



International Centre for Criminal Law Reform  
and Criminal Justice Policy

# Best Interests of the Child in the Adult Criminal Process: Colloquium Report, Project Evaluation, and Next Steps



Prepared by

International Centre for  
Criminal Law Reform &  
Criminal Justice Policy

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Our Partners



REPRESENTATIVE FOR  
CHILDREN AND YOUTH





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## Introduction

Part 1 of this document summarizes the proceedings of a *Colloquium on the Best Interests of the Child in Sentencing and Other Decisions Concerning Parents Facing Criminal Sanctions*, convened at UBC Allard School of Law on June 4, 2024, by the International Centre for Criminal Law Reform, the Office of the Representative for Children and Youth, and the Elizabeth Fry Society of Greater Vancouver.

Part 2 of this document provides an evaluation of the current phase of a broader project (“the project”) on the same theme, of which the Colloquium is part. The project has been supported by a generous project grant from the Vancouver Foundation, in which the International Centre and EFry have partnered with the Canadian Coalition For Children With Incarcerated Parents. The project’s objective is to instigate and support a systemic and cultural change in the way that the best interests of the child are considered by defence counsel, the prosecution and the courts. The ultimate intention is to mitigate the negative impact on the child of a parent facing criminal sanctions, especially when the parent/legal guardian is a primary or sole caregiver.

The motivation for this work is the general lack of attention directed towards the best interests of dependent children whose parents are before the criminal courts, despite a wide range of international and regional norms and standards which suggest that domestic criminal courts are obliged to take the rights and best interests of dependent children into account as a primary consideration when making bail and sentencing decisions. This lack of attention persists despite all that is known about the negative influence of parental criminal sentences, and in particular incarceration, on children. Beyond direct and immediate effects on children themselves, regarding self-esteem, stigma, social isolation, and worsened education outcomes, it is also well-understood that incarceration of a parent has intergenerational effects. In Canada, children who experience parental incarceration are statistically more likely than any other group to one day come into conflict with the law and thus be incarcerated themselves. (For detail on these and other patterns, see the companion document to this report, [Considering the Best Interests of the Child in Sentencing and Other Decisions Concerning Parents Facing Criminal Sanctions: An Overview For Practitioners](#) [2023]).

# Part 1: Colloquium

## Background to the Colloquium

The Colloquium was intended as the capstone piece on a twelve-month period of consultation on the key themes of the project. Synthesizing a number of discrete pieces of research into the normative, legal and practical aspects of considering the best interests of the dependent child in adult criminal process, the project team assembled an *Overview For Practitioners* which served as the basis for consultations. The document was shared widely within the British Columbia criminal justice system, with child and family advocates, and other relevant stakeholders, including the following. Approximately 70 key decision-makers and experts received in-person or virtual briefings directly, with another 200 estimated to have been reached indirectly. Chief Justice of the Court of Appeal for British Columbia

- Chief Justice of the Supreme Court of British Columbia
- Chief Judge and Associate Chief Judge of the Provincial Court of British Columbia
- Criminal Defence Advocacy Society
- British Columbia Prosecution Service
- British Columbia First Nations Justice Council
- Native Courtworker and Counselling Association of British Columbia
- Department of Justice Canada (Criminal Law Policy)
- Department of Justice Canada (Indigenous Justice Programs)
- Department of Justice Canada (Public Prosecution Service)
- British Columbia Ministry of Attorney General (Deputy AG)
- British Columbia Ministry of Attorney General (Justice Services Branch)
- British Columbia Ministry of Public Safety & Solicitor General (Deputy SG)
- Canadian Bar Association
- Society for Children and Youth of BC
- Access to Justice BC
- Connective (a major BC non-profit service provider)

- A2JBC Transforming the Family Justice System Collaborative
- Law Foundation of British Columbia
- National Judicial Institute
- Representative for Children & Youth of British Columbia
- Law Society of British Columbia
- Elizabeth Fry Society of Greater Vancouver
- Legal Aid BC
- Retired judges of the Ontario Court of Justice
- RISE Clinic
- Multicultural Family Support Services Society

In addition, briefings have been secured (but delayed due to factors outside the project team's control) with BC Corrections, with the Correctional Service of Canada, and with the BC Association of Chiefs of Police.

