



PRINCE EDWARD ISLAND

OFFICE OF THE CHILD AND YOUTH ADVOCATE

**MAJOR ADVANCEMENTS IN THE RIGHTS, PARTICIPATORY VIEWS AND
BEST INTERESTS OF CHILDREN AND YOUTH - BUT MUCH WORK LIES
AHEAD TO SUPPORT SUCCESSFUL IMPLEMENTATION OF THE
PROPOSED *CHILD, YOUTH AND FAMILY SERVICES ACT* INTRODUCED BY
GOVERNMENT**

RESPONSE TO BILL 32:

THE PROPOSED *CHILD, YOUTH AND FAMILY SERVICES ACT*

November 2023

Glossary for the Proposed *Child, Youth and Family Services Act*

Abbreviation	Term
CRIA	Child Rights Impact Assessment.
CYFEA	<i>Child, Youth and Family Enhancement Act</i> (now the proposed <i>Child, Youth and Family Services Act</i>).
CYFSA	<i>Child, Youth and Family Services Act</i> (previously the proposed <i>Child, Youth and Family Enhancement Act</i>).
OCYA	Office of the Child and Youth Advocate.
UNCRC	United Nations Convention on the Rights of the Child.
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples.

Executive Summary

The Office of the Child and Youth Advocate recognizes the profound impact of the proposed PEI *Child, Youth and Family Services Act*, and values the ongoing and meaningful consultation with the Department of Social Development and Seniors throughout the development of this legislation. The opportunity to formally review and provide recommendations has enabled the Office of the Child and Youth Advocate to advance twenty-seven child rights-informed recommendations to safeguard the rights and best interests of the most vulnerable children and youth.

We wish to recognize, at the outset, the complexity of child protection work, and the many dedicated professionals in this Province, who give so much of themselves to protect children, support families, and strengthen communities every single day. They are asked to make difficult on-the-ground decisions and are too often criticized by others who have the benefit of hindsight.

We also wish to acknowledge the goodwill and cooperation extended to our Office over the past year by senior staff in the Department of Social Development and Seniors. These meetings have been cordial, respectful and collaborative, with sincere efforts made to reach consensus on a multitude of issues.

This Submission is intended to propose a better way forward in child protection law reform and to promote a child rights respecting culture within the delivery of child protection reviewable services. The current PEI *Child Protection Act* reflects a well-intentioned, but paternalistic and needs-based system that has prescribed the range and quality of services provided to children and youth. The current legislative scheme in the PEI *Child Protection Act*, in our estimation, requires a culture or paradigm shift, where we see and treat children as human rights-holders, who have fundamental entitlements that create corresponding obligations on the part of government. It means valuing and giving due weight to the voices of children and youth and treating them, in all instances, with dignity and respect.

As outlined in the *Recommendations of the PEI Office of the Child and Youth Advocate* section of this response to the proposed legislation, a detailed analysis of the proposed PEI *Child, Youth and Family Services Act* indicates that full compliance has not been fulfilled for all twenty-seven (27) recommendations. In this regard, the summary of recommendation compliance reads as follows:

- Full Compliance – Twelve (12) Recommendations.
- Substantial Compliance – Two (2) Recommendations.
- Partial Compliance – Six (6) Recommendations.
- Non-Compliance – Seven (7) Recommendations.

A snapshot explanation of our Recommendation Compliance ranking categories and the listing of the twenty-seven Recommendations and corresponding compliance rankings are to be read and considered as part of this Executive Summary.

While there has been much progress, there are still many outstanding Recommendations unfulfilled. It is the hope of the Office of the Child and Youth Advocate that discussions will be ongoing between our Office and the Department of Social Development and Seniors with respect to potential further amendments, as well as in respect of future regulations and policies.

It is the view of the Office of the Child and Youth Advocate that the proposed new *Child, Youth and Family Services Act* is historic, groundbreaking and aspirational legislation in its promotion of the rights, participatory views and best interests of children and youth, for which Government is to be commended. It represents a dramatic paradigm shift for the Province in its move away from a paternalistic needs-based approach where children and youth have limited voice. It recognizes children and youth as individuals with rights to be respected and voices to be heard. It places children and youth at the centre of decision-making and treats them as active participants when decisions are being made that affect them.

While it has taken a substantial amount of time to get to this point, the Office of the Child and Youth Advocate has used this opportunity to engage in continuous advocacy through many meetings. Tangible and dramatic advancements to promote the rights and well-being of children and youth are embedded in the proposed *Child, Youth and Family Services Act*. Some of the notable child rights advancements include: explicit reference to the United Nations Convention on the Rights of the Child; a listing of the specific rights for children and youth in care, and a separate listing of those rights for children and youth in receipt of services under the proposed *Act*, whether in or out of care; the views of the child are to be given due consideration in matters affecting them; a clear statement of the best interests of the child as the paramount consideration in all decision-making under the *Act*, with its new inclusion of “the child’s sexual orientation, gender identity and gender expression” as a relevant factor; eligibility for transitional supports and services for youth aging out of care are increased from up to twenty-one years of age to up to twenty-five years of age; the ability of children, regardless of age, to access their own information, participate in the development of their plans of care and have the benefit of legal representation in child protection matters; the ability of children to have greater permanency in their placements with grandparents and alternative caregivers; provision for collaborative out-of-court mechanisms, such as family group conferencing and mediation; and the requirement that periodic reviews of the legislation involve a Child Rights Impact Assessment, commonly referred to as a ‘CRIA’.

At the same time as celebrating and recognizing these positive developments, there is the caveat that there is still considerable work ahead to support successful implementation of this new legislation. This is reflected in the need for government to continue to assess the gaps where there has been either partial or no compliance with the recommendations advanced by our Office. These areas of omission include: the removal of a Preamble as an interpretative aid; the absence of harmonization and alignment with the provisions of the *Child and Youth Advocate Act*, potentially affecting the ability of the Child and Youth Advocate: to access information in the custody of the Director of Child Protection in particular circumstances, to fully participate on behalf of a child or youth in family group conferences and mediation, and to fully safeguard the privacy of records and information in the possession of the Office of the Child and Youth Advocate; the lack of a child rights focus in Family Intervention Plans; the absence of an independent mandatory periodic review process for child protection legislation every five years, to be convened and conducted by a Standing Committee of the PEI Legislature; the absence of a clearly defined, transparent and objective child friendly complaint mechanism for children, youth and families; the inability of 16 and 17-year old youth to enter into agreements with the Director of Child Protection for admission to care and supports without parental consent; and the ineligibility of children and youth to gain standing or party status in child protection court proceedings.

