

TRUTH & RECONCILIATION CALL TO ACTION #34:
A FRAMEWORK FOR ACTION



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The Truth and Reconciliation Commission of Canada was composed of federally appointed commissioners and was established to address the colonial impacts resultant of the Indian Residential Schools (IRS), which started before Canada was a country (confederation 1867) with the last residential school closing in 1996. As stated in the TRC document, the goal of the residential schools was ‘to kill the Indian in the child’ (Truth and Reconciliation Commission of Canada, 2015, p. 130). The TRC was the result of a class-action settlement against the Government of Canada that brought about some financial compensation for the outcomes of the IRS program— a condition of the settlement including an agreement to strike the TRC to collect the stories as well as uncover the subsequent harms that have impacted generations of people. The TRC commission worked to collect those truths—with an overall goal of reconciliation. In that regard, there remains a substantial amount of work to do.

With the 2015 release of the TRC report and subsequent 94 Calls to Action, the implication and expectation is that emphasis can shift from truth to reconciliation. These recommendations may act as a starting point to begin to acknowledge and make amends for past harms. However, there has traditionally been a gap between truth and reconciliation. As Llewellyn (2012) explains, truth and reconciliation are not mutually exclusive, but are distinct entities; simply gathering the truth does not equate to reconciliation. Llewellyn (2012) states, ‘Reconciliation requires a truth that is able to contain the complexities borne by our interconnectedness and interdependence’ (p. 191). One criticism is that the TRC Calls to Action are broad, leaving guesswork as to where to begin to take up these Calls. One useful approach was highlighted by then Justice, now Senator Murray Sinclair: “to choose one and focus on that one Call to Action.” This document provides a roadmap in how to address and respond to Call to Action: 34 in which FASD and justice are the central focus.

The Framework for Action seeks to deliver an evidence-based approach to taking up this Call to Action. In so doing, it relies first on the exhaustive evidence presented during the TRC Commission hearings and as evidenced in the six-volume set of books later published. This evidence is complemented with peer-reviewed and policy literature. There is a summary of relevant practices for consideration followed by the Framework for Action. The overall goal is to offer guidance to different sectors that might be engaged in this work and outline a tangible mechanism to bring research into reconciliatory research, policy and practices.

The Framework for Action uses an evidence-based approach to bring about tangible *and* systemic changes in the form of 12 Action Items that are housed within the subsection of TRC Call to Action #34 which reads as follows:

34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:

- i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.
- ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.
- iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.
- iv. Adoption of appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

The Framework for Action, located in the last section and critically informed by the evidence and relevant practices in the field, outlines a discussion of each part of this Call to Action followed by actionable items and descriptions therein:

12 Actionable Items to Respond to Call to Action #34:

1. Mandatory Education about Systemic Racism
2. Equal Access to Paid Gladue Reports Across Jurisdictions
3. FASD-Informed Training Practices:
 - Frontline inside the courts
 - Frontline outside the courts
4. Expand Therapeutic Justice Practices
5. Enhance Alternative Diagnostic Practices
6. Strengthen Community Supports
7. Implement Sentencing Reform During Current Justice Review
8. Remove Mandatory Court Fees
9. Robust Release Planning
10. Bail/Release Conditions that are FASD Informed
11. Evidence-Based Internal/External Evaluations of Programs
12. Training for Communities to Develop and do Evaluation

Introduction

Fetal Alcohol Spectrum Disorder (FASD) is a diagnostic term encompassing several conditions that can occur in a person whose mother drank during pregnancy. Complications can arise in cognitive functioning, social and emotional development, and behaviour. FASD is a lifelong condition, with no cure. As such, when someone has FASD, a number of challenges are likely to arise throughout their lifetime. Those challenges might include contact with the criminal justice system. Because women who have experienced trauma are more likely to consume alcohol (Badry & Wight Felske, 2013), and because many Indigenous women have experienced disproportionately high rates of trauma through the legacy for residential schools (Bombay, Matheson & Anisman, 2014), FASD was taken up as an issue of concern in Canada's Truth and Reconciliation Commission report.

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- ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.
- iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.
- iv. Adoption of appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

In 2015, the Truth and Reconciliation Commission of Canada released 94 Calls to Action. These Calls focused on issues requiring redress to the ongoing impacts of the Indian Residential School (IRS) programs that operated in Canada until 1996. Indigenous children were taken out of their homes and placed into Christian, Caucasian-run boarding schools, with the aim to 'break their link to their culture and identity' (Truth and Reconciliation Commission of Canada, 2015, p. 2). Indigenous parents were deemed unfit to raise their own children by the government. These schools have come to be understood as sites of genocide. These schools became locations in which students were subject to physical, emotional, verbal, mental, and sexual abuse (Ross, 2014)—with impunity. As a result of

IRS, Indigenous people fostered shame of their culture and their people, resulting in inter-generational trauma. Due to the extensive period IRS were run in Canada, 'This legacy from one generation to the next has contributed to social problems, poor health, and low educational success rates in Aboriginal communities today' (Truth and Reconciliation Commission of Canada, 2012, p. 1).

The Calls to Action were meant to instigate action but not serve as a complete roadmap for reconciliation. However, for some, the 94 Calls to Action were overwhelming in their scope. To that concern then-Justice, now Senator Murray Sinclair, the Chairperson of the TRC, reminded us "to choose one and focus on that one Call to Action." That is what this document aims to do. This document offers a proposed Framework for Action that focuses on TRC Call to Action #34. In so doing, this Framework for Action seeks to deliver an evidence-based approach, offer guidance to different sectors that might be engaged in this work, and outline a tangible mechanism to bring research into reconciliatory policy practices in the future.

This Framework draws directly from Bowen and Zwi who put forward a blueprint for evidence-informed policy and practices that are at once mindful of the constraints that policy-makers face but with a goal to expand how evidence is leveraged into policy making and frontline practices accordingly. As Bowen and Zwi (2005) contend, "the starting point for navigating the use of evidence in policy and practice is understanding diffusion (how ideas spread throughout systems), how decisions are made, how policy is developed, and how capacity is required to effectively use evidence in this process" (Bowen and Zwi, 2005: 0604).

To do so, this Framework for Action will draw from evidence within the sections of the TRC itself (accounts of nearly 6,000 witnesses), layer that evidence with current research and gray literature (often research and policy documents that contribute to collective understanding but is not peer-reviewed) and then make recommendations for policies and practices that are both evidence-based and cognizant of system/sector constraints. That said, to bring about reconciliation, there is a need for transformational change at all levels including systems and sectors.

Background on Document Development

This document has been created as a result of a number of local and national events, in conjunction with Dr. Michelle Stewart's expertise in the area of Fetal Alcohol Spectrum Disorder (FASD) as it intersects in the areas of social justice, criminal justice, family cohesions, and social inclusion.

Of the 94 Calls to Action, Calls 33 and 34 focus specifically on FASD. Acknowledging that gathering truth vis-à-vis the lived experiences of IRS survivors and descendants does not equate to reconciliation, Dr. Stewart set about organizing a national symposium sponsored by the Canada NW Partnership, which took place at the University of Regina from February 22-23, 2017. The symposium titled "FASD, Justice, and Reconciliation: Tough Questions, New Collaborations" was a space in which the racialized nature of FASD could be explored, backed by the lived experiences of Indigenous mothers and frontline professionals, allowing for robust discussions about structural inequality and trauma which is critical if speaking about FASD and the path to reconciliation. Participants included policy makers, front-line workers, parents/caregivers, and students. Individuals that self-identify as having FASD were not present. This should be noted as they were clearly absent in the space. Six themes and 18 recommendations were borne out of the symposium discussions, including:

1. Culturally and Historically-Informed Practices
 - Develop relationships between agencies and Indigenous communities.
 - Develop training focused on the TRC and the history of residential schools and colonialism in Canada for agencies.
 - Explore the potential for culturally and historically-informed practices within the health system.
2. Trauma
 - Develop and distribute training on trauma-informed practices.
 - Establish the capacity for trauma to be incorporated as a mitigating factor in sentencing.
 - Develop outreach and training material for frontline health professionals about practices surrounding diagnosis and care.
3. Advocacy
 - Facilitate collaborative spaces that are inclusive and welcoming of candid discussions.
 - Create spaces for individuals with FASD and

caregivers to engage directly with policy-makers and program managers.