As may be inferred, the intended audience of the *Overview* and these briefings included all those whose work provides them with influence on criminal justice decision-making regarding parents who may be diverted from, remanded or sentenced to custody, their children, or both. The *Overview* was also intended to encourage subject matter experts and decision makers holding positions of responsibility in the criminal process to consider how the best interests of the child may most suitably and effectively be incorporated into decisions and orders of the criminal courts,

- at the level of justice system operations
- at the policy and legislative levels, and
- at the community level.

The briefings in support of socializing the ideas in the *Overview* were intended specifically to encourage active consideration of child impact and family impact at time of sentencing and other court decisions, principally by prosecutors and judges but also all those with influence in criminal proceedings, to avoid the potentially negative impacts of those decisions. The project team also sought to raise awareness about these issues more

generally, and to assist those being briefed in identifying practices which serve to diminish consideration of the best interests of the child, where these exist.

The success and reach of the briefings in general exceeded the expectations of the project team. As we anticipated, the understudied and poorly documented nature of this issue meant it was not uncommon for briefing recipients to express some degree of unfamiliarity with the key themes of the project in advance of the briefing. Independent of career length and experience, briefing recipients often stated that the project had alerted them to important practical and ethical issues in criminal law to which they had paid too little attention to date. Briefing participants also frequently drew our attention to the natural alignment between mitigation of negative effects on dependent children and other considerations which are more frequently found on the criminal justice reform agenda. These included overincarceration of Indigenous peoples, excessive use of short sentences and remand, onerous release/community sentence conditions, and insufficient use of restorative justice. In short, we were impressed by the uptake of these issues as “an idea whose time has come,” with the engagement level of briefing recipients, and with recipients’ own linkage of these ideas to other areas of criminal law.

### **The June 4 Colloquium**

All recipients of individual briefings, and others who had received the *Overview* document and/or had otherwise been briefed, were invited to attend a Colloquium on June 4 at the Peter A. Allard School of Law at UBC. The Colloquium gathered various participants in the justice system, child and family advocates, Indigenous-serving organizations, non-profit leaders, and academic experts, who were invited to dig deeper into the key themes of the *Overview* in a series of conversations. On this basis, with the opportunity to share their experiences and perspectives on considering the *best interests of the child* (BIOTC) in the adult criminal justice process, attendees discussed whether and how to formalize such considerations and proposed some possible next steps.

Attendees were invited to participate based on their own individual expertise and experience, and not as formal representatives or spokespeople for their organizations. Attendees were also advised that reporting on the proceedings of the Colloquium would

ensure non-attribution (and thus effective anonymity) for participants. There were twenty-five participants in the Colloquium, and the attendance was broadly reflective of the sectors represented in the list of organizations briefed, above. For clarity and accuracy, the reader should not assume that staff of any particular organization were necessarily present at the Colloquium, nor that the Colloquium participants were necessarily unanimous in their endorsement of identified next steps, below.

As a starting point, three specific questions were put to attendees:

1. How strong is the rationale for enhanced or formalized consideration of BIOTC in the criminal justice process?
2. At what stage of the process would consideration of BIOTC be most practical?
3. Are legislative changes or landmark case law necessary to achieve routine consideration of BIOTC?

Attendees split up into small, diverse groups for discussion focused on these questions. The results of these discussions are summarized below.

### **1. How strong is the rationale for enhanced or formalized consideration of BIOTC in the criminal justice process?**

Many participants felt strongly that there exists a strong rationale – on moral, pragmatic, and legal bases – either for formally considering BIOTC in the criminal justice process, or for seeking to mitigate negative effects on dependent children in some manner.

### **“Best Interests” vs. Mitigating Negatives**

In selecting the *best interests of the child* as our chief concern, the project team is well aware of existing challenges of applying this concept in (e.g.) family law and child protection proceedings. Not only is this area of law complex, *best interests* being a normative and subjective assessment, it has also evolved significantly, with the “voice of the child” and the cultural context and meaning of “the family” being two key elements subject to changing understanding. Until there is full articulation of BIOTC in criminal law (likely some distance in the future) we suggest that good faith efforts to mitigate negative impacts of adult criminal process on dependent children are a more than adequate interim measure.

Several attendees spoke about the strong moral case in support of considering BIOTC. Reducing harm done to children was one of the principles raised, as well as the state's obligation to repair harms and wrongs it caused itself. Many attendees emphasized that considering BIOTC is not, in principle, a matter of leniency, but rather a device to remind the court (or other point of decision-making) of the interests of the child *per se* independent of the interests of the accused.