With greater legal rights being afforded to children and youth, there are corresponding heightened legal obligations placed on front-line child protection staff. Crucial to the success of the enactment of this proposed legislation is Government’s investment in the following initiatives: a sufficient number of full-time front-line child protection employees; effective recruitment and retention strategies; well-planned

child rights and other professional development training, to include the Office of the Child and Youth Advocate; the availability of strong leadership and clinical supervision; reasonable workload allowing for appropriate direct client contact and manageable caseloads; and a sufficient number of case aide workers to allow child protection staff to use their clinical and helping skills to greatest advantage.

“While the proposed new legislation is child-rights based and very progressive, nevertheless at the end of the day, the legislation is only one part of the paradigm shift equation in the realization of children’s rights. Government will also have to follow through on developing child-centred and rights-based regulations and policy, optimally applying a Child Rights Impact Assessment analysis. The challenge lies in transforming the ‘paper rights’ of this new aspirational legislation into ‘lived rights’ for the children, youth and families served and impacted. It will take all of us working together to achieve the full scope of this paradigm shift.

Recommendations

PEI Office of the Child and Youth Advocate Recommendations	Compliance
<p>1. Incorporation of all 10 Independent CRIA Recommendations. The Department of Social Development and Housing [now the Department of Social Development and Seniors] should amend the proposed PEI <i>Child, Youth and Family Services Act</i> to incorporate implementation of all 10 of the recommendations of the Independent CRIA commissioned by the Office of the Child and Youth Advocate.</p>	<p>Partial Compliance</p>
<p>2. Review of Legislation by the Standing Committee on Health and Social Development of the PEI Legislature. Members of the PEI Legislative Assembly should consider taking steps to refer the proposed PEI <i>Child, Youth and Family Services Act</i>, before enactment, to the Standing Committee on Health and Social Development for a detailed review and consideration of possible amendments.</p>	<p>Non-Compliance</p>
<p>3. Rights of Children and Youth. A comprehensive child rights section should be added to the <i>CYFEA</i> [now <i>CYFSA</i>] and include, in consultation with children and youth, the following rights:</p> <ul style="list-style-type: none"> • To have their voices heard, including the ability to raise concerns safely, and to have their views given due weight; • To be informed of their rights; • To be free from physical punishment, restraint or detention in locked premises; • To participate in decisions impacting them, including where they live, how they maintain cultural and familial connections, education and training, and recreational activities; • To privacy in communications with family, respecting the services provided to them under the <i>CYFEA</i> [now <i>CYFSA</i>], and respecting the right to personal property; • To have a plan of care that focuses on their particular needs and to participate in the development of the plan in accordance with their age and maturity; • If in the care of the Director, to have the right to an appropriate education, the right to recreational activities and clear rights to health, including supports for children with disabilities, and an appropriate standard of living; and, • The obligation on service providers to respect the rights of children pursuant to the UNCRC and the <i>CYFEA</i> [now <i>CYFSA</i>]. 	<p>Full Compliance</p>

<p>4. Codification and Classification of Rights of Children and Youth in Care and/or in Receipt of Services under the <i>CYFSA</i>.</p> <p>In addition to the positive reference to the United Nations Convention on the Rights of the Child (UNCRC), children’s rights should be modelled to the extent possible on the Ontario <i>Child and Youth Family Services Act, 2017</i> and classified in the proposed <i>CYFSA</i> according to: rights of children and youth receiving services pursuant to the <i>CYFSA</i> (which includes children and youth in care); rights exclusive to children and youth in care; rights enunciated in Katelynn’s Principle for children and youth who are in receipt of services (again including children and youth in care); and obligations of service providers to uphold all rights set out in the proposed <i>CYFSA</i>.</p>	<p>Full Compliance</p>
<p>5. Independent Complaints Mechanism Accessible by Children and Youth in Care (adopted from Independent CRIA).</p> <p>The <i>CYFEA</i> [now <i>CYFSA</i>] should include a comprehensive independent complaints mechanism accessible to children and youth in care or receiving services under the <i>CYFEA</i> [now <i>CYFSA</i>] that includes access to representatives and an appeal process. The full extent of the complaint procedure should be transparent in the legislation and not be buried in the Regulations.</p>	<p>Partial Compliance</p>
<p>6. Coordination with the PEI <i>Child and Youth Advocate Act</i> (adopted from Independent CRIA).</p> <p>The <i>CYFEA</i> [now <i>CYFSA</i>] should incorporate language that facilitates access by children and youth to the advocacy services of the Child and Youth Advocate. The Office of the Child and Youth Advocate should be a key component to the communication and enforcement of the rights provisions in the <i>CYFEA</i> [now <i>CYFSA</i>]. Children and youth should be able to freely and privately communicate with advocates in that office, and service providers should be required to facilitate this access.</p>	<p>Full Compliance</p>
<p>7. Alignment of <i>CYFSA</i> with Jurisdiction Conferred in the <i>Child and Youth Advocate Act</i> Authorizing Access to Records.</p> <p>The provision in the proposed <i>CYFSA</i> that restricts the jurisdiction of the Child and Youth Advocate to cases of child deaths and serious injury reviews and investigations should be amended to ensure that there is alignment of the <i>CYFSA</i> with the PEI <i>Child and Youth Advocate Act</i> thereby authorizing the Child and Youth Advocate to obtain disclosure of records in the custody of the Director of Child Protection without the requirement of prior consent, so long as the Child and Youth Advocate is exercising a statutory power under the <i>Child and Youth Advocate Act</i>.</p>	<p>Partial Compliance</p>
<p>8. Standing in Legal Proceedings and Legal Representation (adopted from Independent CRIA).</p> <p>Children and youth should have the right to standing as a party in proceedings under the <i>CYFEA</i> [now <i>CYFSA</i>], along with the right to have legal representation appointed.</p>	<p>Partial Compliance</p>

<p>9. Criteria for Appointing Legal Counsel for Children. The proposed <i>CYFSA</i> should include criteria to assist a court in determining whether “legal representation of a child is necessary to ensure that the child’s interests are adequately protected in a proceeding under this <i>Act</i>.”</p>	<p>Full Compliance</p>
<p>10. Views and Wishes of Children and Youth to be Given Due Weight (adopted from Independent CRIA). In all instances where decisions are being made that impact children and youth, their views and wishes are to be ascertained and given due weight in accordance with Article 12 of the UNCRC. In ‘the best interests of the child’ definition, which applies to courts among other decision-makers, the reference to “the child’s views and preferences’ in s. 2(1)(h) should be expanded to read “the child’s views and preferences, given due weight in accordance with the child’s age and maturity.” Similarly, the requirement that the Director of Child Protection “consider the views of the child” in s. 8(2), for purposes of making decisions or taking actions should be expanded to read “the child’s views and preferences, given due weight in accordance with the child’s age and maturity.”</p>	<p>Full Compliance</p>
<p>11. Children and Youth and Child and Youth Advocate Office Participation in Alternative Dispute Resolution. The proposed <i>CYFSA</i> should be amended to include children and youth and a representative from the Office of the Child and Youth Advocate in the list of participants for purposes of the definition of each of “family group conference” and “mediation”.</p>	<p>Partial Compliance</p>
<p>12. Definition of the Best Interests of the Child (adopted from Independent CRIA). The definition of ‘the best interests of the child’ should be more comprehensive and include:</p> <ul style="list-style-type: none"> • the unique needs of Indigenous children and youth (or specifically incorporate the test in <i>An Act respecting First Nations, Inuit and Metis children, youth and families</i> (Canada)), and including reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as it affects children and youth; • children and youth with disabilities; and • substantive equality rights of children and youth from minority groups. <p>In addition, the following factors should be considered as potential amendments to the ‘best interests of the child’ definition in s. 2(1) of the proposed <i>CYFSA</i>:</p> <ul style="list-style-type: none"> • “a secure place for the child and the development of a positive relationship as a member of a family” (restored from s. 2(2)(f) of the <i>PEI Child Protection Act</i>); • “the continuity of care for the child and the possible effect of disruption of that care on the child” (restored from s. 2(2)(l) of the <i>PEI Child Protection Act</i>); 	<p>Substantial Compliance</p>

