socially agreed upon rights.

Striking in Kohlberg's taxonomy is the similarity between stages four and five and the theories that our justice system is built on.

The care-oriented model was developed by Carol Gilligan. It is often referred to as an ethic of care, as opposed to an ethic of justice. Gilligan was a student of Kohlberg's, and she was struck by the fact that women tended to cluster below men in Kohlberg's taxonomy. She believed that Kohlberg's stages were based on a male model, and as such ignored the fact that women place great value on inter-connectedness, care and responsibility to others. Gilligan's model has three stages, with the third (highest) stage being a principal of non-violence and doing no harm to self or others.

Although most people – men and women - bring an ethic of care into personal moral decision making, this is not what an adversarial justice system has at it's core. And yet, we would probably all agree that this is exactly what we would endeavour to bring to our own, deeply personal, family dilemmas.

As lawyers, we are deeply rooted in the ethic of justice. A study of law students found that the first year of legal education alters women students' moral decision-making processes. Women students in the study shifted from a predominantly care orientation, at the beginning of law school, towards a rights orientation by the end of first year law school. Male law students showed little change in their moral reasoning. Men in the study demonstrated a predominantly rights orientation both at the beginning and the end of first year law. Also, men were able to maintain the ratio of balance between care and rights thinking that they had entered law school with. Although men predominantly made decisions from a framework of rights and obligations, there were some decisions - especially those involving personal circumstances - that they brought a care orientation to, and this form of balance became more ingrained for men by the end of first year.

This study exemplifies the challenges those of us in the justice system may have as we struggle with the concept of transforming the family justice system by focussing on family well-being.

Incremental innovation is what the justice system is used to. I know this. I spent eight years on the BC Supreme Court Rules Revision Committee.

In 1990 I presented a paper to a group of senior family law lawyers wherein I argued for the adoption of child support guidelines. There was not a lawyer in the room that supported the idea.

Moving away from our training in an adversarial model is difficult. In one of my early Collaborative cases, my colleague and I became so embroiled in arguing our positions, that when I hung up the phone and walked into my paralegal's office I cried. Not only was the other lawyer a colleague, I also considered her a friend. And I said to my paralegal, "If she and I can't do this, I don't know how I can expect this process to be

successful."

But what I have learned is that we can do this. Those of us committed to working in Collaborative Process have seen our cases become more difficult, and more high conflict. Frankly, those who can resolve matters on their own are doing that. Yet as a Collaborative community, we have been able to support each other in the hard work that we do, and we manage to create enough support, in a non-adversarial setting, for clients to resolve even extremely difficult matters.

Richard Susskind, in his book "Online Courts and the Future of Justice" explores what he calls "Outcome Thinking". He describes a manufacturer of drills who told his sales force that they weren't selling drills, they were selling holes in the wall. Professor Farrow's study, asking members of the public to define "justice" or "access to justice" and finding many responded with "the right to a good life" is classic outcome thinking. As we endeavour to embrace the concept of "transforming the family justice system to support family well being" and work to re-imagine the system, it will be helpful for us to use outcome thinking. Remember that the outcome we are looking for is one that reduces, rather than increases, toxic stress. A system that strengthens resilience. And a system that supports families, rather than escalating conflict.

When I read Susskind's broad definition of access to justice as having four components:
Dispute Resolution
Dispute Containment
Dispute Avoidance
Legal health promotion

I was overjoyed! For once, I was reading a definition that resonated with what I knew people wanted from the justice system. And we know that the courts, in their present iteration, have only been designed with the first of these: dispute resolution - in mind. The Early Resolution project in Victoria and soon Surrey is groundbreaking in part because it strives to incorporate dispute containment from the outset.

We know the family justice system needs to be transformed. I was in provincial court last year. I had agreed to do a matter pro bono because it was so complex I could barely figure it out. My client, even with his PhD, had literally sat down in the registry and wept when the registry refused to file the document I had drafted for him. When I attended at the courthouse, I stood in front of the screen that scrolls through the list. I counted how many of the litigants had lawyers. More than 85% had no lawyer. And of the 15% that did have counsel, many of those were Ministry matters. Those lawyers were the ones with the Ministry contract.

I think we would all agree that family is the cornerstone of our communities, of our society, and of our country. And yet our family justice system needs to make a profound shift. We cannot ignore the science. We are beyond the time of incremental change. It

is time to positively support families at their time of greatest need, a time of grief and restructuring, by transforming the family justice system to support family well-being.

(https://accesstojusticebc.ca/)

Transform the Family Justice System the (TFJS) Collaborative

In December 2020, A2JBC's Steering Committee accepted the recommendations of a **working group report (https://accesstojusticebc.ca/family-justice-leadership-strategy/)** on an A2JBC family justice leadership strategy and committed to creating a cross-sectors collaborative to transform the family justice system in BC by focusing it on achieving family well-being – the Transform the Family Justice System (TFJS) Collaborative.

Thanks to funding from the Notary Foundation of BC, A2JBC is now engaged in taking the steps necessary to lay the foundations for a sustainable family justice collaborative as set out in the working group report. **Join us**!

(https://www.youtube.com/watch?v=3d13Qimx84E)

(https://www.youtube.com/watch?v=3V9wpc0Ag3g)

Indigenous Perspectives on a Transformed Family Justice System

(https://www.youtube.com/watch?v=o2n6UtEAA7w)

Why I Support the Transform the Family Justice System Collaborative

Chief Justice's Family Justice Blog Posts

A2JBC takes first steps in leadership to transform the Family Justice System

(https://accesstojusticebc.ca/2021/01/a2jbc-takes-first-steps-in-leadership-to-transform-the-family-justice-system/)

In December, I blogged about aspiring to be a butterfly rather than a cautious caterpillar in choosing to transform the...

Butterfly or caterpillar? It's time for transformation of the family justice system (https://accesstojusticebc.ca/2020/12/butterfly-or-caterpillar-its-time-for-transformation-of-the-family-justice-system/)

"We have arrived at that point in history where we need to make an intentional choice: do we continue to...

Putting children at the centre (https://accesstojusticebc.ca/2019/12/putting-children-at-the-centre/)

At the most recent meeting of the A2JBC Leadership Group on October 30, 2019, I was grateful for the opportunity...

Understanding the value of alternative dispute resolution (https://accesstojusticebc.ca/2018/06/understanding-the-value-of-alternative-dispute-resolution/)

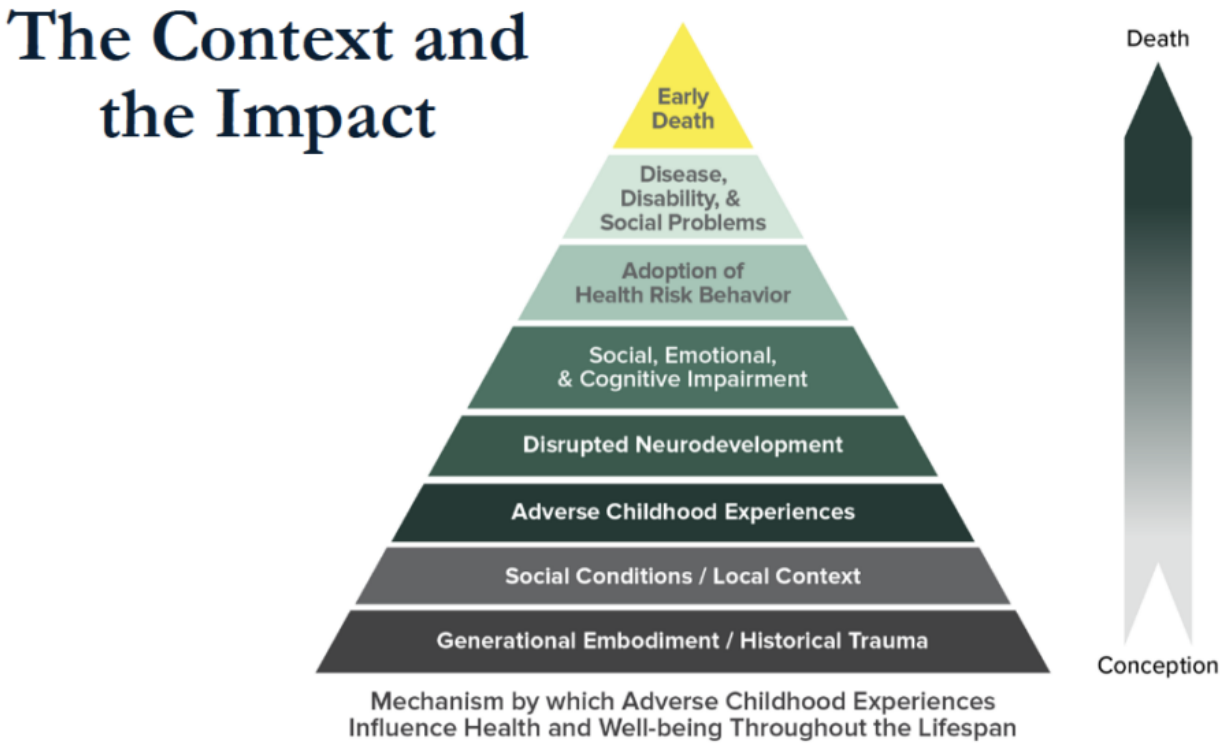
The Canadian Forum on Civil Justice recently released a report evaluating different dispute resolution methods in family law matters. The...

Access to justice for children and youth (https://accesstojusticebc.ca/2017/12/access-to-justice-for-children-and-youth/)

Last week I had the opportunity to meet with lawyers from the Child and Youth Legal Centre, launched earlier this...

The Why: What brain science tell us

Research on **how brains are built (https://www.albertafamilywellness.org/resources/video/how-brains-are-built-core-story-of-brain-development)** tells us that toxic stress and childhood trauma can have disastrous immediate, long-term and intergenerational impacts on children and families.



"**Resilience (https://www.albertafamilywellness.org/resources/video/brains-journey-to-resilience)**", inherent in everyone, helps children, youth and adults cope with stress and trauma. Adults, who themselves have experienced the impact of trauma, need support to help them minimize the impact of trauma on their children.

To promote child and family well-being, we – as a society - need to find ways to reduce the tox tress, enhance resilience and support families going through these traumatic life experiences.

Read more (https://accesstojusticebc.ca/family-justice-leadership-strategy/brain-science/) on the Brain Science

The What: A shift from doing unintentional harm to promoting family well-being

Access to justice is not just about improving access to courts or lawyers. It is about creating the conditions that allow all people to live a good life. The justice sector cannot do that on its own; but it has a part to play in promoting the well-being of the people it serves.

Parental separation and divorce, family dysfunction, domestic violence are all Adverse Childhood Experiences that are subject to the family justice system. Looked at from the perspective of families, legal issues are secondary to their social, relationship, parental and financial issues.

The family justice system - through its adversarial-based processes and culture, and its siloed focus on legal solutions - unwittingly increases toxic stress for family members and misses opportunities to promote family well-being.

By shifting the perspective FROM a justice system that has courts as the focal point TO one that has children, youth and families at the centre, the family justice system can transform itself into a system that does no harm and promotes family well-being.

***Vision**: a family justice system that, together with other societal systems, supports children, youth and families*
***Goal**: child, youth and family* well-being

(https://secureservercdn.net/198.71.233.189/m5k.dc7.myftpupload.com/wp-content/uploads/2021/01/FJPS.jpg)

The Family Justice Collaborative will seek to achieve this shift in thinking and place the family justice system alongside other societal systems as part of an ecosystem that supports children, youth and families to live a good life.

Read Nancy Cameron's keynote speech (https://secureservercdn.net/198.71.233.189/m5k.dc7.myftpupload.com/wp-content/uploads/2020/12/20-11-23-Why-Transformation-Nancy-Cameron.pdf) on why we need to transform the family justice system, presented to the November 2020 Colloquium on Transforming the Family Justice System.

Watch the video (https://www.youtube.com/watch?v=3d13Qimx84E) of Chief Justice Bauman's conversation with Nancy Cameron.

The How: “Highly aligned and loosely coupled” activities

To reach the goal of a transformed family justice system, focused on achieving family well-being, requires many people and organizations aligning around common strategic objectives, engaging in activities directed at those objectives and assessing success by using shared measures. Through the use of a strategy mapping approach, the Transform the Family Justice(TFJS) Collaborative will create the necessary framework and backbone support for this collective effort.

Read more about using a strategy map framework (https://accesstojusticebc.ca/family-justice-leadership-strategy/recommendation-4/) for the TFJS Collaborative.

View the **High Level Transform the Family Justice System Strategy Map (https://secureservercdn.net/198.71.233.189/m5k.dc7.myftpupload.com/wp-content/uploads/2021/01/TFJS-strategy-map-Jan-2021.pdf)**.

An Indigenous Lens

In taking a family-focused approach to transforming the family justice system, BC is fortunate to be able to learn from the traditional approaches of its Indigenous peoples. Indigenous perspectives on child and family well-being are based on a different model than the nuclear family model that drives Western thinking.

Community, culture and land are central to the well-being of Indigenous families. Colonialism and Canada's Residential Schools policy have resulted in historical trauma that has had intergenerational impact on Indigenous children, youth and families. Promoting family well-being for Indigenous peoples in BC requires a community-based approach.

Achieving the goal of family wellbeing in the BC family justice system will only happen if the justice sector follows the lead of Indigenous peoples and communities, and acts in support of their efforts.

Read more on the Working Group Report Recommendation #3 (https://accesstojusticebc.ca/family-justice-leadership-strategy/recommendation-3/): *Invite Indigenous leaders to co-develop an Indigenous family justice strategy, with A2JBC in the context of the TFJS Collaborative*

Join Us:

Invitation to participate: If you are inspired to be part of the TFJS Collaborative, contact us at **contact@accesstojusticebc.ca (mailto:contact@accesstojusticebc.ca)**. We are looking for:

- **Family members** (adults, children and youth) with lived experience in the current family justice system who are motivated to help change it – We want to learn from your experience.
- **Family law lawyers, mediators, judges and other justice sector service providers** – We know that you feel the stress of being involved in a system that is not working for the people you are in it to serve. You can help change it by sharing your experiences and insights, by making shifts in your practice and by participating in the Collaborative.
- **Leaders of justice sector organizations** that are already working at improving the family justice system for children, youth and families – We want to build on what you are already doing and link you to others who might help you achieve your goals. **Tell us your stories (https://accesstojusticebc.ca/share-your-story/)** of the work you are already doing
- **Indigenous justice and community leaders** - We want to work alongside you and support your efforts to achieve family well-being for Indigenous peoples in the BC family justice system
- **Organizational leaders and professionals from other sectors** – We want to explore with you how we can work together to transform the family justice system so that it does no harm and positively impacts family well-being.

 (https://twitter.com/A2JBC) Email us at **contact@accesstojusticebc.ca (mailto:contact@accesstojusticebc.ca)**

Report on Child & Youth Family Justice Gatherings held on March 2 and 16, 2021

A. The gatherings

On March 2 and 16, Access to Justice BC and the Representative for Children and Youth hosted Zoom gatherings, attended by about 50 invited guests who met to consider the family justice system and how it impacts children and youth (the "March gatherings").