- Facilitate spaces for individuals with FASD and families to access training.
 - Implement and integrate changes to programs and practices that honour Indigenous perspectives.
 - Establish keeping families together as a top priority informed by Indigenous perspectives.
4. Resources
 - Identify wise practices that best support individuals with FASD across the lifespan informed by Indigenous perspectives.
 - Prioritize community driven requests for supports and services with an emphasis on sustained funding.
 - Fund culturally appropriate diagnosis, mentorship, and respite for families, life-skills and mentoring for individuals, and ongoing support that changes across the lifespan.
 5. Interagency Collaboration
 - Facilitate regular opportunities for interdisciplinary teams to come together to share resources.
 - Strike working groups comprised of federal, provincial/territorial stakeholders, and policy-makers in collaboration with Indigenous communities to implement TRC Calls 33 and 34.
 6. Challenging Systems and Policy
 - Complete a program and policy review through a TRC lens to make appropriate modifications to programs, practices, and protocols.
 - Undertake a review of culturally modified/culturally appropriate diagnostic practices to modify or enhance current diagnostic practices.

This document acknowledges that in order to mobilize around the Calls to Action from the TRC and to respond to the recommendations arising out of the 2017 National Symposium, there must be collaboration and intersection of practices between frontline practitioners of justice, policy-makers, and researchers. This document is meant to not only spark conversations and draw attention to ways in which evidence-informed policies and practices will be key in addressing FASD at the local and national level but to also assist in transforming discussions into tangible action.

A Framework to Answer the Call

The TRC Calls to Action were written to mobilize all sectors, all agencies, all levels of government and everyday residents of Canada. This Framework for Action seeks to help further that movement. Returning to Justice Sinclair's comment to choose ONE call and start to take action—we offer the following document to outline some potential actions that could be taken to mobilize around TRC Call to Action #34.

This document is written with three audiences in mind:

- Frontline justice practitioners
- Policy makers
- Researchers

By writing to these three audiences we seek to highlight how all three are interconnected, aiming for frontline practices and policy that are evidence-based—and researchers who are not only developing or sharing the evidence but are in explicit dialogue with policy as well as on-the-ground practices. Accordingly, this document is written to offer ideas and a Framework for Action to each of these discrete audiences. The Framework assumes that there is a collective goal to take up the Calls to Action and engage in evidence-based policy and practices that could improve outcomes for individuals with FASD in the criminal justice system.

We will note again that the TRC Calls to Action call for transformative change—we will make practical suggestions but with the understanding that programs, practices, and methods must be decolonized in many instances before reconciliation is possible.

Section One will discuss the evidence. Section Two will look at some current practices associated to each audience: frontline justice professionals, policymakers, and researchers. The Final Section will provide an overview of a framework for action including potential actions, target dates, and first steps to mobilize the Framework for Action.

This document is a *Framework* for Action. It is meant to be a potential tool, not a rigid guidebook on reconciliation. We hope it helps to synthesize some information, offer suggestions on ways forward, and an opportunity for not only dialogue but also, and most critically, much needed action.

SECTION ONE: What does the evidence tell us?

“The closing of residential schools did not bring their story to an end¹”

Evidence-based policy making is predicated on three actions that include sourcing, using, and then effectively implementing the evidence (Bowen & Zwi, 2005). This section is organized purposefully to place the evidence that was presented in the TRC at the front of the discussion; it is then supported with peer-reviewed and gray literature in that order. The testimonies from the TRC are evidence. It is the truth and lived experiences of survivors of the residential school program—it serves as the foundation of this work. Accordingly, the section will first review key areas of the TRC to identify how FASD was raised and framed within those settings. The section will then review supporting evidence. Taken together the TRC, peer-reviewed, and selected gray literature will serve as the evidence in the supporting sections that focus on frameworks for action for each of the named audiences: justice sector frontline, policymakers, and researchers.

1.1 FASD as evidenced in the TRC

The Truth and Reconciliation Commission of Canada was struck as a result of the Indian Residential Schools Settlement Agreement. It was a fact-finding mission that lasted six years, involving discussion and documentation from 6,000 witnesses that was transformed into a six-volume overview of the findings that included Volume One, a 300-page Summary of the findings. The preface of the Summary compels the reader, “the Commission’s focus on truth determination was intended to lay the foundation for the important questions of reconciliation. Now that we know about residential schools and their legacy, what do we do about it?” (Truth and Reconciliation Commission of Canada, 2015: vi). This section will outline the ways in which FASD is raised in the TRC volumes before turning to additional and supporting literature that offers further guidance on steps and strategies to address the four subsections of #34. Call #33 focused primarily on the prevention of FASD because it is understood to potentially increase the risk of justice involvement (Streissguth et al., 2004).

¹ Taken from the opening paragraph of the Introduction to Volume 5 of the TRC (Truth and Reconciliation Commission of Canada, 2015: 5)

Linking Residential Schools to Justice Encounters

This section draws heavily on Volume Five. Included in the volume are examples when FASD is raised explicitly in the courts including: R. v. Jessie George and R. v. Charlie. In the case of Jesse George, the court heard information about his background and his family’s links to residential schools. The judge heard and accepted facts about FASD as it can contribute to criminal behaviour. However, in handing down a seven-year sentence he stated:

Mr. George did not ask for the hand he was dealt even before his birth. He did not ask for a chaotic childhood. His mother did not ask for the hand she was dealt in her childhood. Her inability to parent compounded the prenatal effects of alcohol on Mr. George’s brain. These are handicaps he will have to deal with for the rest of his life. I am sorry he has to deal with them. I hope he can overcome them. Nevertheless, the court must be concerned with the risk this young man presents to the public as a result of his impaired judgment and inability to control his impulsive behaviour (Truth and Reconciliation Commission of Canada, 2015: 163).

The link to residential schools serves as tangential in some regards as “the hand he was dealt” appears to place the onus on Jessie George’s mother (and father). There is also a clear misunderstanding that if Jesse George tries harder he can “overcome” his disability. This speaks also to the broader need for understanding of the disability at all levels of the justice system. FASD is a lifelong disability. The primary elements of the disability are then framed as a risk to be managed. Seen this way, when FASD is raised (and many recent cases demonstrate this same phenomena) there is a concern about how the court takes up the matter. R. v. Jessie George stands as an example in which the link between residential schools is made but is not salient. Were it not for a Gladue Report² even this small amount of context and information would be missing.

On the other hand, Volume Five also discusses R. v. Charlie in which Judge Lilles (Yukon) makes clear and tangible links between residential schools, FASD, and criminal engagement in which historic and intergenerational trauma are evidenced as relevant to the matter at hand. Included in the sentence was an overview of Mr. Charlie’s home community as well as his family and fam-

² A Gladue Report is derived out of section 718.2(e) in the criminal code, such that special consideration should be given to offenders of Aboriginal descent during sentencing, such that colonial histories and associated inter-generational trauma are considered.

ily history in which the Indian agents took his parents when they were just six years old to attend residential school. Judge Lilles' comments go beyond indicating family engagement with the residential schools and notes the deeply coercive nature of that engagement, "The parents of these children had little choice in the matter, as they were threatened with the loss of their rations if they did not cooperate. At the same time, they were offered \$6 for each child that was taken to the residential school" (Truth and Reconciliation Commission of Canada, 2015: 164). Then, in what is often understood to be an unprecedented acknowledgment, Judge Lilles goes on to state (Truth and Reconciliation Commission of Canada, 2015: 225):

The parents of these children had little choice in the matter, as they were threatened with the loss of their rations if they did not cooperate. At the same time, they were offered \$6 for each child that was taken to the residential school.