<ul style="list-style-type: none"> • “the effects on the child of delay in the disposition of the case”: See s. 34 (3)(ix) of the Ontario <i>Child, Youth and Family Services Act</i>, 2017; • the child’s views and preferences, “given due weight in accordance with the child’s age and maturity” (expansion of s. 2(1)(h) of the proposed <i>CYFSA</i>, with reference to 74(3)(a) of the Ontario <i>Child, Youth and Family Services Act</i>, 2017; • “the child’s race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression” (expansion of s. 2(1)(j) of the proposed <i>CYFSA</i>, with reference to 74(3)(c)(iii) of the Ontario <i>Child, Youth and Family Services Act</i>, 2017; and • “the degree of risk, if any, that justified the finding that the child is in need of protection”: See s. 34(3)(xi) of the Ontario <i>Child, Youth and Family Services Act</i>, 2017. 	
<p>13. Exclusion of children from Child Protection Court Proceedings. The provision that allows a court to exclude a child from a child protection hearing or any part of it without specifying any criteria should be amended to stipulate that such judicial discretion can only be exercised when determining that it is the best interests of the child to make an exclusionary order.</p>	Full Compliance
<p>14. Criteria Articulated for Family Intervention Plans to Include Plan of Care (adopted from Independent CRIA). Family Intervention Plans must maintain a focus on the best interests and needs of the child or youth. Specific provisions that require the plan to include educational, recreational and developmental considerations should be included along with a clear statement that the plan must reflect the best interests of the child or youth.</p>	Partial Compliance
<p>15. Periodic Review (adopted from Independent CRIA). The periodic review provision in the current PEI <i>Child Protection Act</i>, should be included in the <i>CYFEA</i> [now <i>CYFSA</i>] to ensure accountability and transparency. Any periodic review should include:</p> <ul style="list-style-type: none"> • a Child Rights Impact Assessment that seeks out and includes the views of children and youth impacted by the legislation; and • systematic data collection and qualitative assessment of the impacts and outcomes of the services provided to children, youth and families under the <i>CYFEA</i> [now <i>CYFSA</i>]. 	Full Compliance

<p>16. Mandatory Periodic Reviews to be Less Partisan and More Focused on Children’s Rights.</p> <p>Section 64 of the proposed CYFSA (Review by advisory committee) should be amended to include the following requirements:</p> <ul style="list-style-type: none"> a) a mandatory periodic review of the legislation that shall be convened and conducted by a Standing Committee of the PEI Legislative Assembly instead of the Minister of Social Development and Housing and the advisory committee appointed by the Minister; b) every review of the legislation shall address the rights of children and youth through the application of a Child Rights Impact Assessment (CRIA) analysis to examine both the impacts of the legislation in existence at the time, as well as the potential impacts of proposed amendments to child protection legislation; c) every review of the legislation shall include the active participation of the Office of the Child and Youth Advocate; d) every review of the legislation shall include meaningful consultation with children and youth; and e) the results of every review of the legislation shall be made public. 	<p>Non-Compliance</p>
<p>17. Better Integration of <i>An Act respecting First Nations, Inuit and Metis children, youth and families</i> (Canada) (adopted from Independent CRIA).</p> <p>The provisions respecting the application of <i>An Act respecting First Nations, Inuit and Metis children, youth and families</i> need to specify that all Indigenous children and youth in PEI will be treated in accordance with the principles and standards set out in the federal legislation and should also reference the United Nations Declaration on the Rights of Indigenous Peoples.</p>	<p>Full Compliance</p>
<p>18. Inclusion of Preamble or Statement of Principles (adopted from Independent CRIA).</p> <p>The legislation should include a Preamble or Statement of Principles that clearly situates the child at the centre of decisions and includes some of the key thematic rights of the UNCRC including non-discrimination and the participation rights of children and youth. A Preamble or Statement of Principles could also incorporate the language of Katelynn’s Principle that places children at the centre of all services provided to them and acknowledges their right to be heard.</p>	<p>Non-Compliance</p>
<p>19. Duty to Report.</p> <p>The proposed CYFSA should be amended to make explicit that the duty to report is a personal duty that cannot be delegated and that the continuing obligation to report applies to every person.</p>	<p>Full Compliance</p>
<p>20. Definition of ‘Youth’.</p> <p>The definition of “youth” in s. 1(o) of the proposed CYFSA as meaning “a child who is 16 or 17 years of age” should be amended to conform with the definition of “youth” in s. 1(n) of the PEI <i>Child and Youth Advocate Act</i> so as to read “means a person over the age of 12 years and under the age of 18</p>	<p>Non-Compliance</p>

years.” This is the definition that is currently set out in s. 1(y) of the PEI <i>Child Protection Act</i> .	
<p>21. Inclusion of Parental Educational Neglect. The proposed legislation should include parental educational neglect as part of the definition of ‘emotional harm’ which can ground a finding that a child is in need of protection.</p>	Full Compliance
<p>22. Right of Children to Personal Information. The proposed legislation should include the right of the child to access their own personal information, regardless of age, on the basis of their presumed capacity, unless the Director of Child Protection has reasonable grounds to believe that the child does not have the requisite capacity.</p>	Full Compliance
<p>23. Explanation of Plan of Care and Consideration of Children’s Views. The proposed legislation should specify that a plan of care for a child in care will not be effective unless the plan of care has been explained to the child in a manner appropriate to the child and the Director of Child Protection has considered the views of the child.</p>	Full Compliance
<p>24. Agreements with Youth. Youth who are 16 or 17 years of age should have the right to enter into an agreement with the Director of Child Protection, who determines that there are reasonable grounds to believe that the youth is in need of protection, for admission to care, or for supports and services, independent of parental consent, on the basis of the youth’s presumed capacity, unless the Director of Child Protection has reasonable grounds to believe that the youth does not have the requisite capacity.</p>	Non-Compliance
<p>25. Criteria for Agreements with Parents. The conditions required for a temporary or permanent agreement between a parent and the Director of Child Protection should be restored to those set out in the current <i>Child Protection Act</i>, subject to removing minimal age requirements, and including the obligations of the Director of Child Protection: to explain to the child in a manner appropriate to the child, the reasons for, and the nature, effect and implications of the proposed agreement; to consider the views of the child; to cause further assessment to be made, where the child proposes an alternative or expresses opposition to the proposed agreement; and to be satisfied that the agreement is in the best interests of the child.</p>	Substantial Compliance
<p>26. Access to Information in the possession of the Office of the Child and Youth Advocate. The proposed legislation should include an exception to the Director of Child Protection’s right to access information about a child, where such information is in the possession of the Office of the Child and Youth Advocate, with a view to protecting the privacy of those children, youth and other individuals who engage with the Office of the Child and Youth Advocate.</p>	Non-Compliance