Most of the participants attended on both March 2nd and 16th. The participants made up a diverse group of child and youth champions that included about ten young people with lived experience who participated fully and co-facilitated small group conversations. Other participants, both in the justice sector and other sectors, included judges, lawyers, mediators, social workers, psychologists, family doctors, paediatricians, academics, leaders in the not-for-profit sector and government policy people in the Ministry of Attorney General and the Ministry of Children and Family Development. What they all had in common was a commitment to transforming the family justice system in BC so that it does no harm, but instead contributes to the long-term well-being of children and youth.

On March 2, the group worked diligently at viewing the family justice system from the perspective of children and youth. They were aided by hearing the views of the young people and by the stories of Ben, Haley and Jaiya – three fictional characters who reflected the lived experiences of many young people with the family justice system. In small groups, participants identified pain points for Ben, Haley and Jaiya, and missed opportunities for the system.

Four themes were extracted from the March 2 group discussions that were turned into four "What If" questions:

What would it look like if:

1. *All children and youth meaningfully participated, from beginning to end, in decision-making related to family justice issues, with supports as required?*
2. *Children and youth's best interests and well-being (both short and long-term and understood to be relational) were the central focus from the beginning and throughout their family's involvement with family justice issues?*
3. *The family justice system worked very closely with other sectors to identify and address issues experienced by families and impacting their well-being?*
4. *The family justice system was contributing to increasing equity for families and family members?*

On March 16, each participant virtually attended two small group sessions. Each session focused on one of the What If questions. With two small groups for each question, every question had four different participant groups contributing to the answers. Answers were written on online sticky notes. Participants were invited to offer further answers after the session, particularly for the questions that they did not work on at the gathering, and some did.

B. Themes, vision, some high-level strategic objectives and guiding principles reflected in the answers

In the weeks following the March 16 gathering, the answers to the four questions were collated and several common, interrelated themes across questions were identified. In summary, the answers added up to one overriding conclusion: **if any of the imagined states were realized, the family justice system would look very different than it does now**. In what way different? The answers fit into four interrelated themes:

1. meaningful participation of children and youth
2. long-term well-being mindset
3. systemic equity
4. customized, intersectoral supports.

The input in terms of each of these themes or buckets was detailed and imaginative, and often remarkably similar across the small groups. The actual responses are available. What follows is a generalized statement of the vision for each of them, followed by either the key strategic objectives emerging to achieve the vision, or an attempt to capture the key concepts for guiding principles or values.

1. **Meaningful participation of children and youth:** *Vision of the desired state:* Children and youth of all ages meaningfully participate* (before, throughout and after their families are engaged in the family justice system**) in decision-making that affects them.

Three general strategic objectives to obtain this desired state emerged from the answers to question one, and were echoed in other small groups:

a. Provide, at different stages, various opportunities for children and youth to participate meaningfully in ways that are safe and developmentally appropriate.
b. Across all sectors, support children and youth to make their participation meaningful, including by helping them to develop their capacity to participate effectively.
c. Educate family members***, service providers, legal professionals, judges and others interacting with children and youth, about how important participation is to the well-being of children and youth, and how to support it effectively.

***Participation**: The UN Convention on the Rights of the Child (UNCRC) asserts that participation is a fundamental right of children and youth – a right they carry with them from birth and across all parts of their life. Participation promotes healthy development, and respects human dignity and agency. What meaningful participation looks like will depend on the stage of development of the child or youth and their circumstances. It must be implemented with due regard for the safety of the child, and with a presumption of their capacity to participate. It includes the child or youth being: informed in ways they can understand; consulted about their views; involved in making decisions; and empowered to exercise their agency.

****Family justice system:** The family justice system is broadly defined to include all services, (provided by the justice sector and other sectors) and all processes (not just court or administrative tribunal processes) related to the prevention, management and resolution of family justice issues. Family justice issues include issues arising from separation and divorce, child abuse and neglect, and family violence.

***** **Family members:** Family members are defined broadly to include parents, extended family and any adults with whom the child or youth has a bond of affection.

2. **Long-term well-being mindset:** *Vision of the desired state:* Family justice system thinking is pervaded by a long-term well-being mindset, and policy and practice are guided by this mindset and the principles reflected in the UN Convention on the Rights of the Child.

Many elements of this long-term well-being mindset were highlighted at the March gatherings. They need to be clarified and expanded upon. Key words and phrases include:

a. child centred
b. holistic/intersectoral
c. taking a long-term view of needs
d. emphasizing importance of relationships
e. preventative
f. strengths-based rather than deficit focused
g. supportive of agency and presumed capacity to choose
h. trauma-informed.

3. **Systemic Equity:** *Vision of the desired state:* Equity is a driving force in the family justice system.

What Equity in the family justice system looks like includes:

a. Promoting substantive and restorative justice throughout the family justice system
b. Recognizing and addressing inherent bias in family justice processes, policies and decision-making.
c. Implementing decision-making that is less hierarchical, more collaborative, and deliberately shares power
d. Engaging and empowering, in family justice processes, the communities with which families identify
e. Taking into account and reducing barriers resulting from conditions of special vulnerability and from biases related to race, historical trauma, gender, disability and culture
f. Identifying and addressing the use of justice system processes as a tool for one participant in the process to exert ‘power over’ another.

4. **Customized, intersectoral supports**: *Vision of the desired state:* Supports are provided, across sectors, to children, youth and family members that are customized to their multi-faceted, holistic needs, including but not limited to their need to be safe.

   Four general strategic objectives were identified to obtain this desired state:

   a. Design and resource less rule-bound and more intersectoral, joint problem-solving, "wrap around" responses that feel safe to children, youth and families experiencing family justice issues.

   b. Develop accessible assessments (done early and along the way as needed, by people and in circumstances that children, youth and families can trust) that:
      i. identify relevant trauma and current safety issues
      ii. assess family and individual strengths
      iii. analyse support needs.

   c. Find ways to share relevant family information on a "need to know" basis, while respecting privacy and safety.

   d. Increase the knowledge of those interacting with children, youth and families, in all sectors including the family justice sector, about
      i. The impact of trauma and the importance of reducing toxic stress and de-escalating conflict
      ii. The developmental needs of children and youth, in particular for loving relationships, trust, safety and opportunities to assert agency
      iii. What services are available in all sectors for appropriate support
      iv. How to support children, youth and family members to access those services.

   e. Use technology to help direct families to the right services, and address how to overcome the barriers to access to technology.

How the Child & Youth champions March gatherings feed into the Transform the Family Justice System (TFJS) Collaborative

2021 is the year for laying the foundations for the A2JBC-led Transform the Family Justice System (TFJS) Collaborative. The work done at the March gatherings provides rich material for this foundational phase.

The March gatherings began the TFJS Collaborative's work by:

- highlighting the importance of child and youth participation
- developing a common language around what is meant by a "well-being" approach

- linking to the UN Convention on the Rights of the Child as a developed well-being framework accepted as law
- articulating shared values and principles of equity that should guide the family justice system and the TFJS Collaborative
- emphasizing the need to adopt intersectoral approaches
- identifying elements of the current state that need to change and envisioning a future desired state (Note: this "From/To" thinking allows for the articulation of high-level strategic objectives and measures of success.)

Many of the participants at the March gatherings are involved in organizations or professions that are already working to achieve child and youth well-being. The TFJS Collaborative seeks to align these people and organizations (and others yet to be recruited) around common strategic objectives, and to develop common measures of success. It will also use a tool for sharing information about activities to generate new ideas and improve the chances of success.

The TFJS Collaborative is about people working together towards a common goal. For the participants, the March gatherings were first steps in participating in the TFJS Collaborative. The next steps will be different for different participants. A survey of participants will identify interests for future participation.

The focus of the TFJS Collaborative is on the action of people and organizations. It is particularly looking to engage organizations that are already involved in, or have planned, activities that support the overall objective to transform the family justice system by focusing on achieving family well-being.

Communities of interest related to high-level strategic objectives will be created where energy for action is apparent. The community of Interest will be a space to:

- share information about current and proposed activities
- confirm alignment around common objectives
- develop measures for success
- learn from experience, asking what more could be done to achieve the related strategic objectives, and
- collectively pursue more resources to achieve the objective.

The March gatherings had a particular focus on child and youth participation. A child and youth participation community of interest will be created to move this strategic objective along and because it will be the first of the communities of interest, it will be involved in test-driving the strategy mapping approach that the TFJS Collaborative is proposing to use. Read more about the TFJS strategy mapping approach. It is an approach or tool that encourages a high degree of alignment coupled with loosely connected, independent activities.

Other emerging streams of the TFJS Collaborative that participants may want to be involved in include:

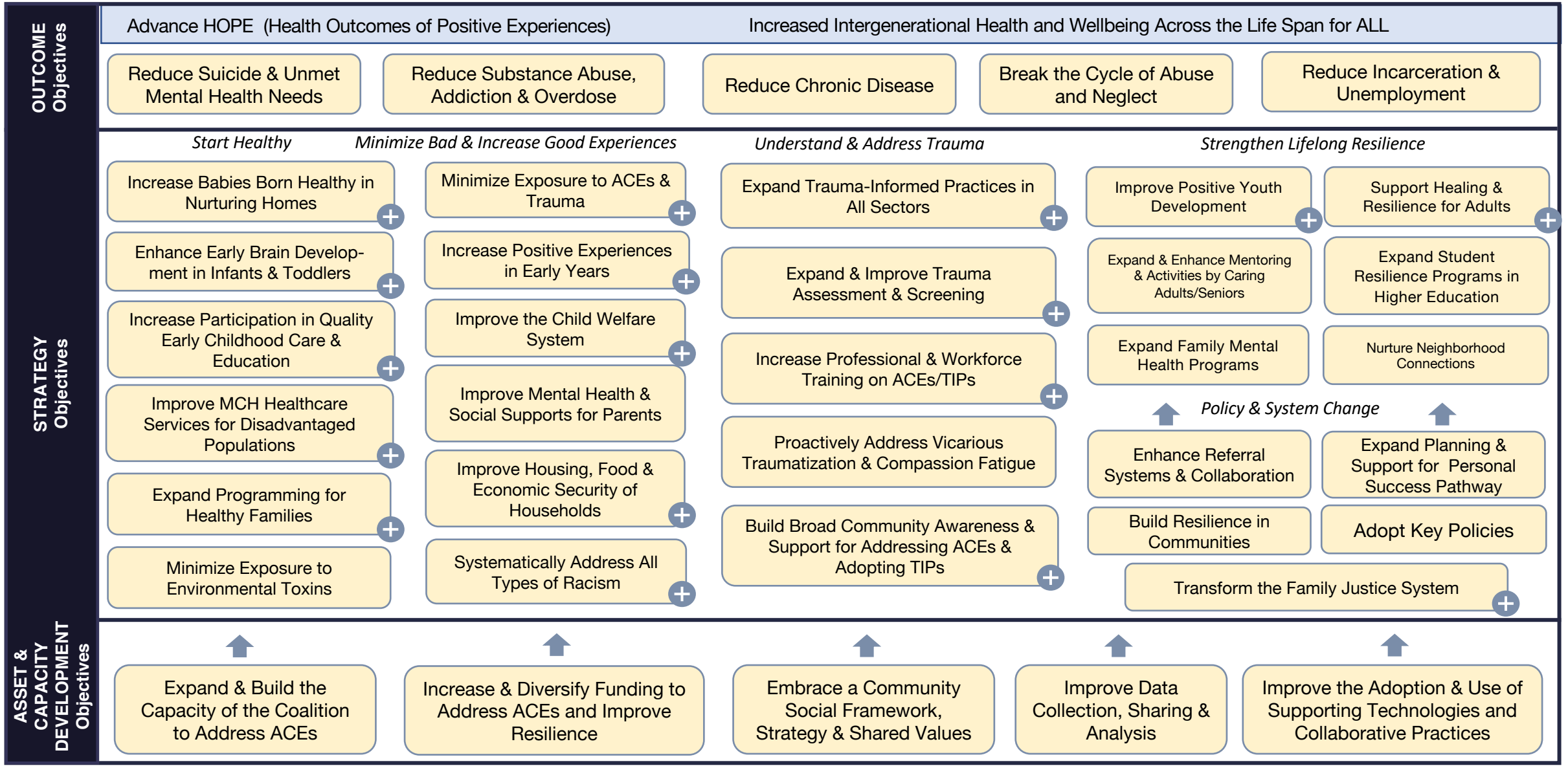
- educating practitioners about the reasons for a well-being approach and how to implement it in their practices;
- reducing the negative effects of an adversarial approach to family justice issues while keeping children, youth and family members safe;
- making intersectoral approaches the norm;
- finding ways to connect children, youth and families to supports that are customized to their needs.

The next step for each participant (and anyone else interested) is to think of whether and how they want to contribute to transforming the family justice system. What activities do they or their organization have underway that might both benefit from connecting with other organizations trying to achieve a similar objective? Where are their energies best directed? Do they want to participate in a community of interest related to the TFJS Collaborative and, if so, which one(s)?

The March gatherings were an important step along the path to a transformed family justice system. The co-hosts Access to Justice BC and the Representative for Children and Youth are grateful to everyone who participated.