This history of Franklin

Charlie's family is important because it identifies a direct link between the colonization of the Yukon and the government's residential school policies to the removal of children from their families into abusive environments for extended periods of time, the absence of parenting skills as a result of the residential school functioning as an inadequate parent, and their subsequent reliance on alcohol when returned to the communities. Franklin Charlie's FASD is the direct result of these policies of the Federal Government, as implemented by the local Federal Indian Agent. Ironically, it is the Federal Government who, today, is prosecuting Mr. Franklin Charlie for the offences he has committed as a victim of maternal alcohol consumption.

Volume Five goes on to note the importance of making these connections between the history of residential schools, alcohol consumption, FASD and current rates of over-incarceration. Judge Lilles' sentence, in which he takes great effort to explicitly make those links, serves as a template for others to follow.

Ultimately, the TRC decided to house much of their discussion about FASD in the section focused on Justice. However, concerns about FASD and the contributing factors to prevalence rates are not bound only to the justice section. Indeed, the discussions about FASD are framed within broader contexts of historic and inter-generational trauma in which FASD is a symptom of a broader issue—that FASD in indigenous populations is itself one of the many legacies of the residential school program.

FASD as a Legacy

Volume Five of the Final Report of the Truth and Reconciliation Commission of Canada, is called the "The Legacy" and focuses on the long-term outcomes that have been brought about by the Residential School program.

The introduction notes that the lingering impacts of the residential school program include inequities in health, education, income as well as access to justice, over-representation in the justice system as well as inter-personal and systemic racism (Truth and Reconciliation Commission of Canada, 2015). The language of the TRC indicates that "poorly trained teachers" had lasting impacts on those that attended the schools, as students were not just stripped away from their families, they were also sub-

ject to violence and abuse. The TRC was charged with collecting the stories of survivors but as Volume Five (and other sections) point out: the legacy of Residential Schools impacted survivors but also their partners, families, communities, children, and generations that followed.

In the section focused on Justice, the report indicates that children in the schools were subject to abuse and injustices that extended decades. Indeed, when former students started to garner much overdue attention in the 1980s, the justice system under-reacted and effectively re-victimized these individuals. Case in point, "the Commission was able to identify fewer than fifty convictions stemming from abuse at Residential Schools, a small fraction of the more than 38,000 sexual and serious physical abuse" (Truth and Reconciliation Commission, 2015: 7) that was submitted for adjudication during the lawsuit. Here, the abuse itself, coupled with challenges in connecting with family and community alongside sustained racism at the individual and structural level has resulted in many people self-medicating. The report notes that over-incarceration must be understood in relationship to these forms of marginalization, as should the increased experience of victimization (58% more likely to be victims of crime vs. non-Aboriginal people – see page 8). This section speaks briefly about FASD and links the prevalence of FASD within the Aboriginal population to these broader historical and ongoing structural inequalities. Citing the prevalence of FASD in custodial settings – 15-20% of the population in jails can be living with FASD – the authors note that the challenges surrounding a diagnosis can lead to no diagnosis and therefore people with a disability being sent

to prison. This section closes by arguing “in this way, the traumas of residential school are quite literally passed down from one generation to another” (Truth and Reconciliation Commission, 2015: 8). The report notes that aside from Caroline Tait’s literature review, that there has been limited research that focuses specifically on the intersection of residential school experiences and prevalence of FASD.

FASD and Intergenerational Trauma

The link between FASD and the Residential School program as outlined above must include an understanding of intergenerational trauma. The experiences of those that survived the Residential School program deeply impacted their own sense of self-worth and value as there was a systemic attempt to devalue their language and culture. Concurrently many individuals grew up experiencing minimal care and affection as the project worked to delink children from their families. Children in the Schools did not feel connected to their parents and experienced isolation and abuse while in IRS. These experiences in youth and adolescence critically shaped their experiences when they grew up and were left to puzzle at how to parent when it was never modeled to them; how to care when care was actively stripped away from them with no means to reconcile these injustices. Thus, the experiences of trauma were passed between generations and the role of self-medicating to escape these experiences became part of the cycle of intergenerational trauma—cycles that can now be tangibly traced out in the criminal and family courts across Canada:

The picture that emerges through court documents is one in which Aboriginal overrepresentation in prison can be directly connected to problems experienced by Aboriginal people whose roots are deep in the intergenerational legacy of residential schools. The list of such problems reads like a social minefield. It includes, poverty, addiction, abuse, racism, family violence, mental health, child welfare involvement, loss of culture, and an absence of parenting skills. And one of the least well-understood but most insidious afflictions borne by the inheritors of the residential school legacy is fetal alcohol spectrum disorder. (Truth and Reconciliation Commission of Canada, 2015: 222).

The Aboriginal Healing Foundation linked these matters together to note that when thinking about the connection between intergenerational trauma, alcohol

addiction, and FASD that the “residential school system contributed to the central risk factor involved, substance abuse, but also to factors shown to be linked to alcohol abuse, such as child and adult physical, emotional and

sexual abuse, mental health problems and family dysfunction. The impact of residential schools can also be linked to risk factors for poor pregnancy outcomes among women who abuse alcohol, such as poor overall health, low levels of education and chronic poverty.” (Truth and Reconciliation Commission of Canada, 2015:152). Seen this way, the frameworks that are used to measure risk – in the justice system for example – are likely

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historically illiterate and make individuals that much more vulnerable in the justice system as the central risk might be framed as alcohol use when in fact it is residential schools that make individuals at risk for alcohol abuse—raising a social justice issue for consideration and making the case for review of who is in jail and how unjust risk tools (management tools that have been developed to estimate the risk a person presents inside and outside of custody) might be a central factor in that outcome. There is a clear and urgent need for a robust understanding of trauma-informed practices across all the sectors not least of which is the justice sector. And it should be noted these risk tools permeate the justice sector and impact families through risk tools that are used to assess family stability and vice-versa.

Set up For Failure

The TRC is careful to note that FASD is not limited to Indigenous communities or peoples. Rather, the report draws attention to the role of FASD across multiple sectors, not least of which is the justice system. Referencing sponsored research by the Aboriginal Corrections Unit of Corrections Canada and a workshop held in 2010, the TRC notes that the workshop report included the following observation, “currently the justice system is set up to fail fasd-affected individuals—poor memory functions results in missed court appearances resulting in fail to appear charges” (Truth and Reconciliation Commission of Canada, 2015: 223). This section then goes on to detail that a major factor impacting better access to justice is the barriers to diagnosis. Listed as costly and challenging to obtain, the TRC notes that even if judges have some understanding about FASD, in the absence of a diagnosis, they are limited in what they can do as diagnosis is critical evidence relative to mitigating circumstances in sentencing.

This section of the TRC Volume concludes with the following statement ramping up to stating Calls to Action

33 and 34:

Given the higher rate of Aboriginal involvement in the criminal justice system and the higher rates of incarceration, there is a need to take urgent measures both to prevent and better manage the harmful consequences of fasd [sic] for Aboriginal offenders (Truth and Reconciliation Commission of Canada, 2015: 224).

The TRC brings together the experiences of Residential School survivors and their families alongside research and evidence to support 94 Calls to Action. This section focused on some of the contributing evidence that was used to substantiate Call 34. The rest of this section will offer additional background information that might be of assistance for those that are trying to map out steps and responses to this call for justice reform.

1.2 FASD as evidenced in peer-reviewed literature

Peer-reviewed literature suggests FASD is a complex disorder that when mixed with the justice system can cause significant issues and concerns for all key players, including police, judges, lawyers, victim service workers, court workers, those living with FASD, parents and guardians of people living with FASD, and other support persons. While there are no fast and hard approaches to working with FASD in the context of justice, there are many tangible strategies at the disposal of the key players in any justice setting. Some of the biggest challenges arise out of first, a lack of diagnosis and screening in the justice setting, and second, the fact that the needs of each individual with FASD are likely to be unique and vary considerably from others living with the same disorder (Flannigan, Pei, Stewart & Johnson, 2018). As such, approaches are likely to need to be individualized for the greatest outcomes. To that end, however, there are many strategies available that can be consistently implemented in policing practices, courts, corrections, and the community to better assist those with FASD and improve their justice outcomes. Such strategies will be outlined in this document. As Brown et al. (2015a) explain, using such strategies to assist people with FASD will cause no further harm to any individual (even someone without FASD); however, not using appropriate measures could cause serious and compounded deleterious effects.