27. Preamble and Best Interests of the Child Considerations in *B.J.T. v. J.D.*, 2022 SCC 24.

The proposed legislation should retain those provisions in the PEI *Child Protection Act* relied upon by the Supreme Court of Canada in the decision of *B.J.T. v. J.D.*, specifically in relation to the Preamble and ‘the best interests of the child’ considerations, which have now established settled jurisprudence and predictability in child protection matters.

**Non-
Compliance**

Introduction

The PEI Office of the Child and Youth Advocate has prepared and directed this Submission to the Standing Committee on Health and Social Development of the PEI Legislative Assembly in response to the proposed PEI *Child, Youth and Family Services Act*, as tabled in the PEI Legislature on November 7, 2023. While constrained within the parameters of the PEI *Child and Youth Advocate Act* from having this Submission tabled directly by the Speaker in the Legislative Assembly, we are, alternately, directing this Submission to the Standing Committee on Health and Social Development

This Submission is being provided pursuant to: section 12(1)(e) of the PEI *Child and Youth Advocate Act*, which confers upon the Child and Youth Advocate the responsibility for “promoting the rights of children and youth in relation to Government legislation, policies, protocols, practices and reviewable services to children and youth” and section 12(2)(h) of the same *Act*, which provides the Child and Youth Advocate with the discretion to “advise or make recommendations to any public body or community organization responsible for providing reviewable services to children and youth on any matter relating to the rights, interests and well-being of children and youth.”

This Submission provides a comprehensive overview of the twenty-seven (27) recommendations provided by the Office of the Child and Youth Advocate to the Department of Social Development and Seniors, including the rationale for the recommendation and assigned compliance rating, as determined by the Office of the Child and Youth Advocate. This Submission is a culmination of over two years of discussion and collaboration with the Department of Social Development and Seniors about the importance of getting this pivotal piece of provincial legislation right so as to safeguard and promote the human rights of children through progressive legislative reform.

During the initial stage of this important work, the Office of the Child and Youth Advocate commissioned an Independent Child Rights Impact Assessment (CRIA) from a third-party subject matter legal expert in child rights to review an earlier iteration of the draft PEI *Child, Youth and Family Services Act*. The purpose of this independent CRIA, as commissioned by the Office of the Child and Youth Advocate, was to advance child rights informed recommendations with the objective to provide children and youth living on PEI with the strongest, rights-based child protection legislation possible. There were ten recommendations that resulted from the independent CRIA, which were then supplemented by an additional seventeen recommendations of the Office of the Child and Youth Advocate.

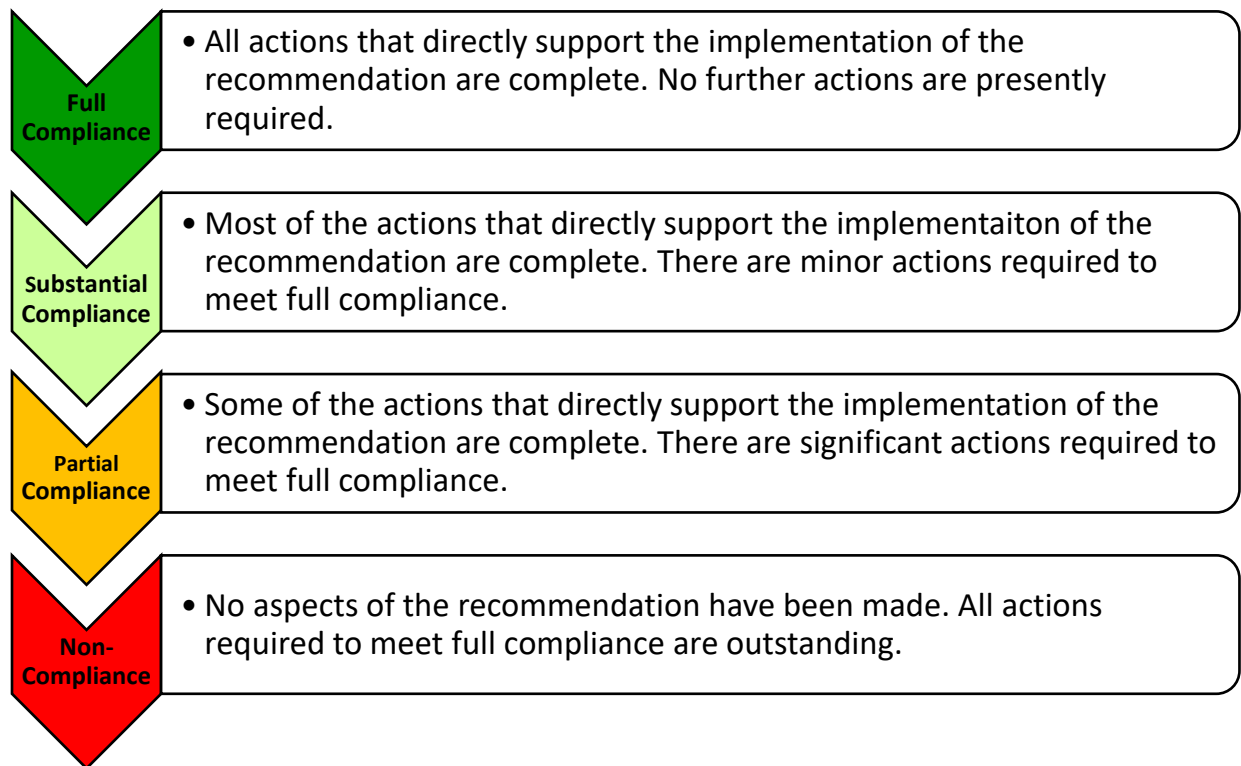
It is the hope of the Office of the Child and Youth Advocate that this Submission will be of assistance to all concerned and provide a permanent record of our assessment, including recommendation compliance ratings, of the proposed PEI *Child, Youth and Family Services Act*.