Many participants argued strongly in favour of relying on a cost/benefit rationale for advancing consideration of BIOTC, acknowledging the necessity of persuading decision-makers who might be swayed by economic logic. Parental incarceration tends to predict future criminal justice system involvement for children, and intervention is more cost effective the earlier it takes place. Considering BIOTC, or otherwise mitigating negative effects on dependent children in criminal justice processes, could help avoid costs associated with incarceration and child protection as well as possibly averting criminal justice system involvement later in the child's life.

Some attendees felt that the rationale to consider BIOTC regularly is getting stronger over time, in line with broader movements toward recognizing the impacts of trauma and collateral effects of justice system involvement, especially with respect to children. Considering BIOTC was also seen as aligning with movements away from punishment and toward rehabilitative and restorative approaches to justice.

Maintaining kinship ties was seen as important on both a moral and a pragmatic basis: children need a healthy family and a healthy broader community. Attendees emphasized the need to embrace more expansive concepts of family, including non-parent caregivers and family members who are not necessarily blood relatives. Attendees also spoke about the need to attend to the specific details of difficult situations, like a single caregiver facing incarceration or a person returning to parenting after a period of incarceration.

Attendees also saw legal support for consideration of BIOTC. In particular, the *UN Convention on the Rights of the Child* was seen as an important foundation for considering BIOTC. While Canadian case law on the subject is limited, family considerations do come up in, for example, the *Youth Criminal Justice Act*, which gives



parents standing to speak on bail and sentencing decisions. Attendees argued that while BIOTC may not be explicitly present throughout Canadian law, it is also not a foreign principle.

Attendees were interested in the question of how to determine BIOTC. It may be that children cannot be fairly expected to understand or articulate their own best interest, and attendees were curious about how to help them make this determination. On the other hand, especially for older children, attendees expressed concerns about paternalism and consent: they questioned whether it was appropriate to collect data about children who were unwilling participants in the justice system to begin with. Some participants suggested that should the courts identify a need for information on BIOTC as a routine intake, it remains an open question as to who is best positioned to organize and present the information. Defence counsel, police, social workers, and MCFD were all suggested as possible contributors. This issue requires resolution whether the courts are seeking formally to determine the best interests of the dependent child, or simply seeking to mitigate negative impact on the child.

Finally, some participants pointed out that some consideration of BIOTC already happen organically, especially in smaller communities where people and their kinship ties are relatively well known. In small communities such as these, professionals are familiar with each other and comfortable working collaboratively – these communities are a promising starting point for study of how best to implement practices around considering BIOTC. Recognizing these strengths, some participants expressed the importance of institutionalizing these practices rather than depending on specific networks and personalities.

## **2. At what stage of the process would consideration of BIOTC be most practical?**

Attendees were in general agreement that the goal should be to consider BIOTC as early as possible and at every stage of the process. Similarly, if diversion of the parent's case is feasible, it may be advisable to disengage from the criminal justice system as early as possible. A holistic approach was also encouraged, with BIOTC considered at all stages as an ongoing concern.

Police intervention was seen as an important stage in the criminal justice process, but one where there may be limited practical opportunity to consider BIOTC. Police interventions and their immediate aftermath can be seriously traumatizing for children, including placement in foster care. However, police are often unaware of the existence of the children of an accused, let alone informed about their best interest, and people being arrested may actively prefer that police do not know about their children.

In cases where an arrest is planned, it was suggested that police practices could be aimed toward minimizing harm to any potentially involved children. One suggestion was to include contextual information in search warrants about who to expect on-site, including any known children. One attendee expressed that police do want this kind of support and are often on board with the idea of reducing harm to children but lack the means to put it into practice. There is local precedent in the policing community regarding avoiding making arrests in front of children, regarding seeking evidence of children at the site of arrests, and regarding asking those arrested if there is anyone for whom they need to arrange care. Assessing the outcomes of these practices may prove significantly worthwhile investigation.

Like police intervention, participants identified bail as a stage at which decisions are generally made with less time and with less information available than would be ideal for considering BIOTC. Defence counsel were seen as the most likely source of information about BIOTC, but they are typically working very quickly at bail hearings, with timelines under twenty-four hours.