ARRCC
ACEs & Resilience
Resource Commons For Communities

ACEs and Resilience Strategy Map

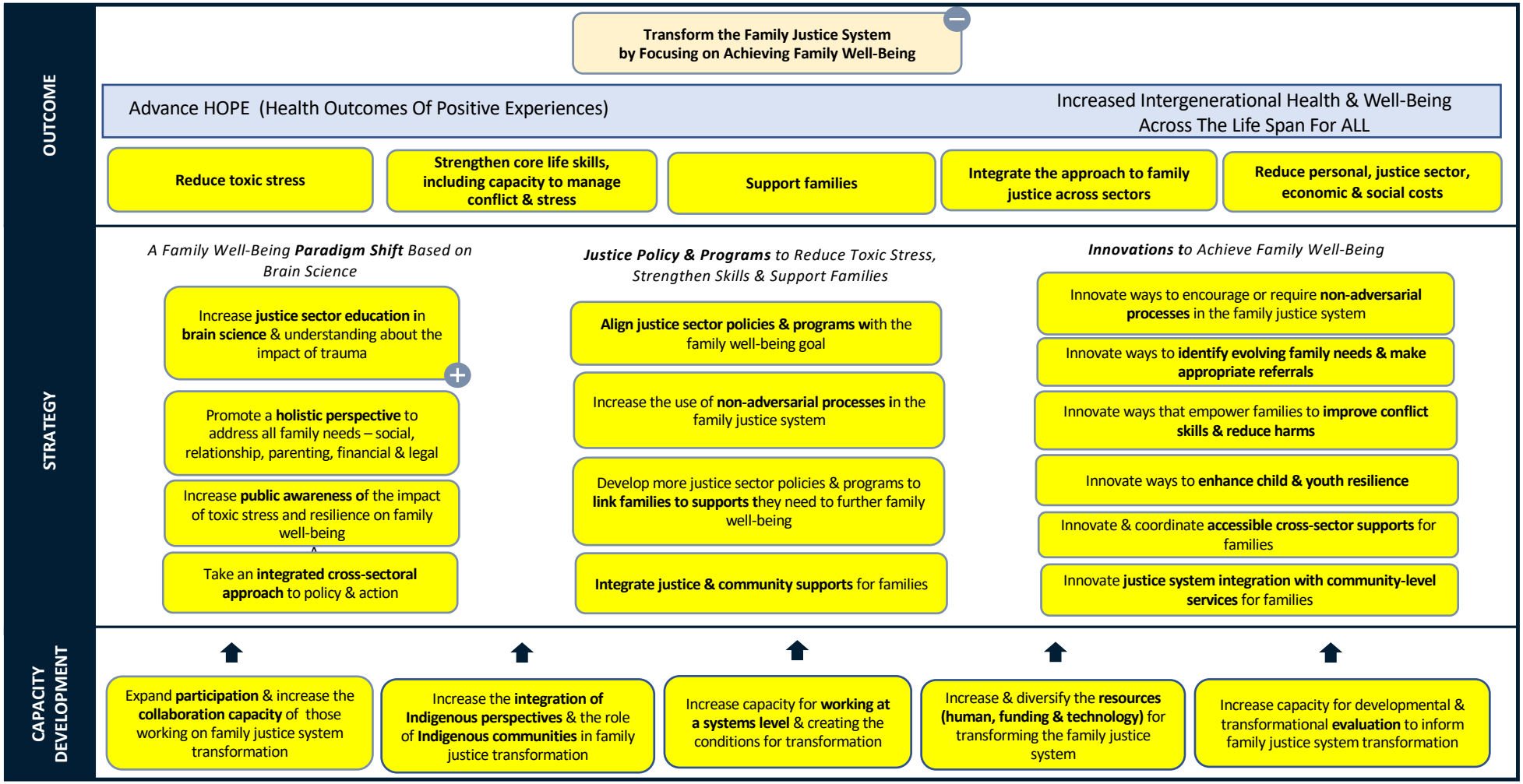


Draft 3, March 2020

MCH = Maternal & Child Health

TIPs = Trauma-Informed Practices

Zoom: Transform the Family Justice System



Jan 2021

Excerpt from Report of the Working Group on an A2JBC Family Justice Leadership Strategy (November 2020)

Brain Science, ACE's and resilience research and the Family Justice System

The scientific evidence

As has been done in other sectors, the justice sector needs to root its understanding of child and family well-being in the scientific evidence. Brain science tells us that the healthy development of children's brains is a crucial determinant of future well-being. Non-stressful interaction with loving adults enhances healthy brain development. Trauma and toxic stress interfere with it.

The research on Adverse Childhood Experiences (ACEs) identifies ten childhood experiences that potentially create toxic stress and risk negative immediate, long-term and intergenerational impacts. (See Figure 3, ACEs chart.) Divorce and parental separation is an ACE, as are other family justice related issues such as child neglect (physical and emotional) abuse violence and incarceration.

The more ACEs experienced by children, the higher the risks of immediate and future negative outcomes. The presence of adverse social conditions and historical trauma also increase risks and lead to intergenerational impacts. (See Figure 4 Pyramid of ACEs Context and Impacts.)

But the news is not all bad. Resilience, inherent in all of us and strengthened through healthy brain development, helps with the management of stress. There is something that can be done to ameliorate the negative impact of ACEs: negative experiences can be reduced, resilience strengthened and positive supports provided. (See Figure 5, Resilience Scale.)

While the biggest potential impact of toxic stress is on the brains of young children and adolescents, adults (especially those who themselves have experienced multiple ACEs) continue to be undermined by toxic stress experienced in adulthood. Their resilience can also be strengthened, albeit not as easily as the resilience of children and youth. With a non-stressful environment and the right supports, adults who have themselves experienced ACEs can provide the necessary stability to their children when those children are experiencing adversity, so that the stress is not toxic and the child's resilience is strengthened rather than undermined.

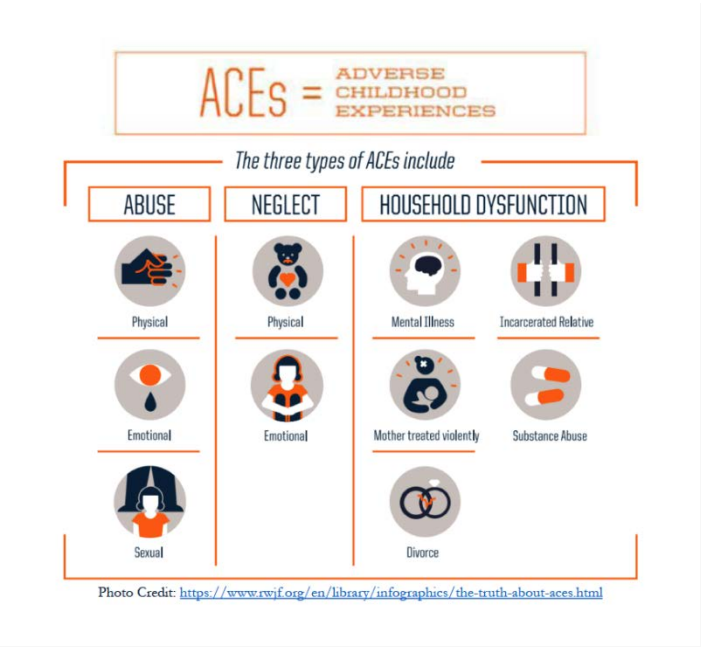


Figure 3: Adverse Childhood Experiences

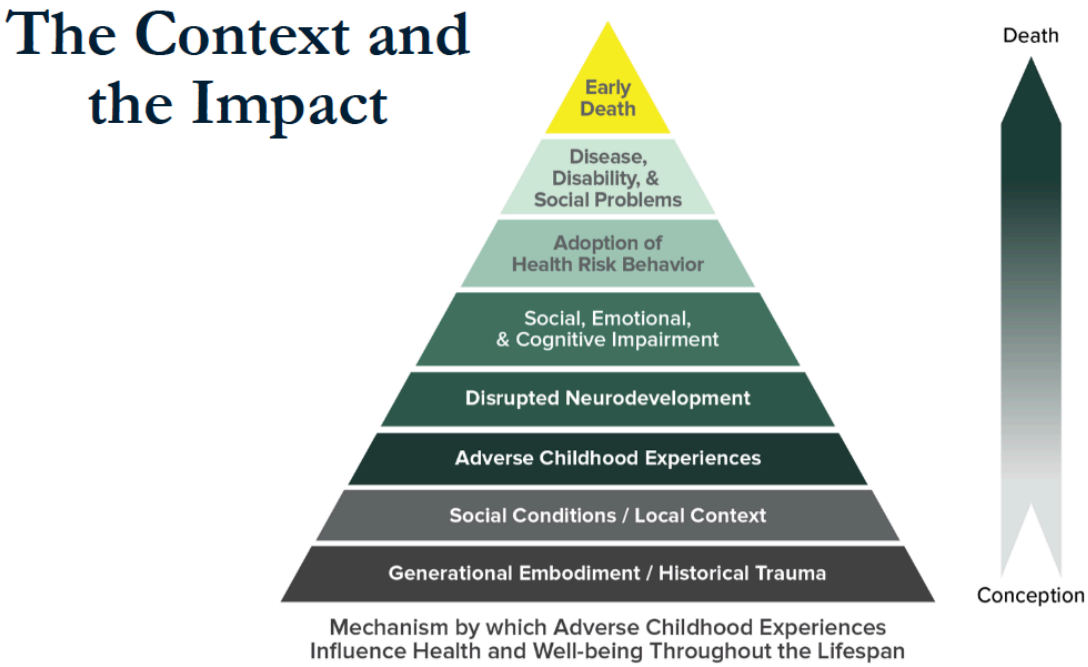


Figure 4: Pyramid of ACEs context and impacts

https://www.albertafamilywellness.org/resources/video/brains-journey-to-resilience

Figure 5: Resilience Scale

How does this play out in the family justice system?

Differences among family members are inevitable, and are not necessarily harmful to children. Experiencing some level of stress is what strengthens children's resilience. If the differences are managed well within the family, children develop the capacity to manage conflict well as adults.

It is when families are having difficulties managing differences that they often come into contact with the family justice system. Families facing family justice issues related to separation and divorce, such as, neglect and abuse and family dysfunction, including mental health and substance abuse, violence and incarceration (all designated as ACEs) will likely be experiencing heightened stress that could be or become toxic.

The family justice system is intended to help families resolve disputes about their family justice issues. In practice, however, the system often exacerbates the stress families are already experiencing, thereby increasing the likelihood that the stress will become toxic.

This is, in part, because the family justice system is based on an adversarial dispute resolution model. In this model, the justice system's role is to provide a neutral third-party decision-making process for unresolved disputes. The adversarial model assumes that the best way for

that neutral third party to make just decisions is in a court process that regulates a clash between opposing forces. It is presumed that out of this clash will emerge justice.

While the system may see itself as playing the benign role of helping to resolve disputes, the adversarial approach creates a win/lose narrative that fuels, rather than diffusing, the toxic stress that may be at play in the conflict between the adults in the family. From the perspective of the participating adversaries, the system encourages them to dredge out the most negative aspect of the other, assume the worst at each stage, confront the other, and work towards an end goal of overcoming the other. Rather than creating optimum conditions for an environment that supports healthy brain development in children, it increases the toxic stress and risks serious immediate, long-term and intergenerational negative health effects on both children and adults.

What is the family justice system's role in promoting family well-being?

"To be entirely or even mainly focused on the resolution of disputes in our pursuit of justice is, I submit, to miss much that we should expect of our legal systems. A broader view is needed."

- Richard Susskind, Online Courts and the Future of the Justice System, p. 66

Richard Susskind argues that the concept of access to justice should embrace four elements:

1. Dispute resolution – an authoritative forum for the vindication of people's legal rights
2. Dispute containment – nipping disputes in the bud or providing justice system responses that are proportionate to what is at stake and in the best interests of litigants
3. Dispute avoidance - building a fence at the top of the cliff, rather than focusing on how responsive and well-equipped the ambulance is at the bottom
4. Legal health promotion – empowering people to access the many benefits that the law can confer.

We can deduce from the brain science that adversarial dispute resolution processes, designed as clashes between the participants, should, as much as possible, be avoided to the benefit of all family members, particularly the children. A family justice system focused on family wellbeing will lead to designing a system that creates the conditions for de-escalation of conflict, and puts a premium on the dispute containment and avoidance roles of the family justice system. This might mean using the authority of judges to divert cases out of the justice system entirely, or creating a presumption of consensual dispute resolution (including mediation and Collaborative Practice, such as is currently being tested by the BC Provincial Court in Victoria, and soon Surrey), or working upstream to avoid court entirely.

Promoting legal health includes empowering family members to manage their own conflicts and to live a good life, in accordance with their rights as humans, as Indigenous peoples or as children. This might mean providing separating parents easy access to online co-parenting tools or child support calculators, or involving Elders in decisions about the children from their communities, or giving children and youth the safe opportunity to participate in decisions that impact them, and thereby allowing them to realize their rights under the UN Convention on the Rights of the Child.

Focusing the family justice system on family well-being and taking a broader view of access to justice will lead to policies and programs that we have only begun to imagine.

Working in partnership with other sectors

From the perspective of the family (adults, youth and children), family legal issues are most often secondary to social, relationship, parenting and financial issues. Making family well-being the focus of the family justice system leads to recognizing that the justice sector is not where the solutions lie for most families. The authority of the court may still be needed to combat power abuses within families, but issues that require skills, knowledge and experience not held by judges and lawyers can and should be referred to others outside the justice system.

A transformed family justice system focused on family well-being will support and be supported by professionals from other sectors, and all will be aligned around the common goal of child and family well-being. The justice sector will be integrated with the health (particularly mental health), education and social services sectors, allowing lawyers, judges and mediators to do what they do best, but not in a silo that plays down the non-legal issues of families.

The shift in focus to family well-being is not intended to turn lawyers and judges into social workers or mental health professionals. Instead, it will lead to the justice system working alongside other societal systems, and together with them, supporting families to achieve wellbeing by offering its particular contribution to that goal.

While the health and social services sectors may be seen as the more obvious leads in generally promoting family well-being, it is up to the justice system to take the lead in designing justice sector policies and processes, and supporting innovations, that reduce toxic stress, strengthen resilience and get families the support they need as they work through multi-faceted issues that bring them into contact with the family justice system.

Additional Material/Links

1) CDC article “Violence Prevention” https://www.cdc.gov/violenceprevention/aces/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Fabout.html

2) The Alberta Family Wellness Initiative, “How Brains are Built” (Video approximately 4 minutes) Resources » Alberta Family Wellness Initiative

3) The Alberta Family Wellness Initiative, “Brains: Journey to Resilience” (Video approximately 97 minutes) Resources » Alberta Family Wellness Initiative

ACEs, The Family Justice System & Strategy Mapping: A Tool For Collective Action

January 20, 2021

A collaboration working together

to improve family well-being:

Access to Justice BC

Reforming the Family Justice System (Alberta)