Monitoring and Compliance Scale

Pursuant to section 12(2)(h) of the *Child and Youth Advocate Act*, R.S.P.E.I. 1988, c C-4.3, the Child and Youth Advocate may:

(h) advise or make recommendations to any public body or community organization responsible for providing reviewable services to children and youth on any matter relating to the rights, interests and well-being of children and youth. (*Child and Youth Advocate Act*, R.S.P.E.I. 1988, c C-4.3, s. 12(2)(h))

In accordance with this responsibility, the Office of the Child and Youth Advocate has developed a compliance monitoring scale to assess ongoing adherence to recommendations made to reviewable services. The compliance mechanism was developed following an analysis of international, national, and provincial monitoring schemes. The purpose is to monitor implementation of and compliance with the recommendations of the Child and Youth Advocate to protect the rights, interests and viewpoints of children and youth. All recommendations by the Child and Youth Advocate will be monitored for compliance and reported publicly to ensure transparency and accountability.



Recommendation 1: Incorporation of all 10 Independent CRIA Recommendations

Recommendation: The Department of Social Development and Housing [now the Department of Social Development and Seniors] should amend the proposed PEI *Child, Youth and Family Services Act* to incorporate implementation of all 10 of the recommendations of the Independent CRIA commissioned by the Office of the Child and Youth Advocate

Rationale: All 10 of the recommendations set out in the Independent CRIA are embedded in a strong analysis of children’s human rights, having regard to the UNCRC, child protection legislation in other jurisdictions, commentaries and interpretations of the UNCRC made by the monitoring UN Committee on the Rights of the Child in Geneva and by Canadian Courts through their jurisprudence.

Compliance Rating:  Partial Compliance.

Analysis: The PEI Office of the Child and Youth Advocate values the ongoing consultation of the Department of Social Development and Seniors in the drafting of the PEI *Child, Youth and Family Services Act*. The 10 recommendations arising from the Independent CRIA and the subsequent 17 recommendations were proposed to advance the rights of children based on a cross jurisdictional scan of Canadian legislation and jurisprudence, available scholarly research, and the UNCRC.

OCYA Recommendation 2: Review of Legislation by the Standing Committee on Health and Social Development of the PEI Legislature

Recommendation: Members of the PEI Legislative Assembly should consider taking steps to refer the proposed PEI *Child, Youth and Family Services Act*, before enactment, to the Standing Committee on Health and Social Development for a detailed review and consideration of possible amendments.

Rationale: It would be important for the Standing Committee on Health and Social Development to consider the need for amendments to the proposed PEI *Child, Youth and Family Services Act* since a unanimous amended motion was passed in the PEI Legislative Assembly on November 2, 2021 where it was resolved “that the Legislative Assembly urge government, in consultation with the Child and Youth Advocate, to develop and share a CRIA tool to be used in all policy and legislative development within government” and further resolved “that the Legislative Assembly urge government to publicly share any and all CRIA analyses that are completed.” To date, the consultation with our Office, as envisioned by this unanimous motion, has not occurred.

Part of this Committee’s role could be to review the Department of Social Development and Seniors’ Child Rights Impact Assessment (CRIA) in conjunction with the Independent CRIA commissioned by our Office. It would also be open to this Standing Committee to consider

hearing from witnesses orally, as well as receiving written submissions, to include the views of children and youth and our office.

Compliance Rating: ████████ Non-Compliance.

OCYA Analysis: There is no commitment or recommendation for a Bill once introduced to be referred to a Standing Committee of the PEI Legislature.

OCYA Recommendation 3: Rights of Children and Youth (Adopted from Independent CRIA)

Recommendation: A comprehensive child rights section should be added to the *CYFEA* [now *CYFSA*] and include, in consultation with children and youth, the following rights:

- To have their voices heard, including the ability to raise concerns safely, and to have their views given due weight;
- To be informed of their rights;
- To be free from physical punishment, restraint or detention in locked premises;
- To participate in decisions impacting them, including where they live, how they maintain cultural and familial connections, education and training, and recreational activities;
- To privacy in communications with family, respecting the services provided to them under the *CYFEA* [now *CYFSA*], and respecting the right to personal property;
- To have a plan of care that focuses on their particular needs and to participate in the development of the plan in accordance with their age and maturity;
- If in the care of the Director, to have the right to an appropriate education, the right to recreational activities and clear rights to health, including supports for children with disabilities, and an appropriate standard of living; and,
- The obligation on service providers to respect the rights of children pursuant to the UNCRC and the *CYFEA* [now *CYFSA*].

Rationale: The *CYFEA* [now *CYFSA*] lacked a comprehensive set of provisions that operationalize the rights of children and youth receiving services or in the care of the Director of Child Protection. Simply stating that the *CYFEA* [now *CYFSA*] shall be construed and applied in accordance with the UNCRC, while a progressive step, is insufficient. It is necessary to ensure that children and youth are aware of their rights, and that individuals carrying out the obligations of the Director of Child Protection in caring for and providing services to children and youth fulfill their duty to respect, protect and fulfill children's rights guaranteed under the UNCRC. UN General Comment No. 4: General measures of implementation of the Convention on the Rights

of the Child (arts. 4, 42 and 44, para. 6), makes it clear that measures are required to ensure that children and youth are made aware of their rights and have mechanisms to seek to have them enforced.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full Compliance with this Recommendation is appreciated.

OCYA Recommendation 4: Codification and Classification of Rights of Children and Youth in Care and/or In Receipt of Services under the CYFSA

Recommendation: In addition to the positive reference to the United Nations Convention on the Rights of the Child (UNCRC), children’s rights should be modelled to the extent possible on the Ontario *Child, Youth and Family Services Act, 2017* and classified in the proposed *CYFSA* according to: rights of children and youth receiving services pursuant to the *CYFSA* (which includes children and youth in care); rights exclusive to children and youth in care; rights enunciated in Katelynn’s Principle for children and youth who are in receipt of services (again including children and youth in care); and obligations of service providers to uphold all rights set out in the proposed *CYFSA*.

Rationale: There are examples of Canadian jurisdictions which have enacted child protection legislation through a child rights approach. For example, potential model legislation for setting out the rights of children and youth in care can be found in section 70 of British Columbia’s *Child, Family and Community Service Act* and in Ontario’s *Child, Youth and Family Services Act, 2017* where there is a clear delineation in rights for children and youth receiving services (which includes children and youth in care) (sections 3-7) and separately for children and youth not in care (sections 8-14). Obligations on service providers to respect the rights of children and youth under the Ontario legislation can be found in sections 15-16. Extracts from Katelynn’s Principle are set out in the Preamble and in section 3 of the Ontario legislation.