Attendees agreed that the most obvious opportunity for considering BIOTC comes at sentencing. However, by the time of sentencing, a great deal of harm may already have been done to the children involved. It may be better to intervene imperfectly with information in a bail hearing than wait to deliver polished information at sentencing.

Opportunities to consider and act on BIOTC also exist after sentencing. Attendees suggested providing special visitation rights for children of incarcerated people, noting that supervision of the process must ensure that visits are having positive effects on children. Even after an incarcerated person is released, attendees observed that dealing

with stigma remains a serious issue for children. For example, some parents might not allow their children to socialize with the children of someone formerly incarcerated. Finding ways to consider BIOTC and support children is important in both the long and short terms.

### **3. Are legislative changes or landmark case law necessary to achieve routine consideration of BIOTC?**

There are already existing avenues for consideration of BIOTC that attendees suggested could be used more frequently. For example, the Criminal Code already provides for Community Impact Statements that might be used to encourage consideration of BIOTC. Pre-Sentence Reports also present an opportunity to provide information about family relationships and BIOTC, although participants were concerned that Corrections staff may feel improperly trained and/or positioned to work directly with children in developing BIOTC information.

Attendees also suggested policy changes that may not require changes in law. In particular:

- Some attendees saw a relatively straightforward path to adding footnotes to standard “pick lists” of bail and sentencing terms. For example, the standard language for a no-contact order could be footnoted to the effect that the order may have a negative impact on children. Adding these footnotes could be a reasonably achievable task with a significant practical impact.
- Some attendees suggested that these ideas might be explicitly incorporated into prosecution policy regarding diversion, like other changes made in recent years at the provincial level.
- Similarly, some attendees saw an opportunity for the federal Crown regarding recent PPSC policy on restorative justice and conditional sentences, and whether it might be possible to also direct prosecutors to consider the benefits of mitigating impacts on children and families.

- Some attendees saw clear parallels to the important strides made in recent years in introducing specialized information reports for the benefit of the court, such as Gladue and IRCA reports.
- Some attendees pointed out that the connection between BIOTC information and Gladue information was not only theoretical but practical, as the intergenerational effects of incarceration in Canada today are overwhelmingly more likely to be experienced by Indigenous children and families. Accordingly, such changes could easily be considered in the same spaces and at the same tables which in the past have contemplated Gladue reporting.

Where changes to law are needed, attendees mostly agreed that legislation was likely to be a more effective avenue than litigation for increasing consideration of BIOTC. Attendees suggested that it could be impactful, though perhaps difficult in practical terms, to add BIOTC as a factor in sentencing decisions via Criminal Code amendment.

### Next steps

The Colloquium concluded with a brainstorming session regarding possible next steps. In all, seventeen different actions were suggested by participants in small group discussions. Reflecting on the full range of proposed actions, participants identified the following six alternatives as the most desirable and/or viable next steps in the near term.

- **Piloting in a limited setting.** Developing a practice protocol for consideration of BIOTC from arrest through sentencing, involving community services and sharing information throughout the process. This protocol could be piloted in a small community where justice sector practitioners are more readily able to work across organizations and government agencies due to the size of the community.
- **Capacity-building.** A capacity-building project aimed at developing resources to help various actors understand BIOTC, impacts on children of parent/caregiver incarceration, and how to introduce information on BIOTC or mitigation of negative

impacts on the child during the criminal justice process. Even merely raising awareness of the issue could be useful; for many people, even experienced criminal lawyers, BIOTC may not be a familiar concept. A webinar could be assembled from existing materials relatively quickly. This kind of project could take two parallel forms: as a centrally coordinated repository or example bank, and / or as a set of independent initiatives within separate organizations.

- **Data collection.** Collecting data on outcomes for children with caregivers with criminal justice system involvement. Attendees noted a particular lack of Canadian data and of longitudinal data tracking individuals through various systems. There may be several opportunities to collect useful data as part of future projects: participants suggested that (for example) there might be some valuable insights within the data held by Legal Aid BC, or within data which might be collected in a federal or provincial corrections context.
- **Criminal Code amendment.** Proposing, via existing federal-provincial-territorial law reform structures, an amendment to the Criminal Code to add BIOTC as a factor in sentencing.
- **Cost analysis.** Some participants recommended ICCLR take on an economic analysis showing the long- and short-term savings associated with reduced harm to children and reduced incarceration. While many funders are interested in returns on investment, the consequences of introducing information on BIOTC may prove difficult to measure given the absence of baseline data.
- **Coalition building and consensus development.** Participants noted the general value of ICCLR keeping attention on the topic via various meetings, consultations, and publications to support the nascent coalition in support of the proposed reform.