Flannigan et al. (2018) conducted a systematic review

of the state of the literature on FASD, summarizing key peer-reviewed evidence and resultant strategies regarding FASD in the context of justice. The article clearly highlights the aim of the document in producing change to practice and policy, so that researchers, policy-makers, and practitioners are implementing simultaneous and well-supported steps in improving justice outcomes for people living with FASD.

Examining 25 rigorous articles of evidence-based literature, Flannigan et al. (2018) found the following, as it pertains to this document: 1) prevalence rates of FASD in justice settings are uncertain, but estimates are high (see: Fast, Conry & Loock, 1999; Popova et al., 2011); 2) there are currently no standardized screening methods for FASD in the justice system; 3) data is lacking on diversionary tactics in this population; 4) FASD in the justice system accounts for roughly 40% of the total financial cost of FASD in the Canadian context (see: Thanh & Jonsson, 2015). In regard to risk factors, the following have been identified: 1) those with FASD

Reconciliation might require decolonizing these tools, as they likely have been created based on colonial misconceptions.

were more likely to experience their first contact with the justice system at a younger age (see: McLachlan et al., 2014); 2) associated impairments of FASD decreases an individual's capacity to understand the legal process and their rights therein; 3) suggestibility is a problem in this population, particularly in the context of justice processes (see: Brown et al., 2011); 4) substance use/misuse, lack of support, and minimal daily structure tend to correlate to

increased involvement in justice (see: Currie et al., 2016); 5) contact with the justice system is more likely for those diagnosed with FASD later in life (see: Currie et al., 2016); 6) adversities in early life, alienation, vulnerability, and lack of services are common among this population and increase their susceptibility to justice involvement (see: Tait et al., 2017; Pei et al., 2016). That said, Flannigan et al. (2018) point out that it is important not to link these factors causally to criminality, but rather understand these as potential risk-factors that can be heightened in someone who has FASD. Linking back to the previous discussion about risk tools (see section 1.1) there is a need to review how risk tools are created, used and then analyze them in practice. Reconciliation might require decolonizing these tools, as they likely have been created based on colonial misconceptions.

Flannigan et al. (2018) also highlight in their review, strategies that have been identified by Pei et al. (2016) as beneficial for those with FASD who come into contact with the justice system, such as "hope for a better future, willingness to change, and resilience" (p. 48). To distil

these ideas further, some items may include: 1) access to long-term housing; 2) better assessment and diagnosis; 3) using strengths-based approaches in lieu of punishment; 4) well-thought out case plans and management; 5) greater education on FASD for justice professionals; 6) access to employment, and; 7) increased supervision.

In regard to justice professionals' knowledge regarding FASD, Flannigan et al. (2018) found mixed results across the literature reviewed. While moderate to high volumes of professionals are aware of FASD, less are self-reportedly prepared to work with a client who has FASD, and fewer still have ever referred a client for an FASD assessment (see: Cox et al., 2008; Douglas et al., 2012). In the courtroom, while FASD might be considered relevant in some aspects, the lack of education on the topic procures gaps and inconsistencies in how to approach the disability (see: Douds et al., 2013). Overall, because there is no concrete profile of someone with FASD (due to the variability in the disorder and resultant effects), approaches are likely to be best when individualized. To even come to that point, however, screening needs to be used in the courtroom wherein the potential of FASD or other cognitive impairments are identified in order to alter approaches to best suit the needs of all concerned for justice. This likely means developing protocols for police, courtrooms, corrections, and communities that are flexible and adaptable to a variety of cognitive levels of functioning.

1.3 FASD as evidenced in policy and gray literature

This is not the first document proposing a framework for action. In 2005, the Public Health Agency of Canada released "Fetal Alcohol Spectrum Disorder: A Framework for Action" as a tool to be used across justice, health, and education sectors, as well as those working in social justice capacities. The framework encourages better understanding of the disability, a vision of where collaborative efforts could lead, and inspiration for change. In providing broad and malleable ideas, the framework is meant to be adaptable to specific community and sector needs. The five main goals included in the document are: 1) Increasing awareness of FASD and how it is caused; 2) Increasing capacity at local and national levels via knowledge sharing and training; 3) Implement standardized screening/diagnostic approaches, as well

as regulated reporting and evaluation methods; 4) Encourage information sharing of best practices and new research; and 5) Increase support for FASD prevention and support of those already living with FASD. While the document outlines underlying reasons behind women drinking during pregnancy such as violence, poverty, and stress, the report fails to look even further beyond these social factors and actively acknowledge colonialism as a major perpetrator of FASD incidence. The TRC, however, allows Canadians to understand how our colonial past contributes to the prevalence of FASD in a major way, allowing us to further contextualize a framework for action in this document.

Many other policy documents exist surrounding FASD, which support the need for this Framework for Action. In 2014, the Saskatchewan Child Advocate released its special investigative report: Two Tragedies: Holding Systems Accountable. The report draws attention to the

... there is a need for robust, grassroots consultation on what is needed, where, and how so that programs, policies as well as research efforts can all be best meeting the needs of Aboriginal peoples.

needs for early childhood diagnosis of FASD in order to properly acknowledge and address complex needs that can arise with intellectual disabilities. Without diagnosis, children are more likely to fall through the cracks of the systems that are supposed to support them in their growth and development. Services should be provided in a comprehensive and collaborative way to ensure they are best meeting client needs. Additionally, more funding is needed to increase childhood

development programs, and decrease poverty and the contributing factors that come about from adverse outcomes when discussing the social determinants of health. Finally, services need to be made readily available in remote and rural areas. These recommendations, while arising out of a tragic incident in rural Saskatchewan, are generalizable to Canada as a nation in our efforts to address FASD. As indicated in a previous section (see 1.1), the issues associated with FASD and the justice system often link directly to broader questions in the area of child welfare.

In 2003, Working Together for Safer Communities was released out of Saskatchewan surrounding Indigenous issues in the justice sector at the provincial level. This document aligns with issues that were brought to the fore once again through the 2015 TRC Calls to Action. The reform document suggests community capacity is key in dealing with crime. Individuals who live in the most impoverished areas are most likely to be involved in crime - further supporting the report discussed above

in which resources need to be allocated to reducing poverty. The report calls for respectful justice processes that acknowledge Aboriginal culture, building community capacity to deal with victimization and offending, and improving partnerships in communities. Further, it is suggested that community driven initiatives such as restorative justice be used to enhance the success rates of re-integration, as well as the provision of effective programming for offenders. The document draws attention to the need to address alcohol and drug abuse issues, as well as FASD, stating that Saskatchewan Corrections and Public Safety will continue to train correctional officers on FASD and other mental health issues.

In 2006 the First Nations Child and Family Caring Society of Canada released a report on FASD training, which suggests the need for deeper and continuing training around prevention, support, awareness, and diagnosis/assessment. The findings were divided into four major areas: funding, training, services, and partnerships. In particular, the report describes the need for substantial and ongoing funding to Indigenous communities to address FASD for those communities to provide adequate training, and to continually develop and expand training opportunities. Indigenous communities should also have freedom to adapt training in culturally appropriate ways to maximize the benefit of the training programs. All training programs should also have attached funding for evaluation to ensure best practices. To reach these goals, support is needed to fill gaps in services, and to increase the availability of assessment and diagnosis. Alongside such support, there should also be better efforts made at collaboration and partnerships within and beyond communities. That said, when speaking about FASD and thinking about FASD gaps and services for Aboriginal peoples there is a need for robust, grassroots consultation on what is needed, where, and how so that programs, policies as well as research efforts can all be best meeting the needs of Aboriginal peoples.