Katelynn’s Principle was formulated by the Coroner’s Jury as its first recommendation at the Inquest into the death of Katelynn Sampson to honour Katelynn’s memory, whose identity and voice were not recognized or heard during her short lifetime. The evidence called at the Inquest documented many instances when significant people in Katelynn’s life, including educators, child protection workers and police, failed to effectively inquire about the abusive circumstances in which she lived. The Jury heard evidence about how the UNCRC establishes important human rights to protection and participation, and if followed, how this might have prevented this tragedy. Katelynn’s Principle is derived from the UNCRC.

Members of the PEI Legislative Assembly have an opportunity to demonstrate commitment to the human rights of Prince Edward Island’s citizenry, specifically children and youth, through enactment of progressive child protection legislation that evidences compliance with the UNCRC.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full Compliance with this Recommendation is appreciated.

OCYA Recommendation 5: Independent Complaints Mechanism Accessible by Children and Youth in Care (Adopted from Independent CRIA)

Recommendation: The *CYFEA* [now *CYFSA*] should include a comprehensive independent complaints mechanism accessible to children and youth in care or receiving services under the *CYFEA* [now *CYFSA*] that includes access to representatives and an appeal process. The full extent of the complaints procedure should be transparent in the legislation and not be buried in the Regulations.

Rationale: While the *CYFEA* [now *CYFSA*] has a complaints mechanism respecting decisions made by the Director of Child Protection, a more comprehensive rights section requires appropriate enforcement mechanisms to ensure that children and youth can effectively complain when their rights are infringed or ignored.

As described in UN General Comment No. 5 (2003): General measures of implementation, in order to enable children to seek remedies for the breach of their rights, there ought to be “effective, child-sensitive procedures available to children and their representatives. These should include the provision of child friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance.” The current complaints provision is inadequate.

The proposed *CYFSA* contains an administrative review provision (section 11) that requires the Minister, upon receipt of a request for review by a person aggrieved by an adverse decision of the Director of Child Protection, “to appoint a review panel composed of not more than three members to review the decision in accordance with the Regulations.” The concept of a maximum three person review panel in the resolution of complaints appears to be a positive development, but it is left to the Regulations to determine how this panel will be appointed; whether it will be independent of government; whether it will apply a child-friendly procedure for the benefit of children and youth; and how the Office of the Child and Youth Advocate will be identified as a resource and be engaged in the process

Compliance Rating:  Partial Compliance.

OCYA Analysis: While some matters will quite properly be included in the Regulations, the *Act* should be further amended and patterned on sections 119 and 120 of Ontario’s *Child, Youth and Family Services Act* to include:

- Matters that may or may not be reviewed;
- Decision-making powers of a tribunal;
- Whether review can take place if matter is before the court; and
- Further right of appeal to the courts.

**OCYA Recommendation 6: Coordination with the PEI *Child and Youth Advocate Act*
(Adopted from Independent CRIA)**

Recommendation: The *CYFEA* [now *CYFSA*] should incorporate language that facilitates access by children and youth to the advocacy services of the Child and Youth Advocate. The Office of the Child and Youth Advocate should be a key component to the communication and enforcement of the rights provisions in the *CYFEA* [now *CYFSA*]. Children and youth should be able to freely and privately communicate with advocates in that office and service providers should be required to facilitate this access.

Rationale: Part 3 of the PEI *Child and Youth Advocate Act* provides a right to children and youth receiving services or in the care of a facility (broadly defined) to communicate with the Child and Youth Advocate. The role of advocate includes:

- (ii) representing the rights, interests and viewpoints of children and youth who are receiving or eligible to receive reviewable services; and,
- (iii) assisting children and youth to initiate and participate in case conferences, service reviews, mediations or other processes in which decisions are made about the provision of reviewable services (s. 12(1)).

As indicated in the Independent CRIA, the proposed legislation “does not include a provision for the involvement of the Child and Youth Advocate”. Without this coordination with the PEI *Child and Youth Advocate Act*, there is a serious risk that children and youth may not be aware of their rights or even the existence of the Office of the Child and Youth Advocate.

A positive example of this type of coordination is s. 70(1) (m) and (n) of the British Columbia *Child, Family and Community Service Act*, which guarantees to children in care the “right to privacy during discussions” with the Office of the Representative for Children and Youth and “to be informed about and to be assisted in contacting” that Office.

Compliance Rating: ████████ Full Compliance.

OCYA Analysis: While there is technical compliance with this recommendation, there would be more complete alignment between the proposed child protection legislation and the *Child and Youth Advocate Act* using cross referencing provisions. To this end, a further proposed amendment to s. 47(4)(n) that should be considered is as follows:

“Rights of child in care

(4) A child in the care of caregivers pursuant to subsection (1) has the following rights:

(n) to be informed about their rights under Part 3 of the *Child and Youth Advocate Act*, and to be assisted in contacting the Child and Youth Advocate, a lawyer or the Ombudsperson.” [the proposal now reads: “to be informed about and to be assisted in contacting a lawyer, the Child and Youth Advocate or the Ombudsperson.”]

OCYA Recommendation 7: Alignment of the CYFSA with Jurisdiction Conferred in the *Child and Youth Advocate Act* Authorizing Access to Records

Recommendation: The provision in the proposed *CYFSA* that restricts the jurisdiction of the Child and Youth Advocate to cases of child deaths and serious injury reviews and investigations should be amended to ensure that there is alignment of the *CYFSA* with the PEI *Child and Youth Advocate Act*, thereby authorizing the Child and Youth Advocate to obtain disclosure of records in the custody of the Director of Child Protection without the requirement of prior consent, so long as the Child and Youth Advocate is exercising a statutory power under the *Child and Youth Advocate Act*.

Rationale: Section 15(1) of the PEI *Child and Youth Advocate Act* stipulates that “The Advocate may require a public body or community organization to provide any information in its custody or under its control, including personal information, and personal health information, that the Advocate considers necessary to enable the Advocate to carry out responsibilities or exercise powers under this Act.” This provision confers jurisdiction upon the Child and Youth Advocate to lawfully require disclosure of information when exercising advocacy and general review and investigation powers (independent of child and youth serious injuries and deaths).

What is worrisome here is the fact that the previous restrictions in the PEI *Child Protection Act* and the draft PEI *Child, Youth and Family Enhancement Act* did allow for the Child and Youth Advocate to at least access records in the case of any review or investigation of a reviewable service. The further erosion of the Child and Youth Advocate’s powers, as set out in s. 55(4)(c) of the proposed *CYFSA*, is puzzling and will likely create confusion in the minds of child protection staff. Additionally, this incremental regression violates the general human rights principle of the non-retrogression of children’s human rights.

Compliance Rating:  Partial Compliance.