InsightFormation

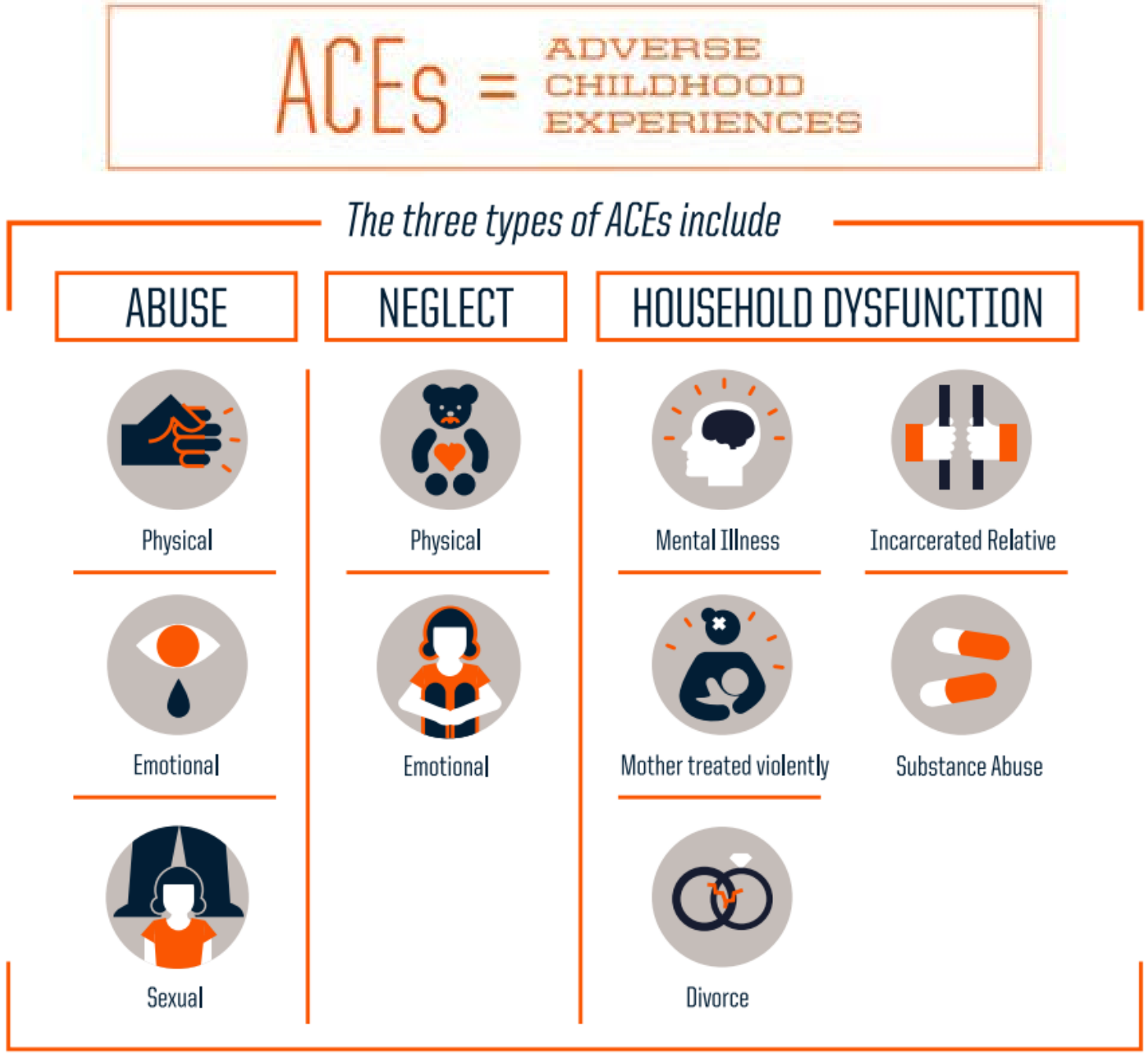


Photo Credit: https://www.rwjf.org/en/library/infographics/the-truth-about-aces.html

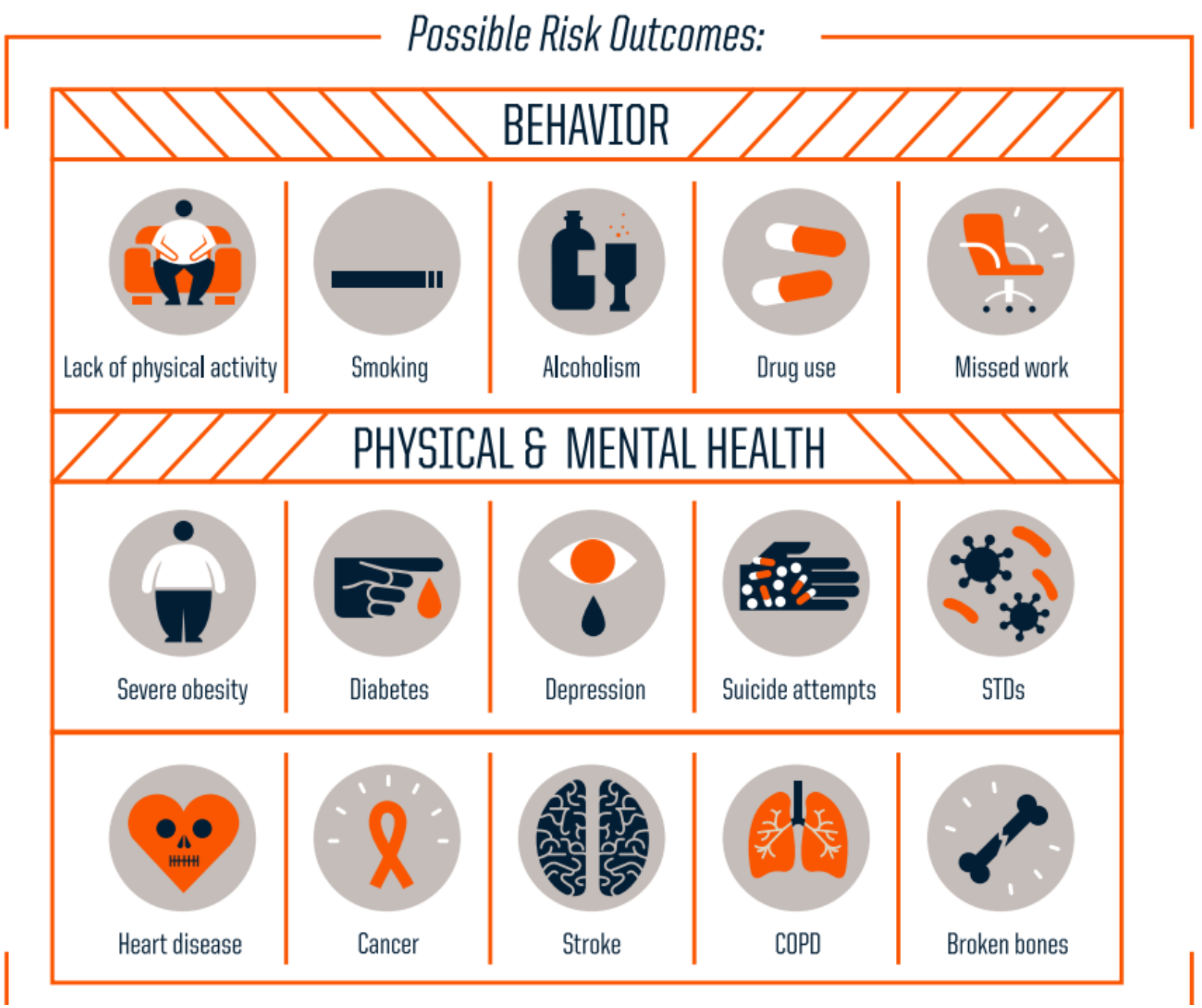
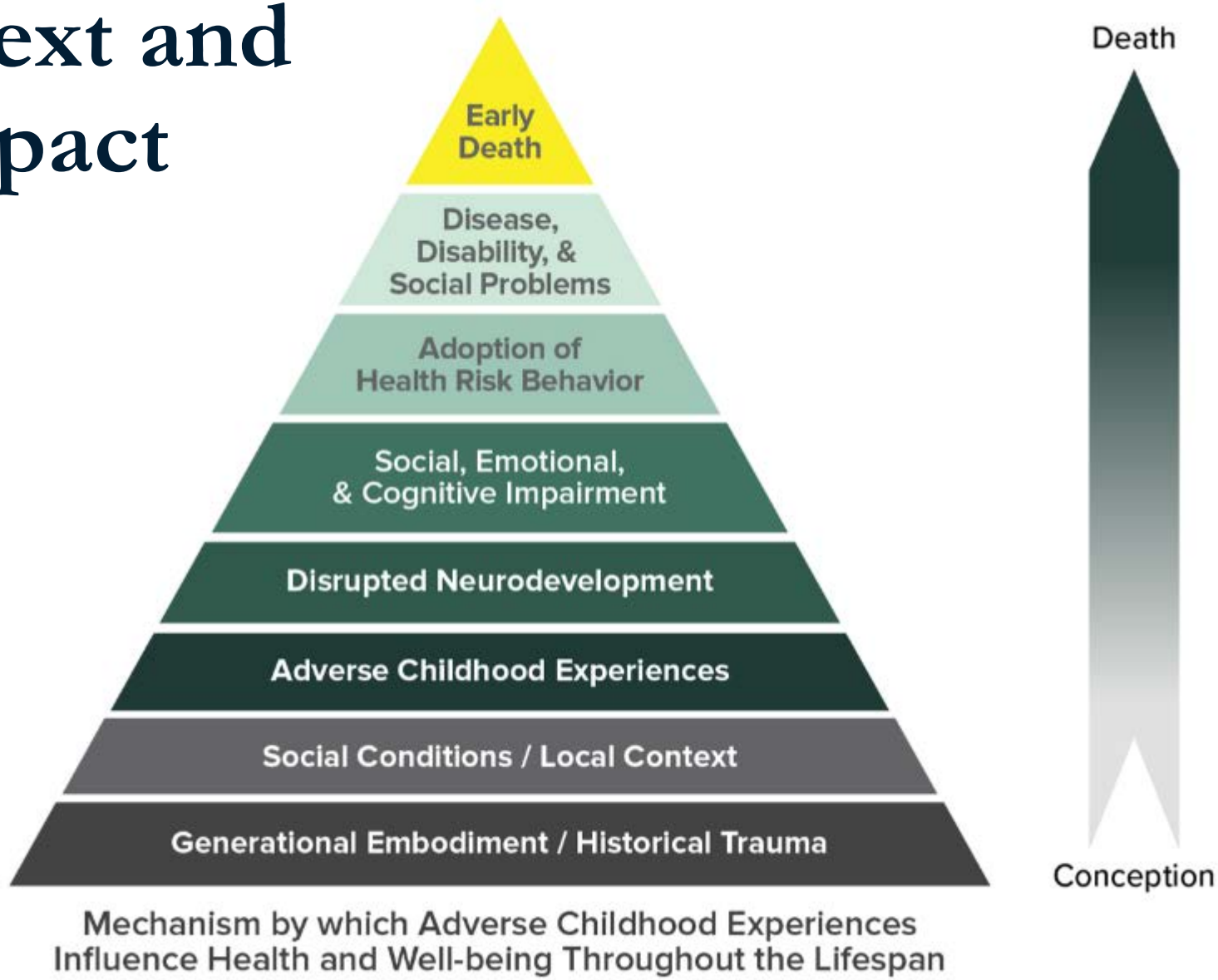


Photo Credit: https://www.rwjf.org/en/library/infographics/the-truth-about-aces.html

The Context and the Impact



Mechanism by which Adverse Childhood Experiences Influence Health and Well-being Throughout the Lifespan

https://www.albertafamilywellness.org/resources/video/brains-journey-to-resilience

How do ACEs play out in the Family Justice System?

- Family members are experiencing and affected by ACEs
- Adversarial dispute resolution model fuels toxic stress
- Parents' capacity to care for their children is undermined

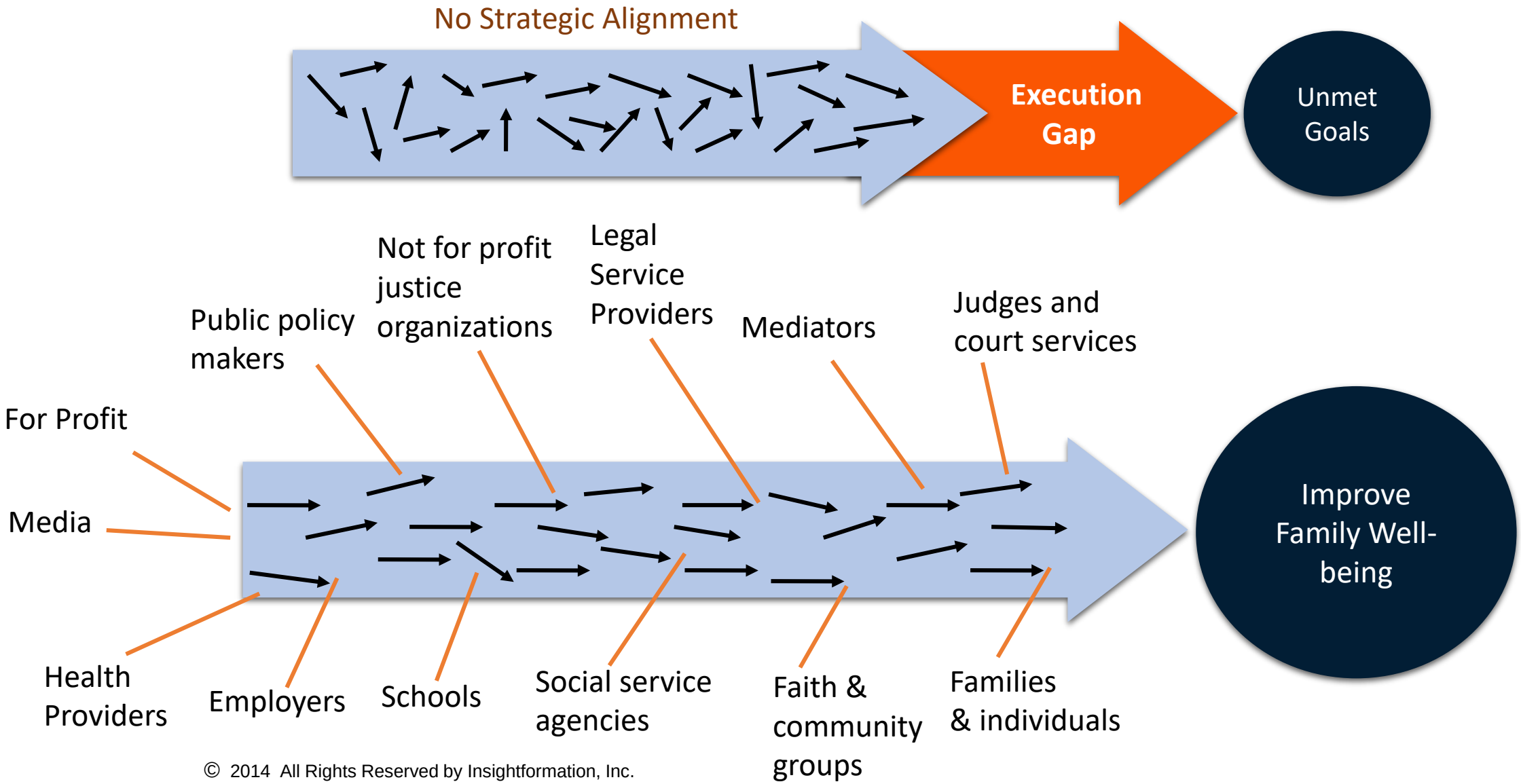
Why Focus System On Family Well-being?

- Transforms thinking
- A holistic, user-centred perspective
- Recognition legal issues as secondary to other social issues
- Looks to supports in other sectors for solutions
- Makes the system's main objectives de-escalation and referrals to supports

How Can We Transform The System?

- Take a systems approach
- Collaborate (or at least co-align)
- Use strategy mapping

Why Align?



Why Strategy Mapping?