Most recently, in 2018, the Federal Government (Department of Justice Canada, 2018) released the first of a series of reports, summarizing findings from roundtable consultations regarding justice reform. In comparing this report to previous gray literature, not a lot has changed in regard to the root causes of crime and the major challenges in the justice system. The most highlighted concern is that many clients in the justice system suffer from mental health, as well as other social determinants of health issues such as poverty, homelessness, and previous victimization. Moreover, those consulted feel that the justice system is not equipped to handle such issues, and that incarceration is not appropriate as a response to individuals plagued by the mentioned social issues. The consultations also suggest that approaches to justice should be rooted in evidence-based knowledge. Within the Department of Justice Canada

(2018) report, in regard to FASD specifically, the 2014-15 Yukon prevalence study was noted, such that at least one third of inmates have FASD. As such, knowing more about FASD would help in creating and sustaining appropriate approaches to working with clients impacted by FASD.

In sum, the evidence presented in the TRC itself demonstrated that while FASD is taken up in the justice section there is a holistic approach to understanding the intersecting issues when discussing FASD and Residential Schools. Accordingly, the material in the TRC was framed thematically to include:

- Link between residential schools, FASD and current justice outcomes
- Analysis of how FASD is a legacy of Residential Schools
- Link between FASD and intergenerational trauma

Each of these items will be revisited explicitly in the next section which outlines a Framework for Action, using the evidence presented in the TRC as the foundation for action.

The policy documents and gray literature highlighted in section 1.2 and 1.3 placed an emphasis on real-life practical issues and potential solutions to keep in line with Bowen and Zwi's call for evidence-based policies and practices that are attentive to constraints. From the research and gray literature, there came additional themes for consideration:

- Funding for programs, practices and diagnosis/assessment
- Knowledge and awareness about FASD
- Sectoral capacity (in particular, justice) to address root causes of FASD and associated behaviours
- Evidence-based practices
- Cultural alignment in services and approaches

By acknowledging strengths of individuals living with FASD, approaches to services can be crafted to best help clients in need. This often means keeping individuals with FASD out of carceral settings, where they are most susceptible to victimization. Moreover, reform programs within prisons are often not effective for individuals with FASD, and as such need to be adapted. Early recognition of FASD via awareness, screening, and/or assessment/diagnosis will be pivotal in identifying where unique interventions are necessary for success. This Framework for Action can be used as a tool throughout the justice sector (and other sectors) in crafting policy and practice that best suit client needs.

SECTION TWO: Relevant Practices

This section will briefly describe some current practices or broader contexts within which the TRC Calls to Action should be framed. The section will provide a brief overview of practices and contexts relevant to frontline, policy, and research in the justice field. This section will include promising practices and examples to draw from prior to outlining the Framework for Action:

“In 2010 and 2013, the CBA called for greater sensitivity and flexibility in the criminal justice and corrections systems to deal more appropriately with people with brain injuries such as FASD.... Calls to action 33 and 34 are consistent with the CBA position on this issue, and recognize the importance of seeing this problem through an Indigenous lens.” (p. 6)

The Canadian Bar Association made position statements upon the release of the TRC 94 Calls to Action. Specifically, the CBA calls for “greater sensitivity and flexibility in the criminal justice and corrections systems” along with eliminating “mandatory minimums” to allow judges the ability to consider cognitive disorders and intergenerational trauma upon sentencing. Taken further, there is a need to adjust curriculum in order to instruct future lawyers, judges, and corrections officers while also modifying policies to facilitate FASD-informed practices moving forward.

Canada is not the only country struggling to reconcile the complexities FASD can present in the justice setting. In Western Australia, Baker (2017) explains the court is responsible for reducing the over-representation of aboriginal peoples in prisons. She explains this group is disproportionately incarcerated because of the higher rates of FASD in aboriginal populations, and the increased likelihood of someone with FASD coming into contact with the justice system. Like Canada, Australian courts also struggle with the court’s capacity to obtain a diagnosis. Call to Action 34 (i) in the TRC specifically calls for greater power for courts to obtain an FASD diagnosis. Blagg, Tulich, and Bush (2015) acknowledge the capacity of court and suggest the use of a “lite screening tool for psychologists and youth workers” (p. 260), which would at least give some indication of cognitive disability. The Call goes on to suggest the need for appropriate community supports. However, there is a gap in the wording of this Call between the need for diagnosis and need for community supports, and that gap is addressing what the court process looks like when working with someone with FASD in a court setting. This is where a number of small-scale yet largely impactful, tangible solutions emerge based on literature and research.

2.1 Court capacity for diagnosis and processes for better justice outcomes (34 (i))

Brown (2014) argues for the use of an FASD screening tool for justice purposes, as this can largely benefit the deliverance of justice for all players in the system. First, standardized screening allows for increased communication between sectors and effective communication between sectors and people with FASD, vis-à-vis appropriate language use. Such screening allows legal professionals flexibility and the ability to screen without dependence on medical experts. Knowledge of a potential cognitive disability helps legal professionals to watch for issues such as confabulation. Lawyers are better able to guide clients through the legal process and judges are encouraged to diversify sentencing and promote treatment.

Once an individual has been identified as potentially being affected by FASD through screening, a number of issues can arise in the courtroom, as discussed above in the gap in Call to Action 34(i). Baker (2017) explains cross-examination uses leading questions, which assume something is a fact when it might not be; this can be summarized as suggestibility. Such strategies are problematic for someone with FASD, who might be agreeable without being able to critically analyze the truthfulness of any particular statement due to their brain impairment. These types of interrogation tactics would be grossly inappropriate for someone with FASD, yet if there is no diagnosis or screening, there is no means to know when to change tactics. Again, screening is essential to identifying this issue. Accordingly, someone with FASD could be considered a special witness; a status that affords assistance perhaps from a communicator, support person, or allowing them to give testimony by video.

Brown et al. (2015b) also discuss approaches in the courtroom. It is important for the defense to gather a medical and social history of the client. When questioning, queries need to be reframed into simple components. Extra time may be needed for people with FASD to understand, process, and answer questions, as well as to have information re-conveyed throughout the trial. Repetition is often necessary. Gaining the attention of the individual before beginning questioning helps to ensure client engagement. It is suggested to only work for short periods (up to half an hour), and continuously check that they are understanding. Communication should happen in multiple and creative ways, perhaps using images, to best suit the needs of the individual with FASD. It is useful for judges to also understand

these things and provide a quiet space during breaks, and assistance from support people to help refocus or to assist during the court process. Sentencing tactics should be considered and altered as necessary; simple instructions should be given so the defendant is not confused about when to report and to whom, in order to avoid administrative breaches of justice. It should be considered a risk to imprison someone with FASD due to his or her susceptibility for victimization. The authors discuss 'red flag screening' (p. 7) and the D.E.A.R. intervention approach, in which it is suggested to use direct language, engage a support system, accommodate needs, and remain calm (p. 8).

2.2 Exemptions from mandatory minimum sentences & alternatives to prison (34(ii))

Call to Action 34(ii) suggests the need to explore the impact of incarceration on those with FASD and subsequently, alternatives. Scott (2017) explains that general deterrence is not effectively communicated through someone with a mental health disability, and specific deterrence is unlikely to occur. According to Baker (2017), programs that divert offenders with FASD out of prison and into communities are largely successful. However, Blagg et al. (2015) explain that diversion out of the justice system must be complemented with diversion into a different system that can offer support. In the case of *Churnside v. Western Australia*, it was determined that a prison sentence would not work to establish specific deterrence and what would be most impactful was creating and maintaining community support (Baker, 2017). Of note, it was determined prison would not stop the offender from offending upon release, thus the potential rehabilitation via community offered greater hope than the policy reasons behind imprisonment (Baker, 2017). The approach taken in this case was to look at the criminal history, determine if there were periods of time in which the appellant was not offending and then explore what was occurring in his life at that time. It was found the appellant was most stable living with his uncle, in a community that prohibited alcohol (a risk factor for this individual; Baker, 2017). Blagg et al. (2015) explain that diversion tends to sway toward the least intrusive way of dealing with the situation. This is problematic however, because it reflects an understanding that people will grow out of crime. For someone with FASD, this is not the case. A glaring issue with the way cases are determined, is they essentially go from one extreme to the other: no intervention or support, to indefinite confinement. Mela (2016) echoes this sentiment, suggesting greater use of mental health courts, and the use of diminished responsibility in diverting offenders away from prison and toward the services they need.