## Looking forward

In the next phase of the project, the project team will identify at least one (and contingent on funding, possibly several) of these recommended steps for implementation. Project work will be prioritized based on the following criteria:

- Timely impact: will the work achieve a meaningful shift in criminal justice system attitudes and / or behaviours in the near-to-medium term?
- Cost: can the project be delivered efficiently?
- Replicability / simplicity: can the lessons of the project be easily disseminated and taken up by other actors?
- Coalition-building: will the project create further momentum by enlisting multiple justice partners in its execution?

Further to this last criterion, at an early stage, participants in the Colloquium as well as other interested parties will reconvene to assist in coalition- and consensus-building around each of the contemplated initiatives.

In addition, participants, justice system actors and advocates will also be encouraged to pursue independent work aligned with the overall goals of the project, whether that be research-based, policy-focused, operational, advocacy, or the development of independent reports within individual organizational mandates as may be appropriate.

## Part 2: Project Evaluation

As noted throughout the project materials and validated during the consultation phase, to promote consideration of the best interests of the child in criminal process is to promote something very new, little-understood, little-documented, and rarely considered.

The project team's goals for the "system change" to be realized by this project have been appropriately modest. The initial goal for 2022-24 – which must be attained before any real change can even be considered – was to inform key actors and thought leaders, provoke discussion, and stimulate thoughtful reaction to the ideas presented in the materials. Once that was achieved, the second goal was to open the minds of practitioners and other experts to the possibility of seeking system change. Our third goal was to glean ideas as to where energies might best be directed in future, to begin the process of system change.

### **Evaluation framework and outcomes**

The project's evaluation framework was thus built around measurement of our attainment of these three goals. The three goals and the corresponding operational measures chosen, stated formally, are as below.

*Goal 1: Inform key actors of the project's key ideas and resources and engage these actors in meaningful discussion [ON TRACK]*

- Method: outreach to and briefings of the major institutions responsible for elements of criminal justice process in British Columbia, and related advocacy, including:
  - Provincial court judiciary
  - Crown prosecution (federal and provincial)
  - Defence counsel
  - Corrections (federal and provincial)
  - Legal Aid

- Major Indigenous-serving justice organizations
- Police agencies (umbrella organizations)
- Professional and advocacy organizations
- Target: 100% of major relevant organizations in British Columbia engaged and briefed.
- Outcome: **Current 85%, on track for 100% by September 2024.** While briefings for all of the above have been sought, not all have been completed at time of writing. Briefings of some Corrections and police umbrella organizations are outstanding due to scheduling delays beyond the control of project staff; however, these will be completed by the end of September.

*Goal 2: Determine the degree to which the ideas and arguments contained within the resources and the briefings have (a) educated the recipients regarding these ideas, (b) persuaded recipients of the need to incorporate consideration of the best interests of the child, and (c) created allies or champions for change [ACHIEVED]*

- Method: via questionnaire, engage all individuals engaged in the above briefings, to determine:
  - pre-engagement familiarity with BIOTC issues in criminal justice
  - post-engagement change in perception of BIOTC as deserving of attention regarding legal issues and principles
  - post-engagement change in prioritization of practical efforts to incorporate BIOTC in criminal process
  - support for future change initiatives related to consideration of BIOTC.