1. Articulates a common agenda for co-alignment
2. Visually represents strategy in a complex system
3. Provides a framework for shared measurement to inform strategy
4. Leads to more coordination and idea generation
5. Keeps track of mutually reinforcing activities
6. Encourages accountability

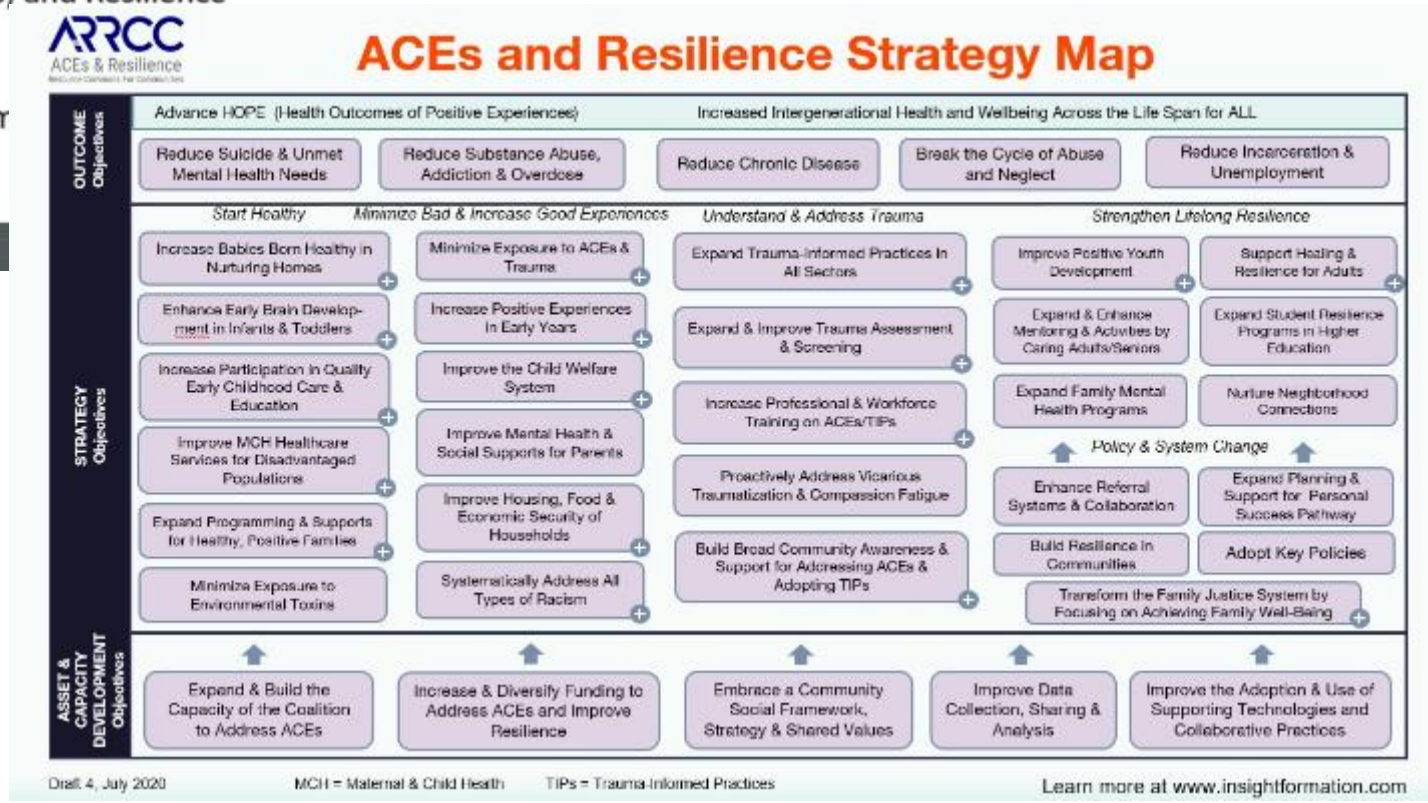
INSIGHT *FORMATION* INC.

Strategy Map Templates & Resource Hubs launched so far...

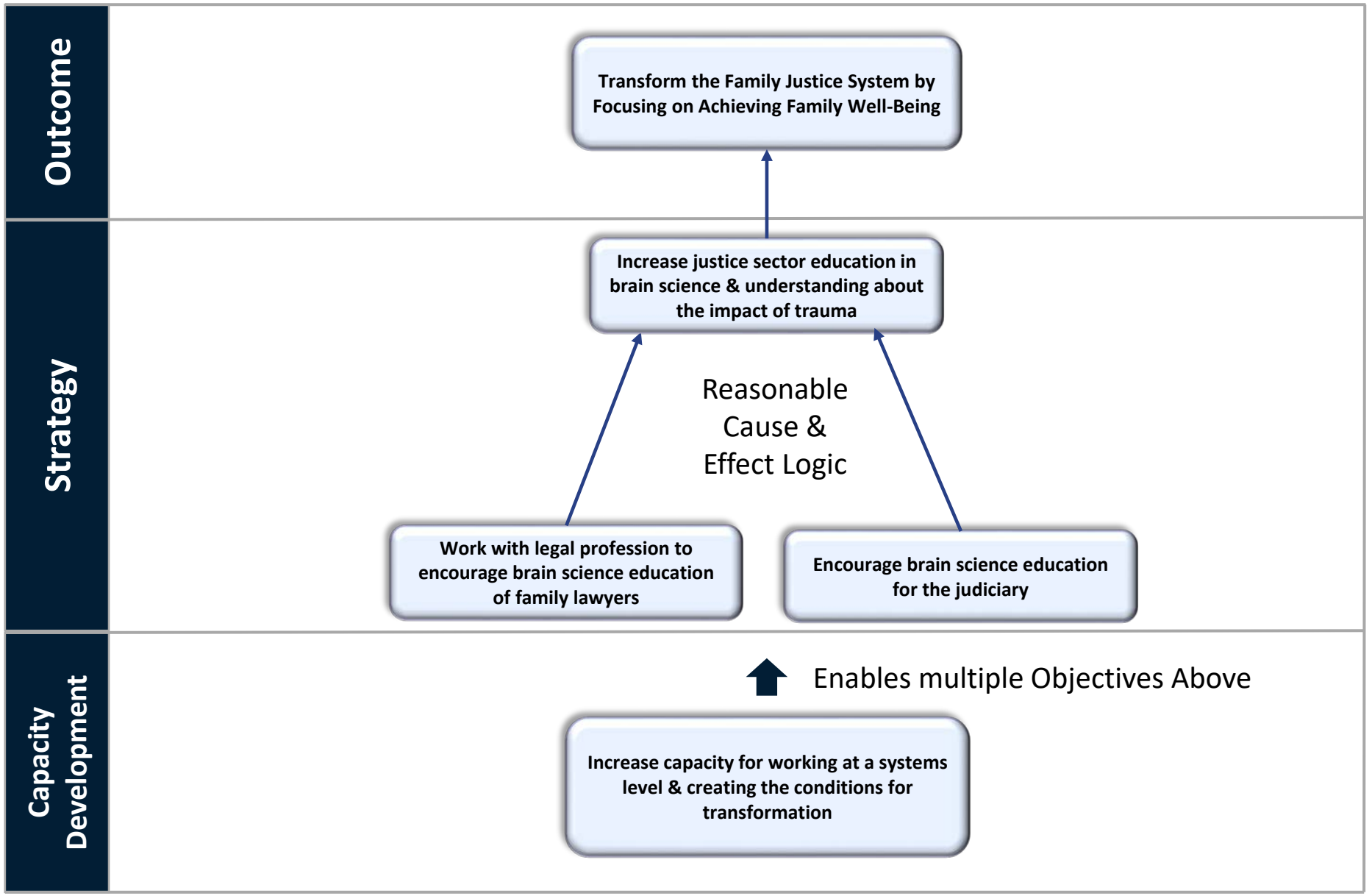
Opioid, Heroin & Fentanyl Crisis

Adverse Childhood Experiences (ACEs) and Resilience

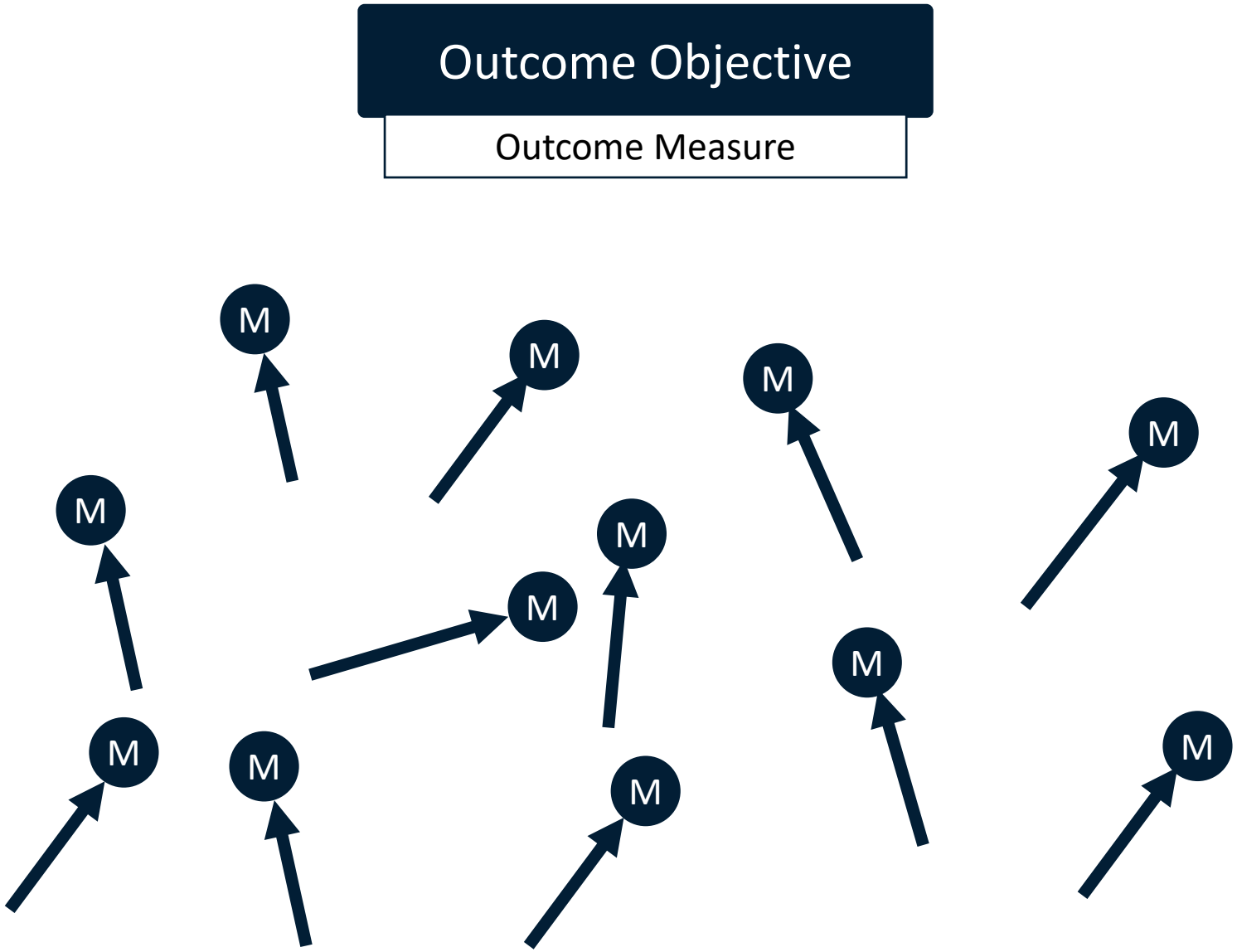
Asthm



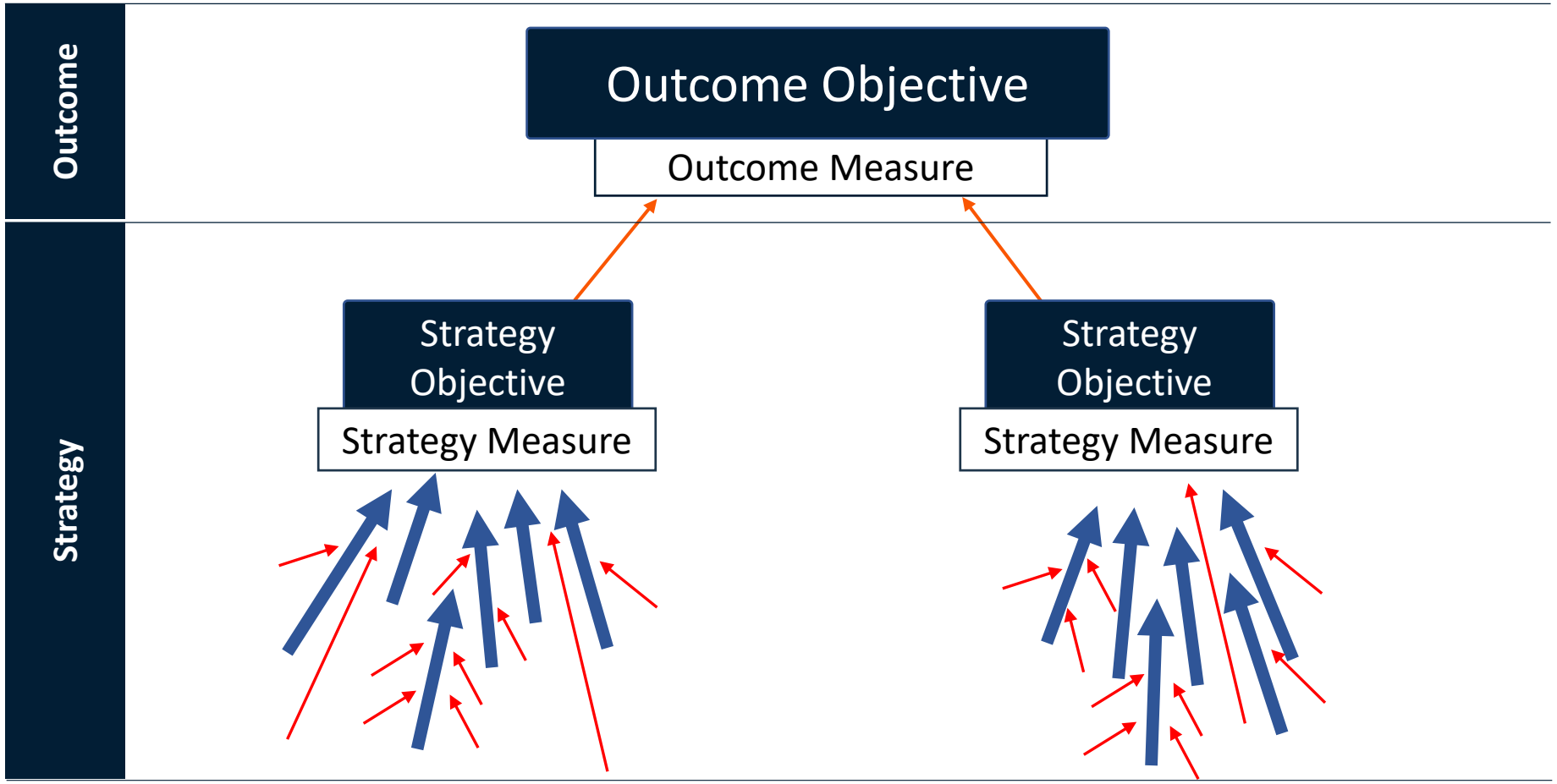
A Story of Intentional Change



Unaligned Measures For Every Program Or Project



The Power of Common Strategy Measures



ACEs and Resilience Strategy Map

ACEs & Resilience
Resource Commons For Communities

OUTCOME

Advance HOPE (Health Outcomes of Positive Experiences)