2.3 Supports for community, corrections & parole (34 (iii))

Call to Action 34 (iii) explains the need for during-incarceration and after-release resources to increase the success of people with FASD living in the community. Brown et al. (2015a) suggest several recommendations for correctional staff who are likely to encounter individuals with FASD such as: identifying the disorder or the potential for the disorder through screening, being aware of FASD and what implications are associated to treatment of inmates and behaviours, incorporating screening for inmates, connecting offenders with appropriate support services for re-entry/reintegration (keeping in mind that traditional probation/parole tactics are rarely suitable for these cases), and altering communication styles (avoiding yes/no questions; asking the individual to repeat back and re-phrase directives; using simple language). Of note, the authors explain, "...that using the strategies and interventions identified in this document on a person who does not have FASD should not result in any injury or impairment. However... not using these strategies on individuals who do have FASD may contribute to secondary disabilities and possibly result in recidivism and even suicidal ideation or self-harm." (Brown et al., 2015a, p. 5). In the correctional setting, steps can be taken for better protection of those with FASD who might be vulnerable and more susceptible to victimization (Brown, 2014). Stewart, Wilton, and Sapers (2016) explain in their study, that offenders with cognitive disabilities likely require assistance in an institutional setting with educational needs and skill attainment for their impending reintegration. Unfortunately, however, people with cognitive deficits are more likely to be sent to segregation in prison settings where there is no opportunity for such supports. These individuals do not pose greater management requirements than non-cognitively impaired inmates upon release. As such, parole and probations can craft successful re-entry plans where clients are suitably matched with community services (Brown, 2014). Professionals will become acutely aware of successful services for certain types of offenders (Brown, 2014).

In regard to 34(iii) and specifically the community, there are a number of interventions that can be taken to bolster the ability of the community to support individuals with FASD, and in particular when they have had contact with the justice system. Bohannon, Gonzalez, and Summers (2016) discuss the benefits of pairing parents who have gone through the court process regarding their children and those who are currently in the process. It is highlighted that this approach affords relationship building through support, education, and encouragement and builds relational and accountability capacity for parents. This approach provided psycho-so-

cial support, empowerment, and engagement, as well as support and assistance through an unfamiliar system. Parents in the program increased their understanding of the system and even their opinions of it. Such an approach can help to stabilize a support system in the community for people with FASD reintegrating after prison, and perhaps lead to stronger advocacy for services and resources upon release.

Mela (2016) explains, “Appropriate expectations, positive relational approach, and the provision of support, structure and supervision are critical, especially when offenders are in the community” (p. 121). Freckelton (2016) suggests an approach in which an adult male mentor be paired with adult men being released into the community. Tait et al. (2017) explain that through accessing, securing, and maintaining clinical support as well as mentors, and friendship, participants in their study achieved stability. That said, any changes in services or gaps of time without services caused disruption. A common mistake is the pulling away of supports once a client is stabilized, under the assumption they no longer need services when, in reality, they have likely just finally struck the right balance in supports. This study also explored the idea of peer-mentorship (pairing someone with FASD who has re-integrated with a newly released and integrating individual) and found success in such an approach.

2.4 Evaluation methods to measure effectiveness and community safety (34(iv))

As the policy reports suggest (see for example: First Nations Child and Family Caring Society of Canada, 2006; Advocate for Children and Youth, 2014) funding should not just be allocated to services and training, but also to evaluating these programs to ensure best practices. By beginning with evidence-based practices, there is a better chance that the programs meant to help individuals with FASD and keep communities safe will do just that. More resources need to be allocated to studying innovative approaches as opposed to incarceration of people with FASD. Tait et al. (2017) found peer-mentorship to be highly effective in reducing re-offending through the creation of peer accountability, and relationship building. Their study focused on the story of two individuals, and such research should be expanded greatly, perhaps grounded in the setting of mental health disposition courts where such strategies are more likely to be explored, in conjunction with mental health services and supports.

SECTION THREE: Framework for Action

The following section will outline a Framework for Action. The Framework offers a cluster of actions that can be taken in different sectors (frontline justice, policy, and research) but that will work together to bring about the type of systemic change that is called for within the TRC. Prior to offering the Framework, a few words on the sectors outlined.

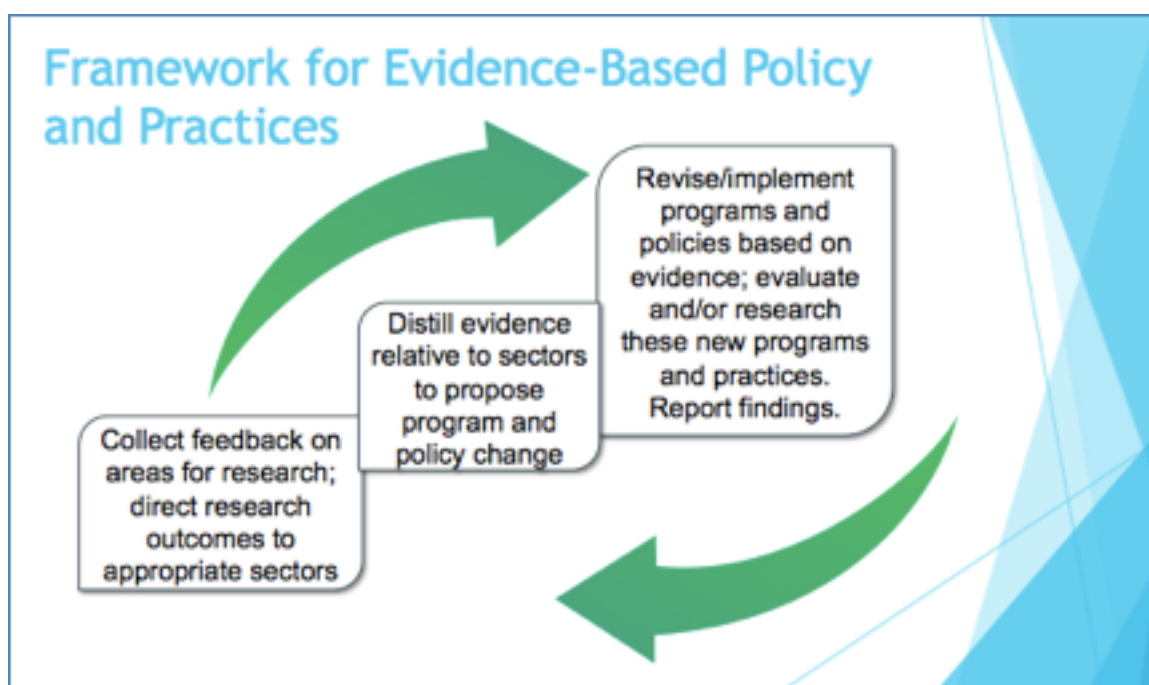
The term “frontline justice professional” is understood to be a mix of agencies and individuals but is meant to mark an intersectoral group including but not limited to policing, courts, corrections, probation, and others that identify as justice professionals that are delivering on-the-ground, frontline services. This grouping is also meant to include associated management. It is a broad frame but intended to include all that are delivering frontline services directly as well as those that create and manage frontline services.

In the context of this Framework for Action, “policymaker” can refer to people at all levels of government (federal, territorial, and provincial) who are responsible for crafting standardized and/or legislated approaches to FASD management and prevention. Moreover, “policymaker” can also refer to individuals embedded in agencies who are responsible for policy and practices within their organizations. Direction and vision for change is the responsibility of those in policymaking positions. While the TRC Calls to Action are meant to mobilize individuals and sectors it can (and has) resulted largely in

a stasis. As such, we have aimed to provide suggestions in this Framework for Action that policymakers can take up and adapt to their specific organizational needs and visions.