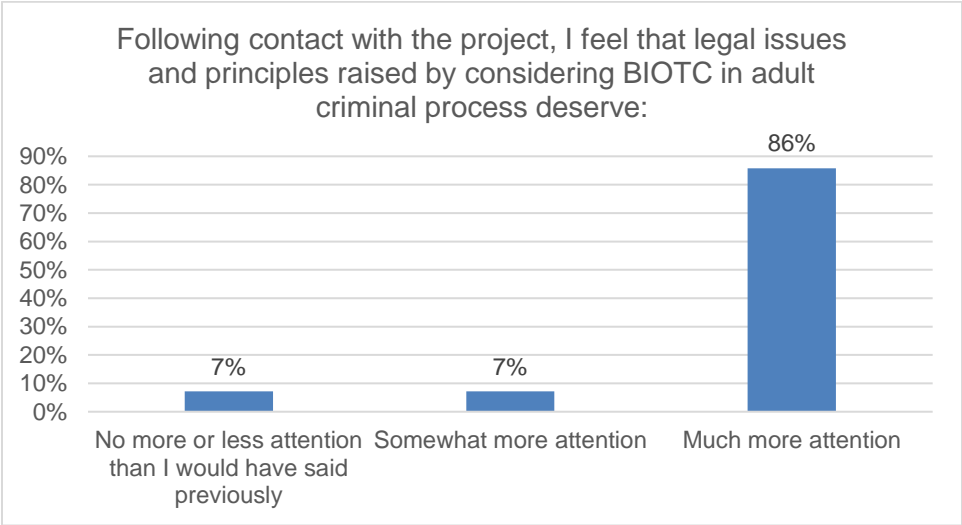
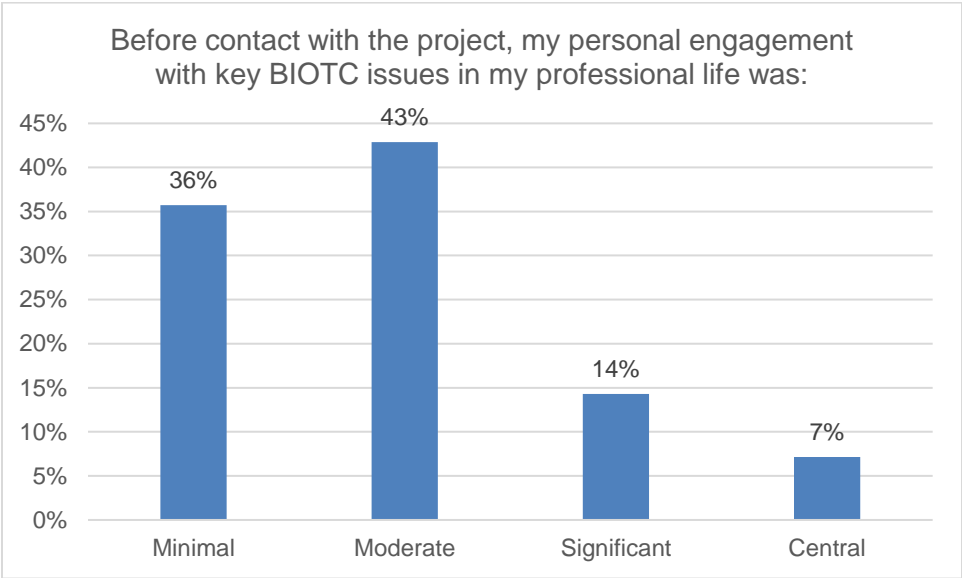