Increased Intergenerational Health and Wellbeing Across the Life Span for ALL

- Reduce Suicide & Unmet Mental Health Needs
- Reduce Substance Abuse, Addiction & Overdose
- Reduce Chronic Disease
- Break the Cycle of Abuse and Neglect
- Reduce Incarceration & Unemployment

STRATEGY

Start Healthy

- Increase Babies Born Healthy in Nurturing Homes
- Enhance Early Brain Develop-ment in Infants & Toddlers
- Increase Participation in Quality Early Childhood Care & Education
- Improve MCH Healthcare Services for Disadvantaged Populations
- Expand Programming for Healthy Families
- Minimize Exposure to Environmental Toxins

Minimize Bad & Increase Good Experiences

- Minimize Exposure to ACEs & Trauma
- Increase Positive Experiences in Early Years
- Improve the Child Welfare System
- Improve Mental Health & Social Supports for Parents
- Improve Housing, Food & Economic Security of Households
- Systematically Address All Types of Racism

Understand & Address Trauma

- Expand Trauma-Informed Practices in All Sectors
- Expand & Improve Trauma Assessment & Screening
- Increase Professional & Workforce Training on ACEs/TIPs
- Proactively Address Vicarious Traumatization & Compassion Fatigue
- Build Broad Community Awareness & Support for Addressing ACEs & Adopting TIPs

Strengthen Lifelong Resilience

- Improve Positive Youth Development
- Support Healing & Resilience for Adults
- Expand & Enhance Mentoring & Activities by Caring Adults/Seniors
- Expand Student Resilience Programs in Higher Education
- Expand Family Mental Health Programs
- Nurture Neighborhood Connections

Policy & System Change

- Enhance Referral Systems & Collaboration
- Expand Planning & Support for Personal Success Pathway
- Build Resilience in Communities
- Adopt Key Policies
- Transform the Family Justice System

CAPACITY DEVELOPMENT

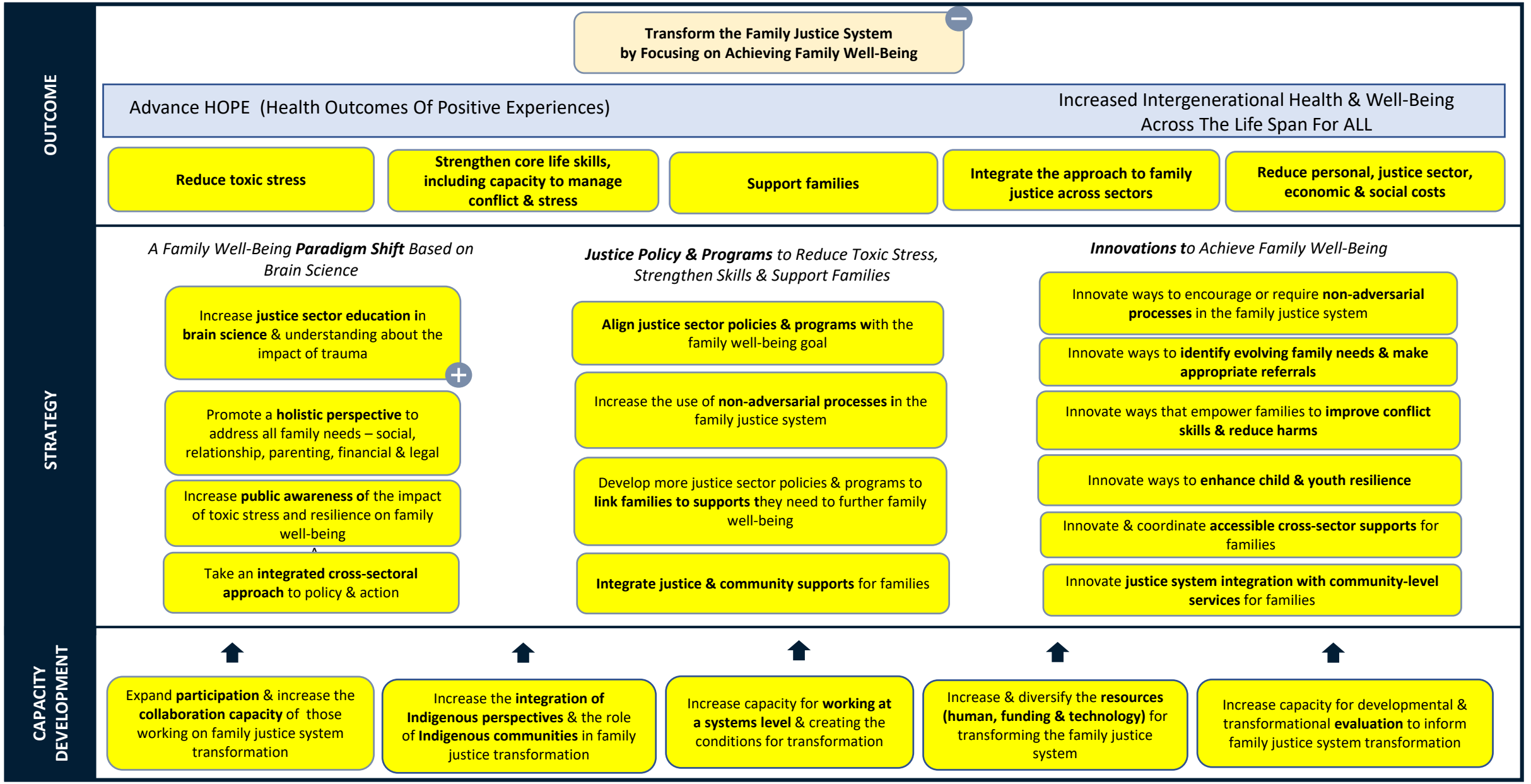
- Expand & Build the Capacity of the Coalition to Address ACEs
- Increase & Diversify Funding to Address ACEs and Improve Resilience
- Embrace a Community Social Framework, Strategy & Shared Values
- Improve Data Collection, Sharing & Analysis
- Improve the Adoption & Use of Supporting Technologies and Collaborative Practices

Draft 3, March 2020

MCH = Maternal & Child Health

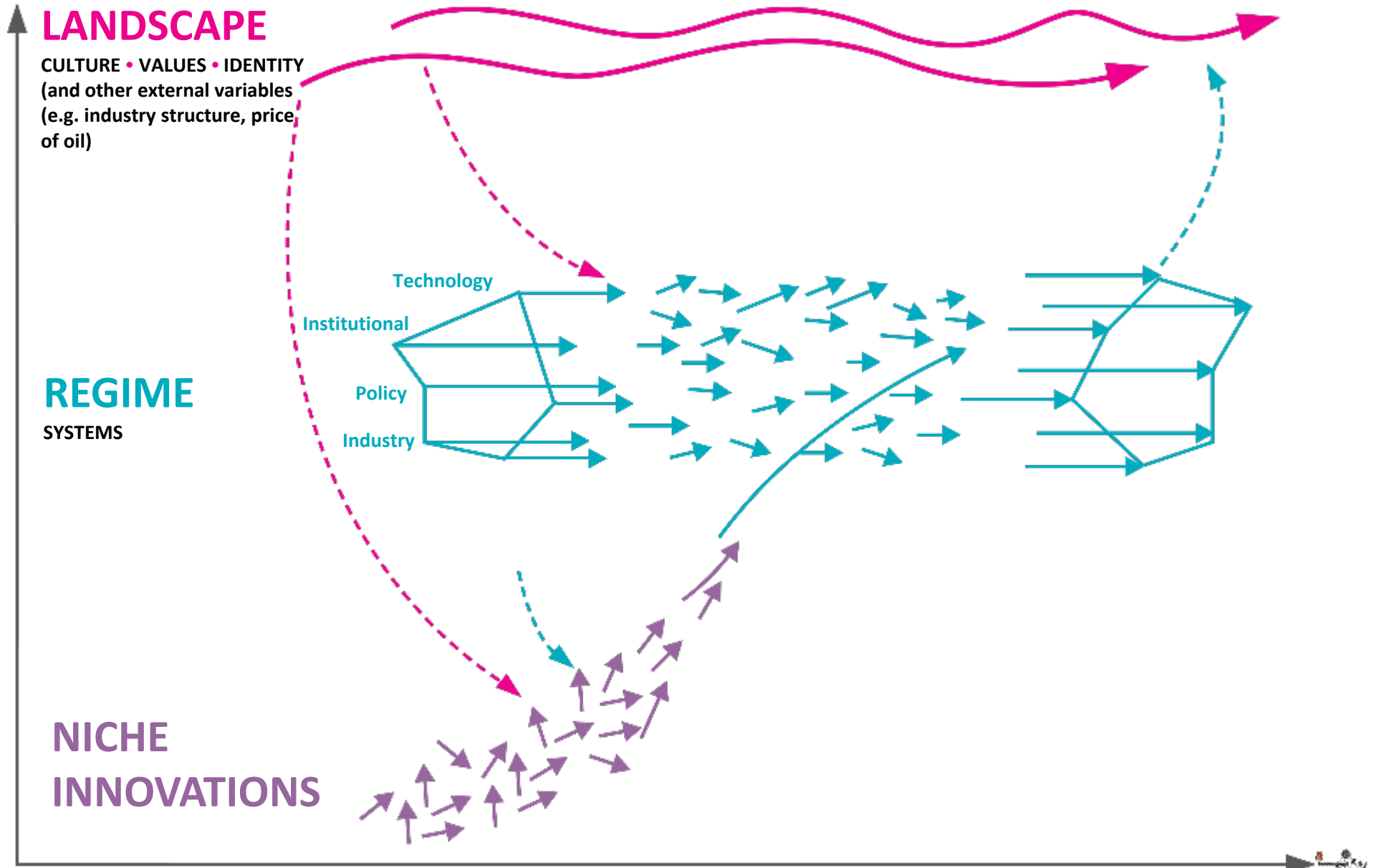
TIPs = Trauma-Informed Practices

Zoom: Transform the Family Justice System



July 22, 2020

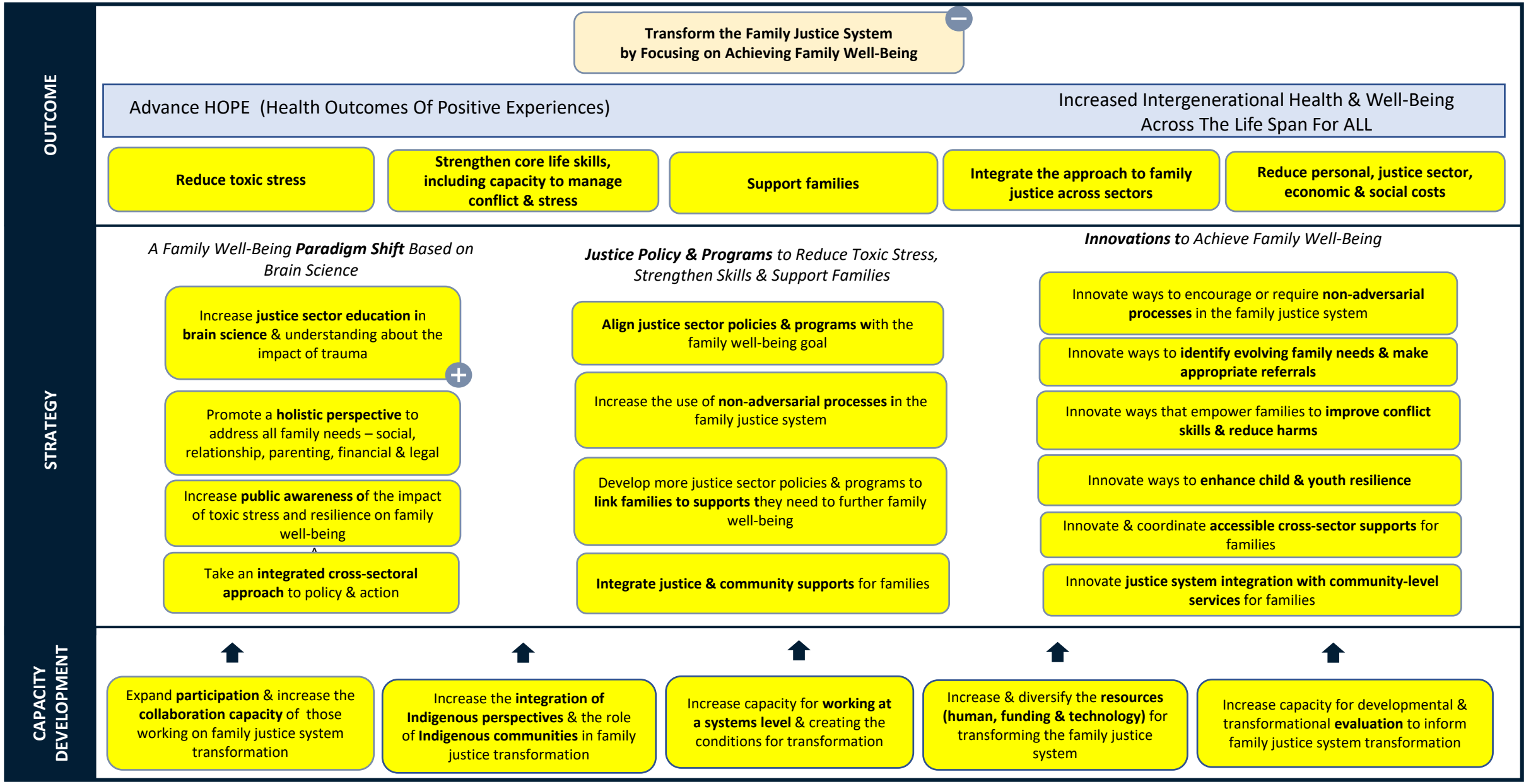
‘Multi-level framework on sustainability transitions’ by F. Geels



Map Components For Successful Strategy Management Over Time

- An elegant system of Objectives – a “zoomable” strategy map
- From/to statements to clarify change needed
- Clear details on each Objective: who, what and why
- Measure(s) of progress on each Objective--with a time-series of data and Targets
- Actions -- many different short-term actions by many different organizations
- Information about the actions and progress monitoring of the actions
- A “*Resource Commons*” so every community doesn’t reinvent the wheel