The phrase “research or researchers” is meant to cover all those that are engaged in research and training both inside and outside academic institutions and are contributing to peer-reviewed and rigorous research in the field. This includes researchers working with organizations as well as those appointed to academic positions.

Before speaking about the Framework, it is important to note that this document affirms that it is widely accepted and understood that strong policy and practices are evidence-based. However, what that means in practice is not always clear. This document purposefully started with the TRC as the foundation for the evidence. That foundation was then complemented by peer-reviewed and gray literature. Moving forward, as policies and practices do change in response to the need to change the justice system more broadly and specifically in response to the TRC Calls to Action, the justice sector and policy makers must expand what is considered to be evidence—and research itself needs to expand. The overall goal of which is evidence driving research, policy, and practices with a recursive relationship between areas of need and feedback loops that allow for research findings to inform ongoing program and practice changes as visualized in the following graphic.



Framework Architecture

This Framework is meant to serve as a set of structural ideas about what could be done to start to more effectively mobilize the Calls to Action, and specifically #34. The Calls themselves clearly outline what needs to be changed. For many, the question remains: how?

Returning to Bowen and Zwi's concept of evidence-based policy making, this document intends to offer specific ideas to mobilize the Calls to Action, which in turn will help fuel diffusion of ideas — ideas that have been supported by the evidence presented in this document that was collected to assist in development of new practices, policies, and capacities. As indicated earlier, Bowen and Zwi write, "the starting point for navigating the use of evidence in policy and practice is understanding diffusion (how ideas spread throughout systems), how decisions are made, how policy is developed, and how capacity is required to effectively use evidence in this process" (Bowen and Zwi, 2005: 0604).

The TRC Calls to Action were released and called upon the Federal, Territorial, and Provincial governments as well as all residents in Canada to engage. This produced a critical disjuncture in some regards when thinking about Bowen and Zwi, namely that diffusion was an issue: could agencies and residents in Canada take immediate action or were there systemic barriers in place? These barriers have and continue to impact diffusion, which in turn impacts how decisions and policies are made as well as the overall capacity and willingness to bring about change.

From Framework to Action

Rather than seeing these barriers as total, this document instead accounts for the barriers in the Framework. In so doing, the Framework builds in mechanisms for education and outreach as well as wilful unwillingness to foster change. In many regards the TRC Calls to Action are calling for an end to systemic injustice—it is a mandate for mandatory change. The Framework then acts as the scaffolding to facilitate such change. Informed by the evidence and relevant practices, the following is an outline of each part of the TRC Call #34 followed by a discussion and recommended actions that can be taken. Together they form the basis for small and large-scale changes.

34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD).

Discussion:

The opening statement for TRC Call to Action #34 is

broad-based to mark the type of sweeping reform that is needed. Specifically, this section notes that every level of justice (from federal to provincial/territorial) needs to be considering the well-being of individuals with FASD. Accordingly, the subsections that follow offer actionable suggestions that would mobilize the specific changes required to bring about substantive change. First and foremost there is a need to do the following:

Action:

1. Mandatory Education about Systemic Racism: There is a need for agencies and jurisdictions to have teaching modules developed for new and seasoned workers alike to recognize the history and ongoing nature of systemic racism. These modules can easily be developed with researchers and then refined for local implementation. Recent examples in the justice system demonstrate an ongoing need for reform and to account for the role of racism inside and outside the courts. Small scale-change can be immediate as these modules exist in K-12—the content can be then modified and enhanced for local need.

2. Equal Access to Paid Gladue Reports: As Rudin (2008) discusses, there is uneven use of Gladue Reports across Canada. The reports are meant to be used to explain the background of the individual facing sentencing as a contributing factor in sentencing. These often take the form of a personal history of the individual facing sentencing and recommendations for alternatives to jail time. In many places, no one is trained to write these reports, in other locations there is no funding made available for the reports. Gladue must be enforced and enforced constitutively between jurisdictions. The money spent on reports will easily be recovered by having less people spend time in jail. One Gladue Report costs approximately \$2-3000 CAD. It is estimated to cost approximately \$90-120K to house a federate inmate for a year. The costs can come from the justice system at the Federal, Territorial and Provincial governments through Tri-Partite agreements. Gladue reports are required by law and have been for nearly 20 years (Hannah-Moffatt and Maurutto, 2010). The money will be spent, this is about the conscious choice to spend differently as it can greatly impact sentencing outcomes.

Call to Action 34

i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.

Discussion:

The TRC outlines the ways in which an FASD diagnosis can be a critical element in securing supports and services but also can play a critical role in mitigating sentencing. The reality is that securing diagnosis with

a multi-disciplinary team is simply not possible across Canada given the cost and limited resources. Moreover, recent court cases are demonstrating that even when an FASD diagnosis is discussed by experts in court, the judge may not see it as a mitigating factor in sentencing. Attention should be drawn to the strengths of therapeutic and problem-solving court models to help individuals to access supports and services over incarceration.

Action:

3. FASD-Informed Training Practices:

- Frontline inside the courts: Develop evidence-based training for judges and court workers to: better identify some signs that an individual may have a complex cognitive disability; to understand the impacts that disability might have on executive functioning and make appropriate connections to community supports and issue sentences that reflect an understanding of the disability.
- Frontline outside the courts: From frontline crisis agencies to police officers as well as probation and correctional officers; all sectors should have basic FASD literacy to provide FASD-informed supports and services. An FASD-informed approach would be potentially beneficial to all persons accessing supports and services. Whereas training for court-related staff (judges, court workers, crown, and defense) might be focused on courtroom practices specifically, FASD-informed practices inside and outside the court would allow for a larger group of people actively supporting individuals with an invisible disability—in which supports and services are non-punitive because of enhanced understandings about the complexities of the disability. A basic information session (60-90 minutes for example) can go a long way in transforming the ideas, practices, and assumptions that inform frontline delivery of care across all sectors—keeping individuals anchored in the community means they will have less contact with the justice system.

4. Expand Therapeutic Justice Practices: the use of therapeutic and problem-solving courts (including drug treatment mental health courts in operation across North America) is understood to be an effective way to manage a group of individuals whose contact with the justice system is symptomatic of broader issues that can often be better addressed outside of jails. Individuals with FASD are seen in many of these courts including Mental Health and Gladue Courts. These therapeutic justice practices, including the principles of restorative justice, can be brought to bear on the lives of those with FASD in which justice outcomes could better address the needs and capacities of the individual.

5. Enhance Alternative Diagnostic Practices: Acquiring

an FASD diagnosis for adults is difficult in most places in Canada and there are long waitlists for both youth and adults. For youth, there can be years-long waiting lists. It is widely accepted that a diagnosis of this nature can cost thousands of dollars and because of the complexity of the disability, requires a specialized multidisciplinary team. Alternatively, courts could request Functional Assessments, which are less laboured and provide a useful overview of key challenges and characteristics of the individual. However, it should also be noted that without effective training these assessments and/or diagnoses can effectively be weaponized as FASD is then presented as a risk to be managed in custody versus a mitigating factor in sentencing as the individual has a recognized disability. Screening tools are freely available as are alternative practices associated to diagnosis and assessment—that said, appropriate training is essential to use these tools or practices to be sure the intervention is being used as intended.

6. Strengthen Community Supports: While there are many supports and services available in communities there can be a challenge of linking individuals and sustaining connections with appropriate supports. Building on those supports that are available there is a need to expand current capacity and services that are available. Specifically, expanding the court worker and mentoring programs could assist and advocate for individuals as they navigate the justice system. Additionally, expanding mentoring programs will also further assist in keeping individuals connected to appropriate community supports versus having crisis contact with the justice system. These enhanced supports will also assist in staving off the run of breaches that can occur when someone has challenges remembering their court dates and/or understanding conditions. Supports that are available must be evaluated and expanded when effective.