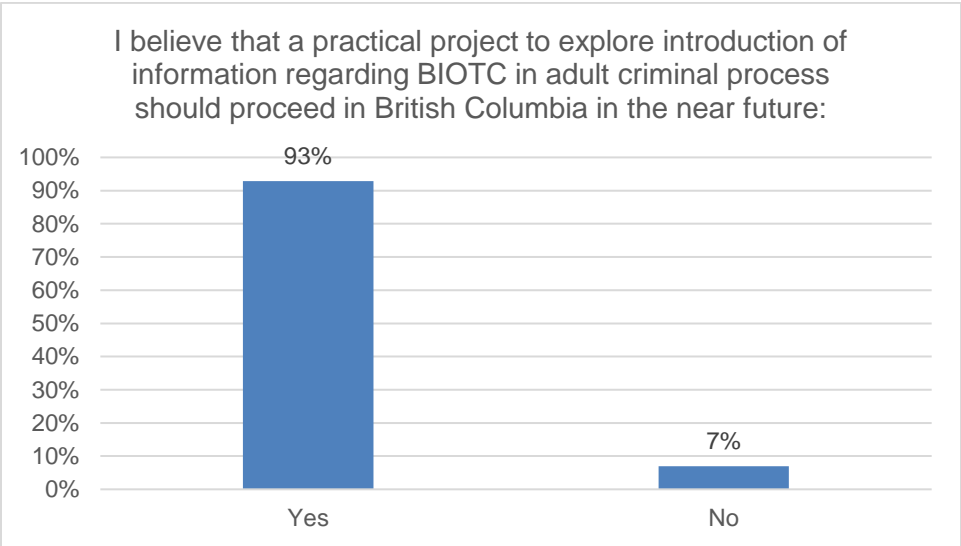
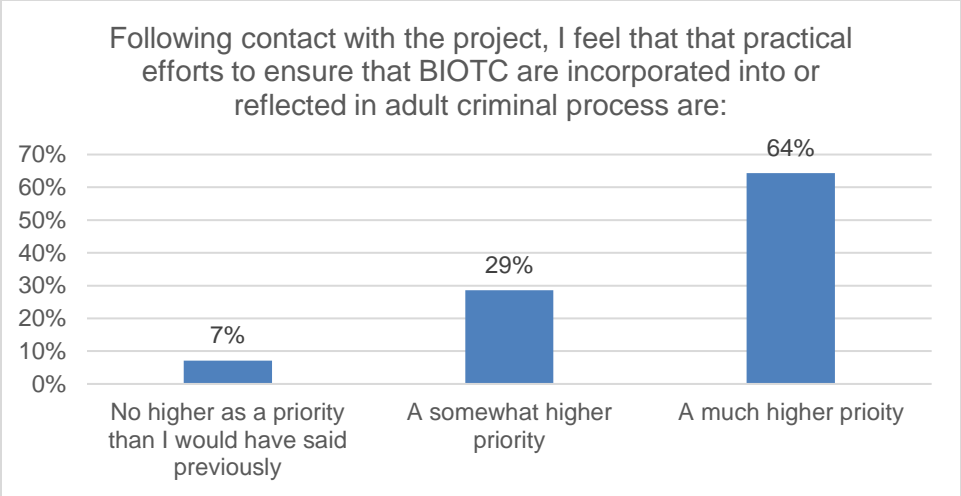
- Targets:
  - That post-engagement, at least 50 percent of respondents believe that BIOTC should receive more attention in terms of legal issues and principles within criminal justice than they felt previously.
  - That post-engagement, at least 50 percent of respondents believe that practical efforts to ensure BIOTC are incorporated into or reflected in adult criminal process should be a higher priority within criminal justice than they thought previously.
  - That post-engagement, at least 50 percent of respondents are supportive of a practical project to explore introduction of information regarding BIOTC in adult criminal process should proceed in British Columbia in the near future.
  
- Outcome: All briefing and Colloquium participants were administered a short questionnaire subsequent to the Colloquium. Completion of the questionnaire was voluntary, and anonymous. There was a 20 percent (14/70) return rate, with several additional “nil replies” from participants who indicated they were unable to participate in policy surveys for ethical reasons even if anonymized. Results were as follows:
  - Pre-engagement with the project, only 21 percent of respondents reported their personal engagement with BIOTC issues to have been “significant” or “central” to their work. 43 percent reported “moderate” levels of engagement, and 36 percent “minimal.”
  - Post-engagement, **93 percent of respondents (target 50 percent)** reported believing that BIOTC should receive more attention in terms of legal issues and principles within criminal justice than they felt previously; 86 percent said “much more attention.”
  - Post-engagement, **93 percent of respondents (target 50 percent)** reported believing that practical efforts to ensure BIOTC are incorporated

into or reflected in adult criminal process should be a somewhat higher or much higher priority within criminal justice than they thought previously; 64 percent said “much higher.”

- Post-engagement, **93 percent of respondents (target 50%)** reported believing that a practical project to explore introduction of information regarding BIOTC in adult criminal process should proceed in British Columbia in the near future.

These findings are set out in visual form below.





*Goal 3: Generate one or more viable pilot proposals for potential implementation in the near future [ACHIEVED]*

- Method: a multidisciplinary facilitated Colloquium involving most or all of the stakeholders noted above, at which ideas for pilot programming will be solicited and workshopped.
- Target: one or more viable implementation proposals, each of which has the support in principle of two separate criminal justice sectors (police, crown,

defence/legal aid, judiciary, corrections, Indigenous-serving organizations). Funding to be determined separately.

- Outcome: **Colloquium was hosted on June 6, 2024. Six viable proposals have been identified.** Negotiations are ongoing regarding the selection of a minimum of one implementation project, and funding applications are in development.

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