Zoom: Transform the Family Justice System



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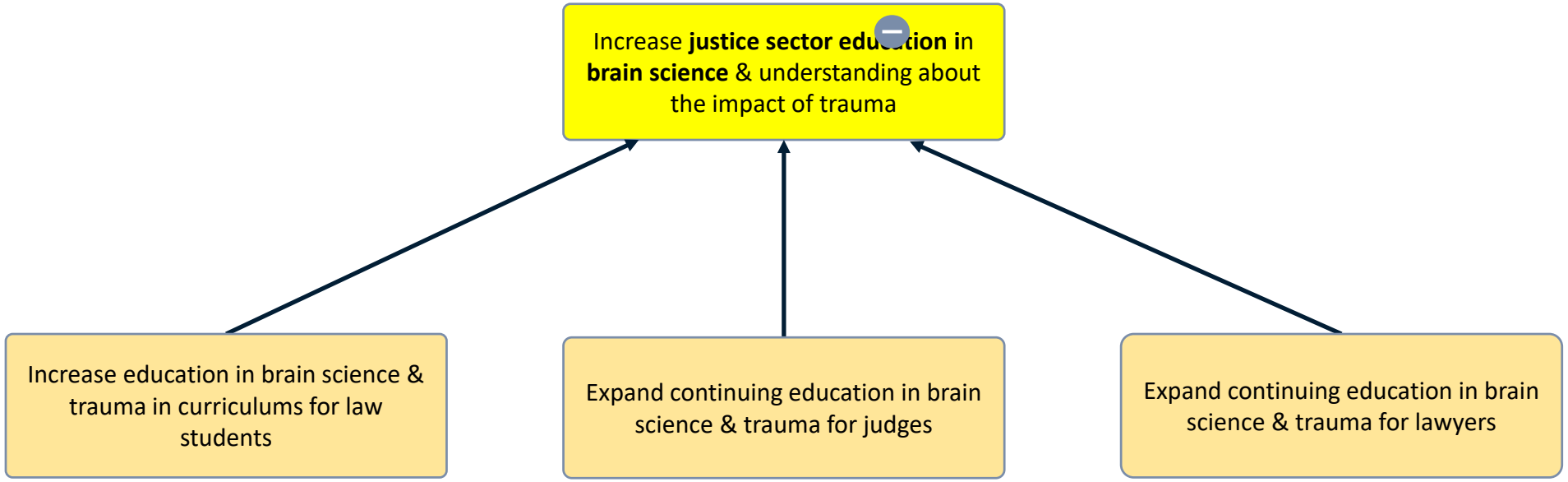
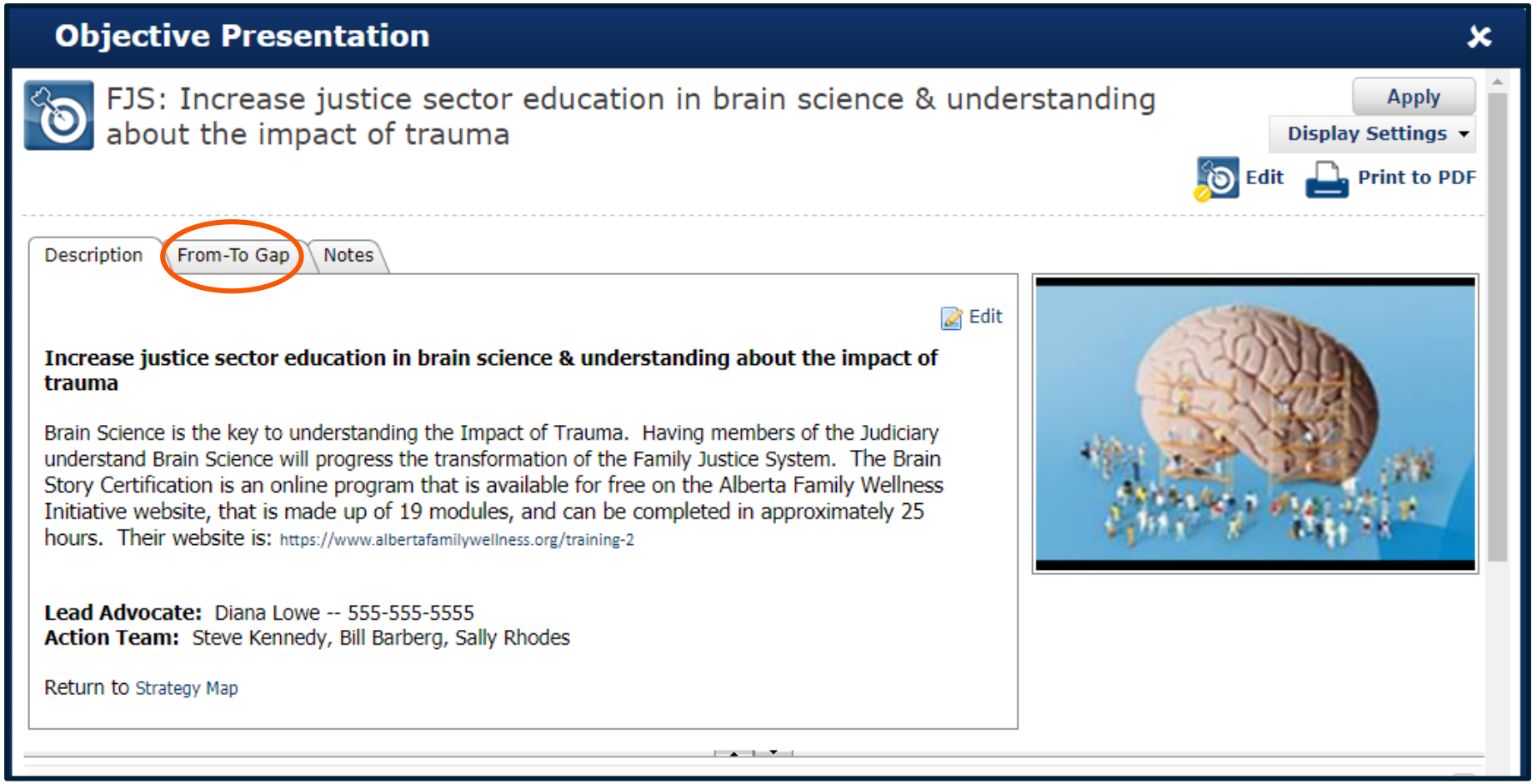
Zooming In To More Detailed Objectives



Each of these would likely have different people involved, different measures, and different actions.

Details Are Stored For Each Objective



From-to Statements For Each Objective

Objective Presentation

FJS: Increase justice sector education in brain science & understanding about the impact of trauma

Apply | Display Settings | Edit | Print to PDF

Description | From-To Gap | Notes

Edit

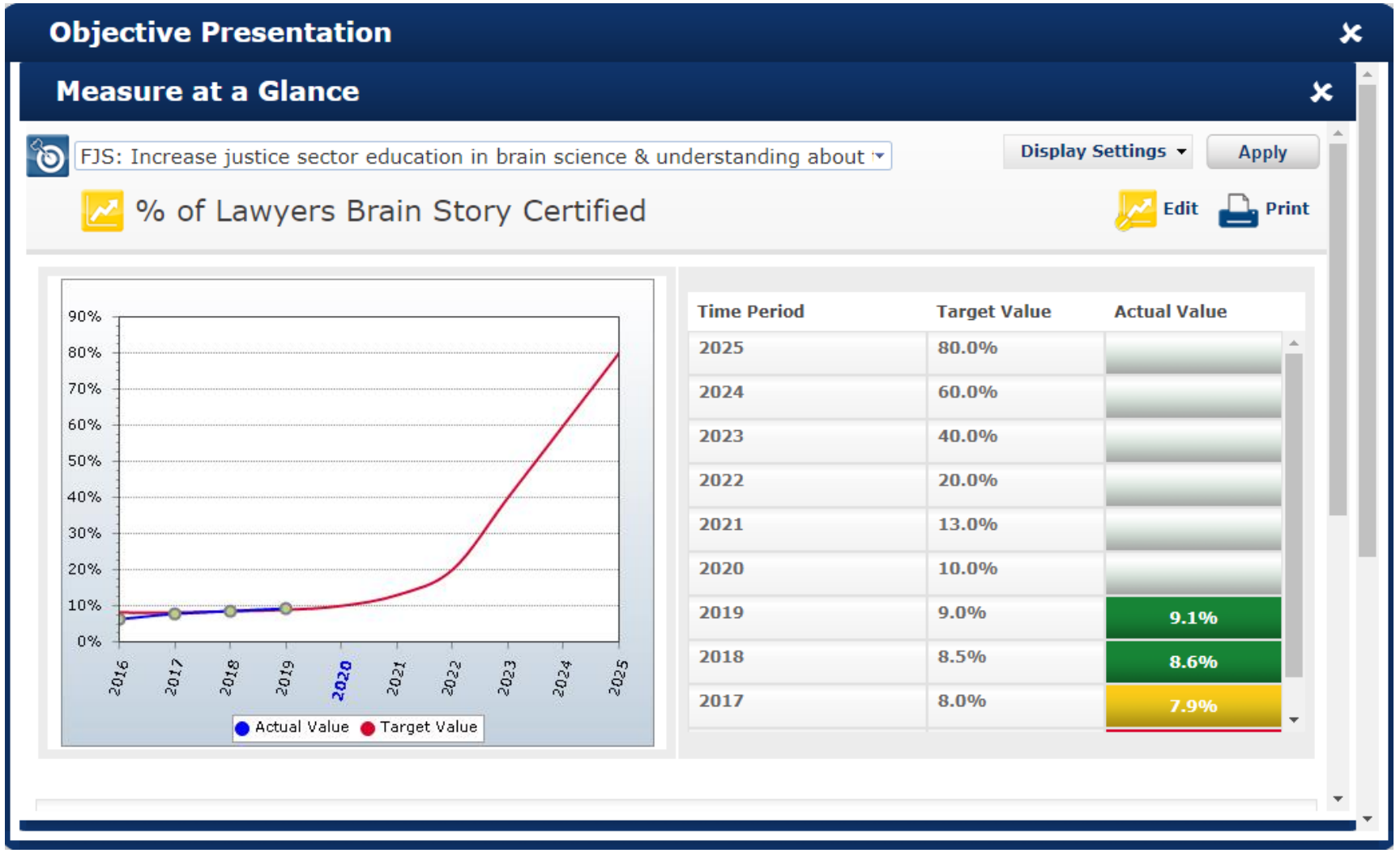
From (Current State) in 2020	To (Desired State) in 2025
A lack of awareness of brain science (the brain story, ACEs, resilience research) and its relevance to the family justice system	Understanding of brain science (Adverse Childhood Experiences and resilience) as it relates to the current and potential impact of the family justice system.
Only a few law schools offer an optional course on brain science and trauma	All law schools require at least one class on brain science and trauma as a part of their law curriculum.

Measures

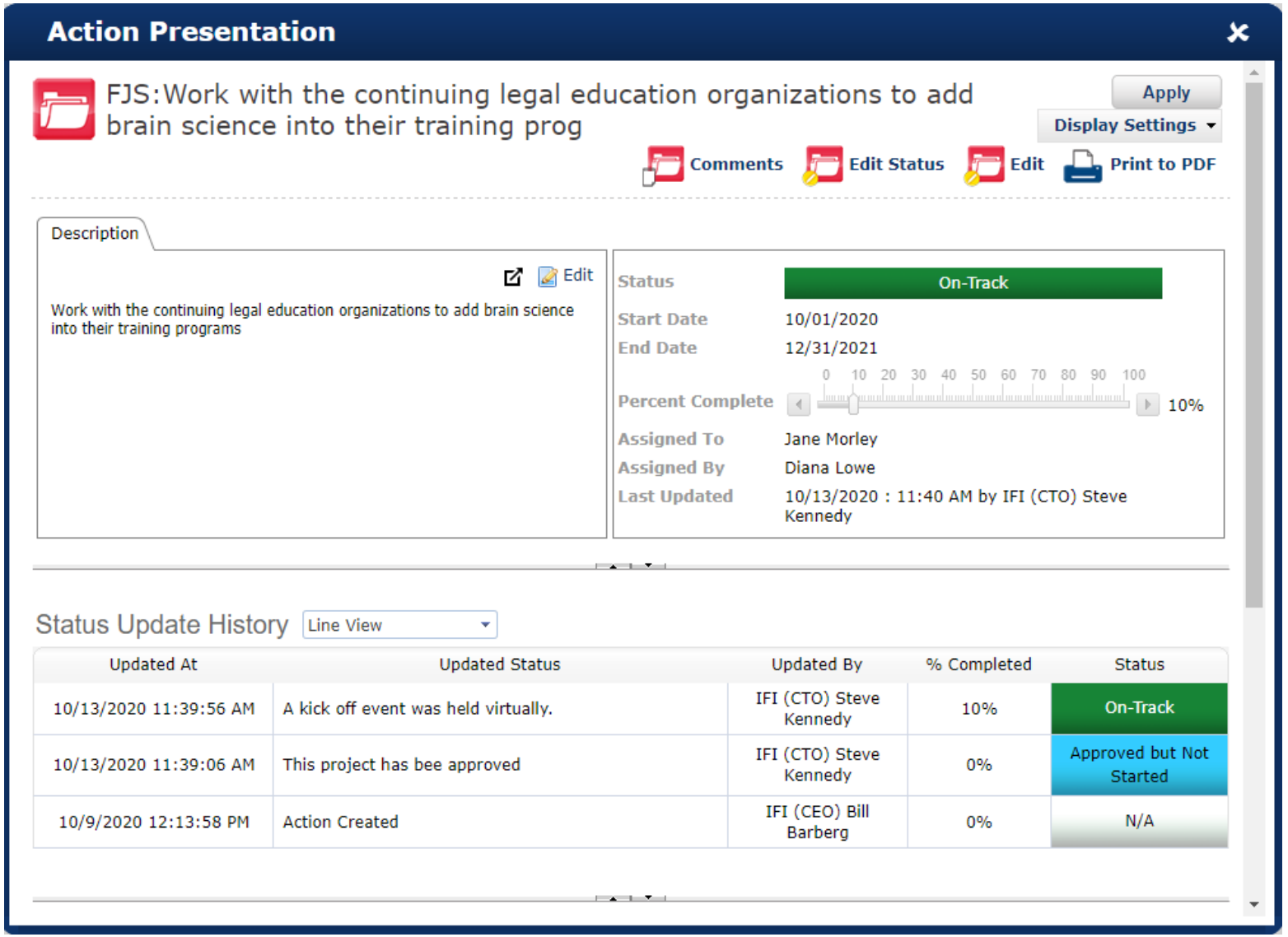
Line

Name	Current Value	Change	Target Value	Most Recent Period	Comments/ Actions
% of Lawyers Brain Story Certified	9.1%	3	9.0%	2019	