OCYA Analysis: While there has been a removal of the stipulation that access to information in the custody of the Director of Child Protection can only be obtained by the Child and Youth Advocate in cases of child death and serious injury reviews and investigations, that has only restored the existing provision in the current *Child Protection Act*. What remains is an attempt to limit the Advocate’s access to such information in cases of reviews or investigations under the PEI *Child and Youth Advocate Act*, but that fails to take into account the broad range of responsibilities and powers the Advocate has pursuant to s. 12 of the *Child and Youth Advocate Act*. This jurisdictional contradiction between s. 55(4)(c) of the proposed PEI *Child, Youth and Family Services Act* and s. 15(1) of the PEI *Child and Youth Advocate Act* in force since July 15, 2020 has the potential to cause confusion in the minds of child protection staff, who will likely be referring exclusively to the provisions of the new child protection legislation for their bedrock authority to take or withhold specific actions. This, in turn, can jeopardize the safety and well-being of children and youth, who may fall through the cracks of these two statutes and have their voices silenced and rights extinguished.

To this end, a further proposed amendment would be as follows:

“Right of access by law

(5) the Director shall, on request, provide access to a record or disclose personal information without the consent of the person to whom it relates, where it is required by law for the purpose of

(c) the exercise of a responsibility or power by the Child and Youth Advocate under the *Child and Youth Advocate Act.*” [replacing “(c) a review or investigation by the Child ad Youth Advocate...”]

OCYA Recommendation 8: Standing in Legal Proceedings and Legal Representation (Adopted from Independent CRIA)

Recommendation: Children and youth should have the right to standing as a party in proceedings under the *CYFEA* [now *CYFSA*], along with the right to have legal representation appointed

Rationale: Article 12 of the UNCRC requires that children and youth be given the opportunity to be heard in any judicial and administrative proceedings affecting them. UN General Comment No. 14: The right of the child to be heard (2013) makes explicit that, “the child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.” (p.11)

Compliance Rating:  Partial Compliance.

OCYA Analysis: A further amendment should confer full or deemed party status on a child. Here a further amendment could be patterned on s. 79(6) of the Ontario *Child, Youth and Family Services Act*, as follows:

Section 79(6) of Ontario *Child, Youth and Family Service Act*: A child who is an applicant under the status review application provisions, receives notice of a proceeding or has legal representation in a proceeding is entitled to participate in the proceeding and to appeal as if the child were a party.”

OCYA Recommendation 9: Criteria for Appointing Legal Counsel for Children

Recommendation: The proposed *CYFSA* should include criteria to assist a court in determining whether legal representation of a child is necessary to ensure that the child’s interests are adequately protected in a proceeding under this *Act*.

Rationale: While a positive step, it is not sufficient to simply remove the minimum age threshold for a court to order legal representation for a child involved in a child protection proceeding. There should also be specific criteria listed in the legislation to guide Courts in making these determinations and to ensure that these decisions are made objectively and consistently amongst the judiciary. This is missing in s. 43 of the proposed *CYFSA*.

As stated in the Independent CRIA, the proposed legislation “does not clearly state the status of children in these proceedings or the criteria for ordering representation.” Some other Canadian jurisdictions set out such criteria. See, for example, s. 34(3) of Manitoba’s *Child and Family Services Act*, which sets out the following factors for a Court to consider when determining whether legal representation should be ordered:

- a) any difference in the view of the child and the views of the other parties to the hearing;
- b) any difference in the interests of the child and the interests of the other parties to the hearing;
- c) the nature of the hearing, including the seriousness and complexity of the issues and whether the agency is requesting that the child be removed from the home;
- d) the capacity of the child to express his or her views to the court;
- e) the views of the child regarding separate representation, where such views can reasonably be ascertained; and
- f) the presence of parents or guardians at the hearing.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 10: Views and Wishes of Children and Youth be Given Due Weight (Adopted from Independent CRIA)

Recommendation: In all instances where decisions are being made that impact children and youth, their views and wishes are to be ascertained and given due weight in accordance with Article 12 of the UNCRC. In ‘the best interests of the child’ definition, which applies to courts among other decision-makers, the reference to “the child’s views and preferences’ in s. 2(1)(h) should be expanded to read “the child’s views and preferences, given due weight in accordance with the child’s age and maturity.” Similarly, the requirement that the Director of Child Protection “consider the views of the child” in s. 8(2), for purposes of making decisions or taking actions should be expanded to read “the child’s views and preferences, given due weight in accordance with the child’s age and maturity.”

Rationale: The legislation should reflect the right of children and youth to have their views given due weight in accordance with Article 12 of the UNCRC. This is the approach taken in Ontario’s *Child, Youth and Family Services Act*, 2017. At present the *CYFEA* [now *CYFSA*] only requires that their views be considered as a factor in the best interests of the child and when the Director of Child Protection is making a decision in relation to a child. UN General Comment No. 12: The right of the child to be heard (2003) states, “by requiring that due weight be given in accordance with age and maturity, article 12 makes it clear that age alone cannot determine the significance of a child’s views. Children’s levels of understanding are not uniformly linked to their biological age.” As Katelynn’s Principle states, “according to their age or maturity, each child should be engaged through an honest and respectful dialogue about how/why decisions were or will be made.”

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 11: Children and Youth and Child and Youth Advocate Office Participation in Alternative Dispute Resolution

Recommendation: The proposed *CYFSA* should be amended to include children and youth and a representative from the Office of the Child and Youth Advocate in the list of participants for purposes of the definition of each of “family group conference” and “mediation”.

Rationale: Clauses 16(3)(b) and (c) of the proposed *CYFSA* should be amended to reflect the right of children and youth to participate and have their views given due weight in accordance with Article 12 of the UNCRC. It seems puzzling that the child who is at the centre of the dispute would be excluded from these alternative dispute resolution processes. In addition, the list should be expanded to include a representative from the Office of the Child and Youth Advocate.

Compliance Rating:  Partial Compliance.

OCYA Analysis: While there has been provision made for the participation in family group conferences and mediations by both the child and the Child and Youth Advocate, there is a concern with the qualifying language that only permits the participation of the Office of the Child and Youth Advocate with agreement by the parties. The Child and Youth Advocate is an independent statutory officer with legislated responsibility pursuant to s.12 (1)(b) of the PEI *Child and Youth Advocate Act* to “represent the rights, interests and viewpoints of children in receipt of, or eligible to receive, reviewable services.” In addition, s. 12(2)(e) of the PEI *Child and Youth Advocate Act* provides that the Advocate may try to resolve matters “through the use of negotiation, conciliation, mediation or other non-adversarial approaches and, if appropriate, make recommendations to public bodies, community organizations or families.” Any operative consent for the participation of the Child and Youth Advocate should belong to the child who should have the right to be represented by a representative of the Office of the Child and Youth Advocate, if those are the child’s views and instructions.