Call to Action 34

ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.

Discussion:

While minimum mandatory sentences are mandated by legislation, the different types of offenses that are included are steadily increasing. That said, judges are increasingly pushing back against the legislation noting that these sentences are out of scale to the crimes committed—and many would argue that the mandatory minimums strip judges of the necessary discretion they should be entrusted with. Moreover, mandatory minimums are likely to cause disparity in sentencing and outcomes, particularly for vulnerable populations, including Aboriginal people. Also, see Action Item #2 for discussion about the need to create equal access to

Gladue Reports and access through an FASD-informed lens.

Action:

7. Implement Sentencing Reform During Current Justice Review: There is currently a review being undertaken of the criminal justice system in Canada. The Minister of Justice is in a position to rollback many of the current minimum mandatory sentences. It is recommended at the very least that a basic requirement for a minimum mandatory sentence should be that a violent crime was committed. That said, judges should retain discretion as the circumstances of that crime and the offender must be considered.

8. Remove Mandatory Court Fees: While not indicated as such in this Call to Action, there has also been an increase in mandatory court fees which places a burden on individuals that is largely punitive in nature and can result in a series of administrative breaches.

Call to Action 34

iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.

Discussion:

Critical to any release plan is a clear understanding of the person's background and needs as well as the resources that are available to best support them in the community. Release planning should be person-centered with less attention on punishment for noncompliance versus collaboration to enhanced capacity for compliance which affords individuals the best opportunity to stay in their community and out of the justice system.

Action:

9. Robust Release Planning: As individuals are released from custody there is a need for planning so that they have direct access and connection to appropriate supports and services. Release planning of this nature might require some training or outreach to be sure that officers of the court have a strong understanding of which agencies to make referrals to. It is recommended that all individuals who assist with release planning have a current list of agencies that can provide FASD-informed care and supports. While there are a limited number of FASD-specific agencies and workers, agencies should be FASD-informed so as to provide effective supports and services to individuals who have FASD (suspected or diagnosed).

10. Bail/Release Conditions that Meet Needs: Bail and release conditions are often standardized and written in such a way that many people (regardless of disability) may not understand the terms of their release. There is

clear evidence that ongoing breaches are a major contributor to sustained justice involvement (Government of Canada, 2017). There are clear models developed by judges and probation offices to help modify or rewrite the conditions to better meet the needs of individuals. Defense Counsel can also argue to remove standardized conditions that set people up for failure and have no direct relationship to the charge (abstaining from alcohol or drugs on non-alcohol or non-drug offenses for example). Appropriately trained probation officers, judges, and counsel can write simplified conditions that state clearly what is expected in accessible language.

Call to Action 34

iv. Adoption of appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

Discussion:

The first three items in the Calls to Action offer recommendations that are grounded in the facts presented in the TRC Reports and supported by research and grey literature. The last of these Calls to Action draws researchers back directly into the work by seeking effective evaluation mechanisms to ensure that the practices can demonstrate effectiveness.

Action:

11. Evidence-Based Internal/External Evaluations: The development of evaluations that are internal and external to the organizations that are implementing changes in programs and practices is essential. Changes should be grounded in evidence-based practices and therefore it is critical that evaluation and research be conducted to ensure changes are bringing about positive impacts to individuals and communities. For example, many universities have campus/community partnerships focused on research and/or evaluation—partnerships of this type can be mutually beneficial as faculty or their students can conduct community-based research and organizations receive evaluations.

12. Training for Communities to Develop and Evaluation: Research and evaluation needs to be expanded to include more than just researchers. Striking partnerships between researchers and community agencies will allow for community members to help craft research projects and be involved in evaluating programs and practices through culturally-specific frameworks that can be taken up in conjunction with agency and university-driven research and evaluation. The net result is a more robust, inclusive, and appropriate understanding of evaluation in practice. Moreover, ownership of the research, practices, and evaluation could incite commitment to strong programs.

Closing Comments—From Talking to Action

TRC Call to Action #34 starts by stating, “We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD).” This is a broad call for systemic reform. It is a call for transformation change and mobilizing the Calls to Action will demand a paradigm shift across all sectors including Justice.

The 12 Action items indicated in this document, if implemented, will draw criticism from some and the call for increased reforms from others. The point, however, is to generate change. We must be willing to have a national conversation about FASD in the context of racism, colonialism, inequality, and trauma—to talk and to take action to bring about change. The absence of action will find that inequalities in the justice system will only continue to expand and intensify. We need to be ready for tough conversations to bring about real change. In focusing on one Call to Action and proposing a Framework for Action around one item, we are providing some tangible ideas to be implemented across all sectors and territories.

Again, the TRC Calls to Action require nothing short of transformational change. And that transformation comes through small and large steps. This document offers a framework to take some steps in the right direction.

Appendix 1: Additional Resources to Consult for Framework

Training:

- Contact Dr. Stewart's research team at <https://fasdresearchproject.com>
- Visit fasdlaw.ca for justice specific information as it relates to FASD
- Visit <https://canfasd.ca/online-learners/> for FASD-related online training courses

Alternative Justice Practices:

- http://www.courts.ns.ca/Provincial_Court/documents/Problem_Solving_Courts_Template_17_06.pdf
- <https://www.nji-inm.ca/index.cfm/publications/problem-solving-in-canada-s-courtrooms-a-guide-to-therapeutic-justice-2nd-edition/>

Alternative Diagnostic Practices:

- http://www.asantecentre.org/_Library/docs/Youth_Probation_Officers_Guide_to_FASD_Screening_and_Referral_Printer-Friendly_Format_.pdf

Enhanced Community Supports

- <http://www.communitylivingbc.ca/wp-content/uploads/Supporting-Success-for-Adults-with-FASD.pdf> [Quite dated]
- http://www.asantecentre.org/Community_Resources.html
- <http://fasdjustice.ca/more-information/community-resources.html>
- <http://nccabc.ca/health/fasd/>

Training for FASD Informed Practices

- http://www.law.uwa.edu.au/__data/assets/pdf_file/0006/3052725/7.-Jacqueline-Baker.pdf Keeping people anchored in community: See - Baker, 2017 [Discusses how legal decision made based on when the individual was functioning the best and trying to replicate those circumstances through the sentence]

Remove Mandatory Court Fees

- Criminal Code, RSC 1985, c. C-46, s. 734(1). <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-734.html>

Release Planning

- <https://doi.org/10.1016/j.ijlp.2015.08.026> Stewart, Wilton, and Sapers (2016) explain in their study, that offenders with cognitive disabilities likely require assistance in an institutional setting with educational needs and skill attainment for their impending reintegration. Unfortunately, however, people with cognitive deficits are more likely to be sent to segregation in prison settings where there is no opportunity for such supports. These individuals do not pose greater management requirements than non-cognitively impaired inmates upon release. As such, parole and probations can craft successful re-entry plans where clients are suitably matched with community services (Brown, 2014). Professionals will become acutely aware of successful services for certain types of offenders (Brown, 2014).
- https://www.fasdwaterlooregion.ca/assets/documents/DOCS_ADMIN-2203574-v1A-FASD_Informed_Approach_-_PHAC_WRFASD-2.pdf
- <http://www.fasd-evaluation.ca/wp-content/uploads/2012/10/FASD-Informed.pdf>
- <http://www.albertaaddictionsserviceproviders.org/pdf/fasdinformed.pdf>

Revising Conditions to Meet Needs

- <https://docs.google.com/file/d/0B95zUuHe3c3edG1ULTJfbE1XcDg/edit>

Training for Communities on Evaluation

- <http://communitylearningpartnership.org/wp-content/uploads/2017/01/PARToolkit.pdf>
- http://umanitoba.ca/rehabsciences/media/par_manual.pdf

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Contributors and Funders

Contributors: Michelle Stewart, University of Regina; Krystal Glowatski, Simon Fraser University; Robyn Pitawanakwat, University of Regina; Kathy Unsworth, Canada FASD Research Network

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University
of Regina