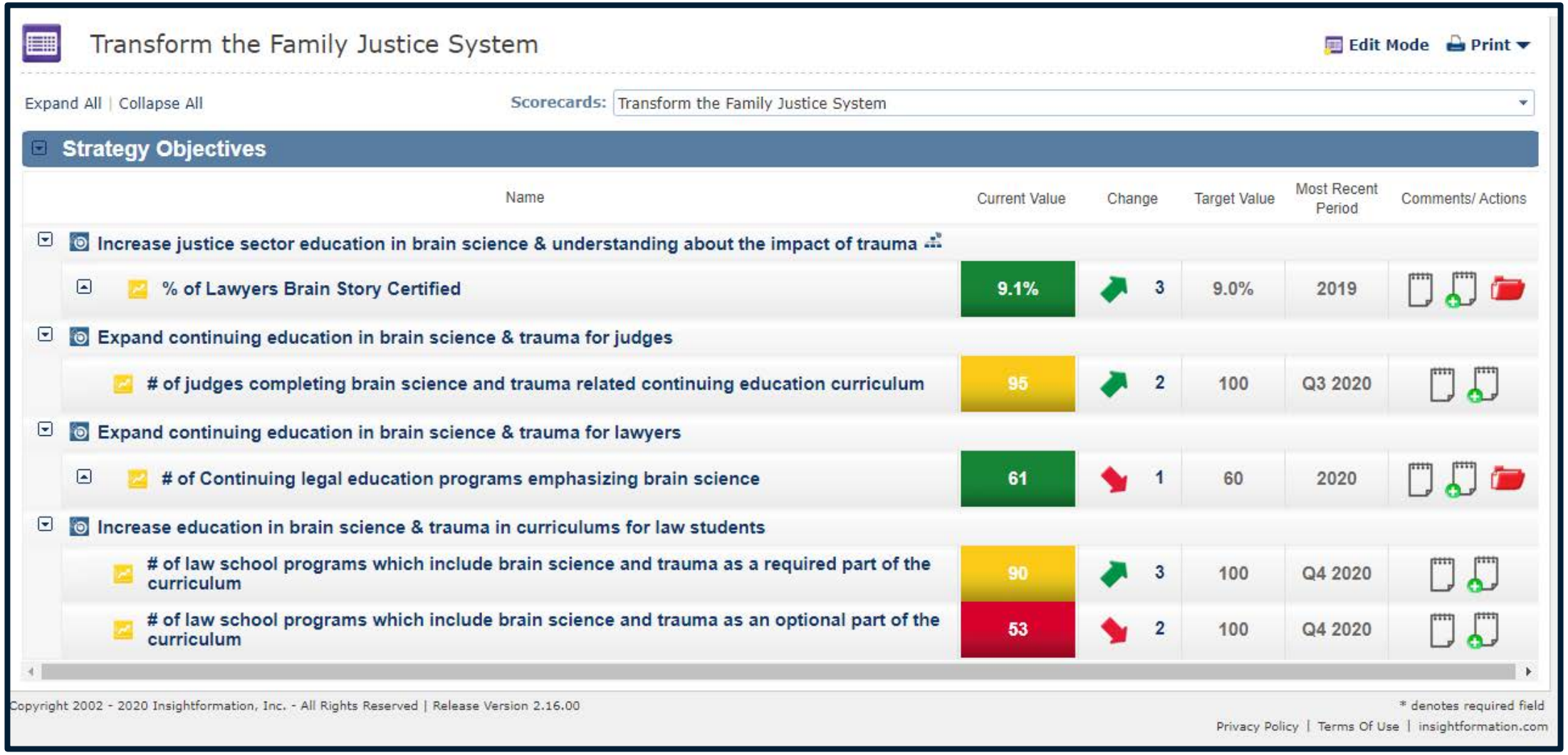
Measures And Targets Help Understand The Progress On Each Objective



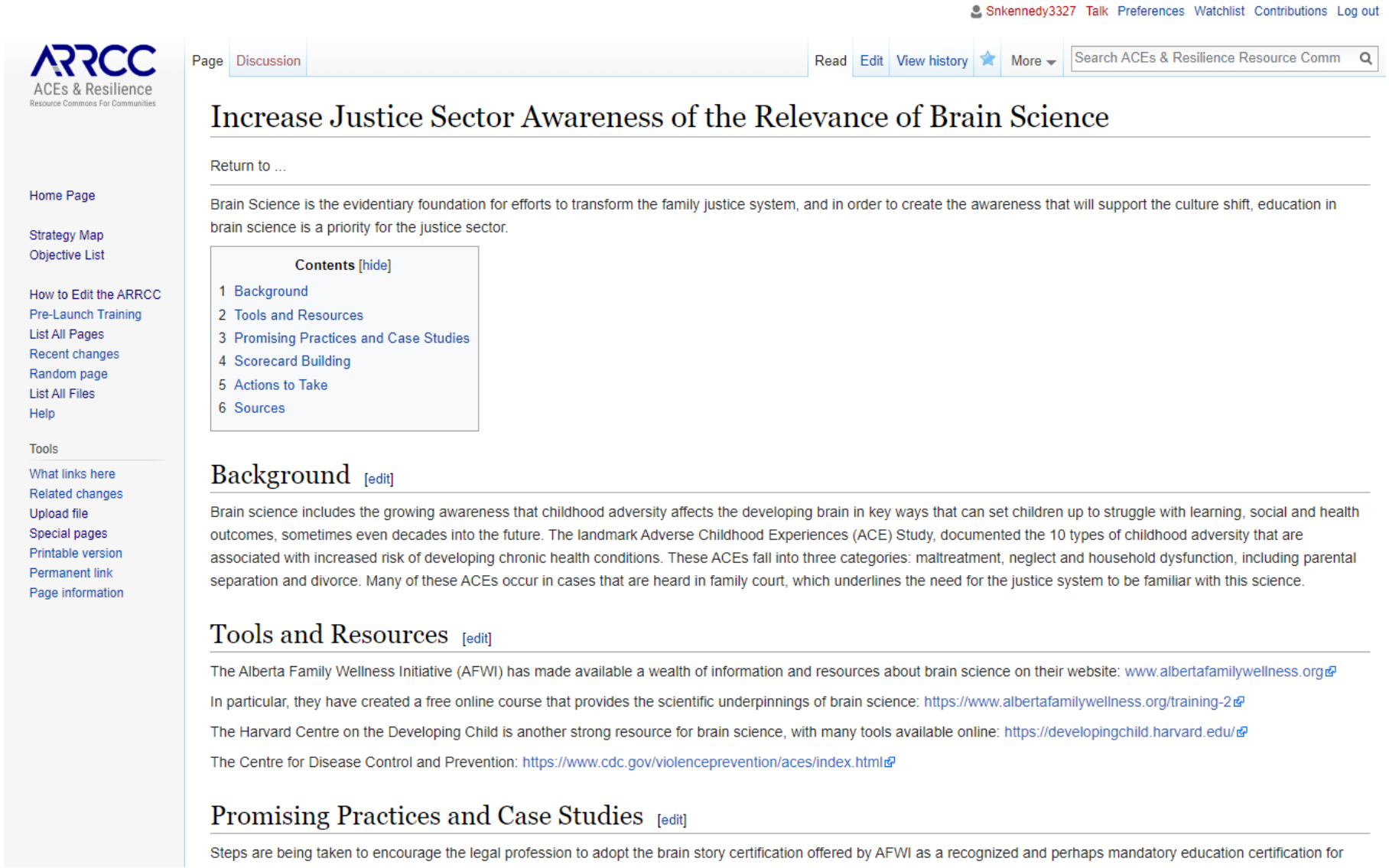
Actions (By Many Different Organizations) Make The Change Happen



Supported By A Scorecard As Another Way To Visualize The Data



Resource Hub



Snkennedy3327 Talk Preferences Watchlist Contributions Log out

ARRCC ACEs & Resilience Resource Commons For Communities

Page Discussion Read Edit View history More Search ACEs & Resilience Resource Comm

Home Page

Strategy Map
Objective List

How to Edit the ARRCC
Pre-Launch Training
List All Pages
Recent changes
Random page
List All Files
Help

Tools

What links here
Related changes
Upload file
Special pages
Printable version
Permanent link
Page information

Increase Justice Sector Awareness of the Relevance of Brain Science

Return to ...

Brain Science is the evidentiary foundation for efforts to transform the family justice system, and in order to create the awareness that will support the culture shift, education in brain science is a priority for the justice sector.

Contents [hide]

1 Background
2 Tools and Resources
3 Promising Practices and Case Studies
4 Scorecard Building
5 Actions to Take
6 Sources

Background [edit]

Brain science includes the growing awareness that childhood adversity affects the developing brain in key ways that can set children up to struggle with learning, social and health outcomes, sometimes even decades into the future. The landmark Adverse Childhood Experiences (ACE) Study, documented the 10 types of childhood adversity that are associated with increased risk of developing chronic health conditions. These ACEs fall into three categories: maltreatment, neglect and household dysfunction, including parental separation and divorce. Many of these ACEs occur in cases that are heard in family court, which underlines the need for the justice system to be familiar with this science.

Tools and Resources [edit]

The Alberta Family Wellness Initiative (AFWI) has made available a wealth of information and resources about brain science on their website: www.albertafamilywellness.org

In particular, they have created a free online course that provides the scientific underpinnings of brain science: https://www.albertafamilywellness.org/training-2

The Harvard Centre on the Developing Child is another strong resource for brain science, with many tools available online: https://developingchild.harvard.edu/

The Centre for Disease Control and Prevention: https://www.cdc.gov/violenceprevention/aces/index.html

Promising Practices and Case Studies [edit]

Steps are being taken to encourage the legal profession to adopt the brain story certification offered by AFWI as a recognized and perhaps mandatory education certification for

Websites For Communication About The Changes Underway

What can the Law Society do?

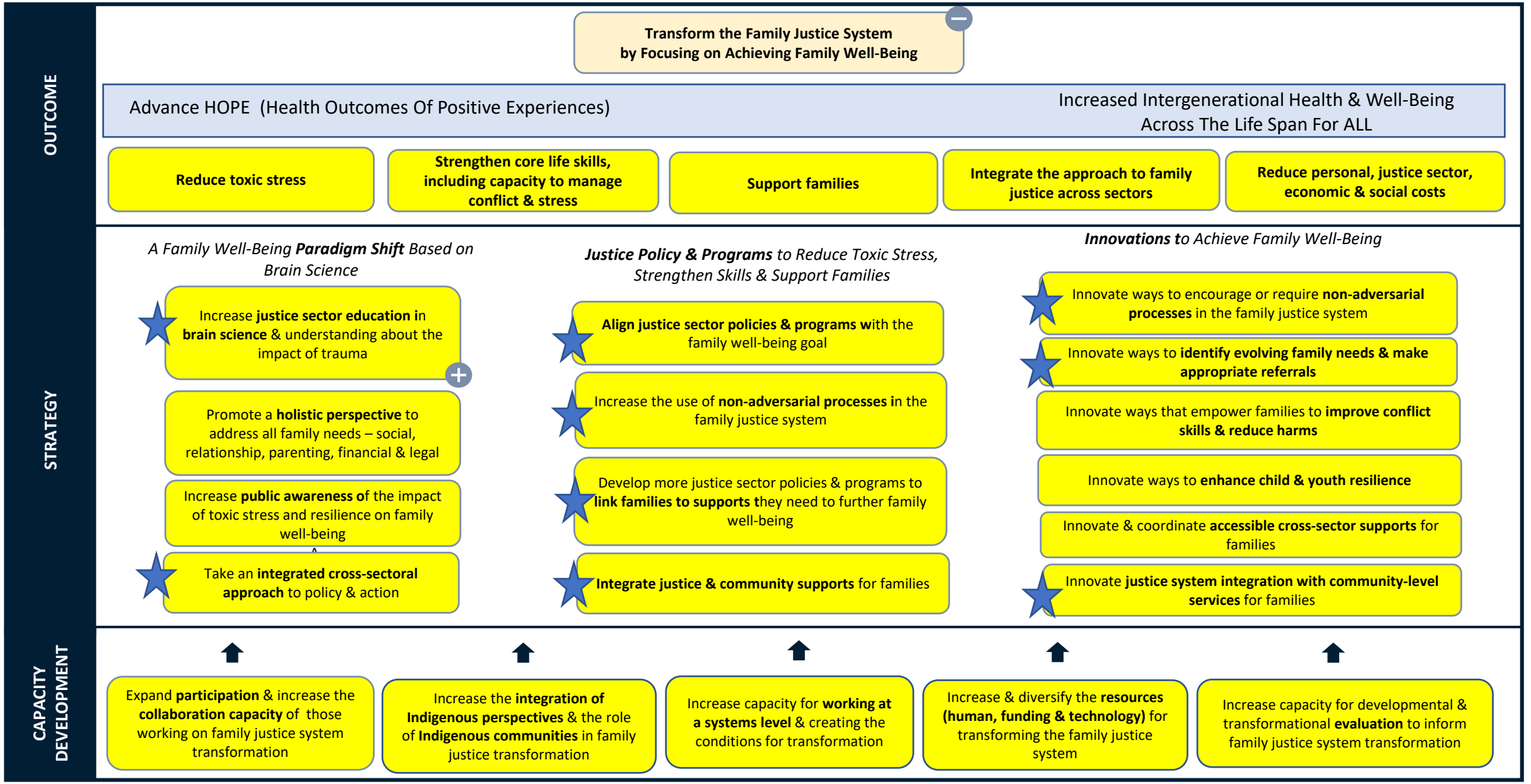
1. Embrace the TFJS Collaborative

2. Connect LS strategic plan to the TFJS strategy map

3. Undertake some projects directed at the strategic objectives and map them on the strategy map

4. Cohost with the Doctors a gathering to focus on high conflict families, well-being and family justice

Zoom: Transform the Family Justice System



July 22, 2020

The Law Society strategic plan leads to embracing the TFJS Collaborative

- Taking action to improve Access to Justice - TFJS all about action; access to family justice means access to the "good life" (family well-being) – Trevor Farrow "What is Access to Justice?" Osgoode Hall Law Journal, 51.3 (2014): 957-987 at pp.971—972.

- Access and Collaboration – Enhanced engagement with governments, courts and other stakeholders to identify improvements in the delivery of legal services – Strategy map approach a way to enhance collaboration

Connecting the Law Society to the TFJS strategy map

- Innovate ways to encourage or require **non-adversarial processes** in the family justice system: Advocate for greater access to non-adversarial dispute resolution in family matters
- **Integrate justice & community supports** for families OR Innovate **justice system integration with community-level services** for families: increase the availability of legal services to people in the communities where they live

Possible LS actions within LS mandate connected to strategy map and LS strategic plan

1. Add to LS website a family section promoting non-adversarial processes for family law and linking to family mediator, family arbitrator, collaborative practitioner rosters

2. Offer an opt-in option denoting family mediator, parenting coordinator accreditation, or collaborative practice training

More possible LS actions

3. Promote FLA and Divorce Act duties and CBA best practices as part of ethical responsibilities of family lawyers to de-escalate conflict

   Possibilities include:

   - Consider changes or adding commentary to the Model Code of Professional Conduct (see JP Boyd memo)
   - Practice points in Bencher Bulletins
   - PLTC
   - In-house training for advisors and investigators

More possible LS actions

4. Increase justice sector education in brain science
   - Introduce in PLTC
   - CPD webinars
   - Brain science certification
   - Collaborate with CBABC, CLEBC

5. Promote meaningful participation of children and youth in legal disputes

More possible LS actions

6. Use the sandbox for family justice system innovation

   - Encourage family justice applications - E.g. Collaborative practice teams without added expense of lawyers, if not needed

   - Connect measures of success to TFJS measures

What about co-hosting with the Doctors a fall session focused on high conflict families?

The doctors in Child & Youth Mental Health and Substance Use(CYMHSU CoP) are

- **Motivated** - they see their patients are being hurt by the family justice system and want to do something about it
- **Trusted** - people facing family justice issues are more likely to turn to their family physicians than to lawyers for help when they are
- **Valuable -** understand family well-being
- **Interested** in partnering.