OCYA Recommendation 12: Definition of the Best Interests of the Child (Adopted from Independent CRIA)

Recommendation: The definition of the best interests of the child should be more comprehensive and include:

- the unique needs of Indigenous children and youth (or specifically incorporate the test in *An Act respecting First Nations, Inuit and Metis children, youth and families (Canada)*), and including reference to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as it affects children and youth;
- children and youth with disabilities;

- substantive equality rights of children and youth from minority groups. In addition, the following factors should be considered as potential amendments to the ‘best interests of the child’ definition in s. 2(1) of the proposed *CYFSA*;
- “a secure place for the child and the development of a positive relationship as a member of a family” (restored from s. 2(2)(f) of the *PEI Child Protection Act*);
- “the continuity of care for the child and the possible effect of disruption of that care on the child” (restored from s. 2(2)(l) of the *PEI Child Protection Act*);
- “the effects on the child of delay in the disposition of the case”: See s. 34 (3)(ix) of the Ontario *Child, Youth and Family Services Act, 2017*;
- the child’s views and preferences, “given due weight in accordance with the child’s age and maturity” (expansion of s. 2(1)(h) of the proposed *CYFSA*, with reference to 74(3)(a) of the Ontario *Child, Youth and Family Services Act, 2017*;
- “the child’s race, ancestry, place of origin, color, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression” (expansion of s. 2(1)(j) of the proposed *CYFSA*, with reference to 74(3)(c)(iii) of the Ontario *Child, Youth and Family Services Act, 2017*; and
- “the degree of risk, if any, that justified the finding that the child is in need of protection”: See s. 34(3)(xi) of the Ontario *Child, Youth and Family Services Act, 2017*.

Rationale: The best interests of the child is a comprehensive set of factors that is a central animating theme of the UNCRC. The test reflects and should include other rights in the UNCRC including non-discrimination and the right to participate in decisions. As stated in UN General Comment No. 14: The right of the child to have his or her best interests taken as the primary consideration, “The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.”

Compliance Rating: Substantial Compliance.

OCYA Analysis: There is a concern that some of the best interests of the child factors recommended by the Office of the Child and Youth Advocate for inclusion have been omitted and that the specific clauses relied upon by the Supreme Court of Canada in the case of *B.J.T. v. J.D.* have been eliminated. See Recommendation 27.

OCYA Recommendation 13: Exclusion of Children from Child Protection Court Proceedings

Recommendation: The provision that allows a court to exclude a child from a child protection hearing or any part of it without specifying any criteria should be amended to stipulate that such judicial discretion can only be exercised when determining that it is the best interests of the child to make an exclusionary order.

Rationale: Section 44(2) of the proposed *CYFSA* provides a judge with blanket discretion in determining whether a child should be excluded from child protection proceedings. This absolute discretion is inconsistent with the article 12 of the UNCRC which guarantees to children and youth the right to participate and express their views in decision-making processes affecting them. The inclusion of a best interests of the child test would also be consistent with s. 6(2) of the proposed *CYFSA*, which states that a court “acting pursuant to this Act shall make decisions and act with the best interests of the child as the paramount consideration.”

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 14: Criteria Articulated for Family Intervention Plans to Include Plan of Care (Adopted from Independent CIRA)

Recommendation: Family Intervention Plans must maintain a focus on the best interests and needs of the child or youth. Specific provisions that require the plan to include educational, recreational and developmental considerations should be included along with a clear statement that the plan must reflect the best interests of the child or youth.

Rationale: The Family Intervention Plans, defined in s.4 of the *CYFEA* [now *CYFSA*], focus primarily on mitigating the circumstances causing a child or youth to be in need of protection. This focus on prevention and supporting families to care for their children is a laudable objective. However, the requirements focused on the child or youth placed outside their parents’ custody leave out many elements that focus on the child’s particular needs.

This is a regression from the ‘best interests of the child’ considerations currently enumerated in the definition of ‘plan of care’ in s. 1(u) of the PEI *Child Protection Act*. Once again, this represents a violation of the general human rights principle of the non-retrogression of human rights. While this might be left to Regulations, the provision risks diminishing the focus on the child or youth. As stated in Katelynn’s Principle, “The child should be at the forefront of all service-related decision-making.”

Compliance Rating:  Partial Compliance.

OCYA Analysis: The Family Intervention Plan should be a child-centered document focused on the best interests of the child and include the components set out in the Recommendation.

OCYA Recommendation 15: Periodic Review (Adopted from Independent CRIA)

Recommendation: The periodic review provision in the current PEI *Child Protection Act*, should be included in the *CYFEA* [now *CYFSA*] to ensure accountability and transparency. Any periodic review should include:

- (a) a Child Rights Impact Assessment that seeks out and includes the views of children and youth impacted by the legislation; and
- (b) systematic data collection and qualitative assessment of the impacts and outcomes of the services provided to children, youth and families under the *CYFEA* [now *CYFSA*].

Rationale: General human rights principles require transparency and accountability on behalf of governments. In the child rights context, this means independent child-focused monitoring as well as regular public reporting. Given the shift in focus to prevention services in the objectives of this legislation, the Government of Prince Edward Island should facilitate evaluation of the approaches and services provided to ensure better outcomes for children. The Northwest Territories, Alberta, Ontario, Quebec, Newfoundland & Labrador, Nova Scotia, and Prince Edward Island’s current legislation all have a statutory review period of four or five years.

The periodic reviews provide an opportunity for extensive consultation with children and youth. General Comment No.5 (2003): General measures of implementation states,

“If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to “listen” to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights.” (pg. 4).

Compliance Rating: ████████ Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 16: Mandatory Periodic Reviews to be Less Partisan and More Focused on Children’s Rights

Recommendation: Section 64 of the proposed *CYFSA* (Review by advisory committee) should be amended to include:

- a) a mandatory periodic review of the legislation that shall be convened and conducted by a standing committee of the PEI Legislative Assembly instead of the Minister of Social Development and Housing and the advisory committee appointed by the Minister;
- b) every review of the legislation shall address the rights of children and youth through the application of a Child Rights Impact Assessment (CRIA) analysis to examine both the

impacts of the legislation in existence at the time, as well as the potential impacts of proposed amendments to child protection legislation;

- c) every review of the legislation shall include the active participation of the Office of the Child and Youth Advocate;
- d) every review of the legislation shall include meaningful consultation with children and youth; and
- e) the results of every review of the legislation shall be made public.

Rationale: While the mandatory periodic review provision has been reinstated in the proposed *CYFSA*, that provision does not go far enough in safeguarding the rights, interests and viewpoints of children and youth. It is too partisan and does not place a sufficient emphasis on children’s rights and consulting with children and youth, as well as actively engaging the Office of the Child and Youth Advocate. There are Canadian jurisdictions that have strengthened child protection legislation mandatory review provisions. For example, s 336(3) and 337 of the Ontario *Child, Youth and Family Services Act, 2017* requires, as part of its mandatory periodic reviews, both a “consult[ation] with children and young persons” and a focus on address[ing] the rights of children and young persons.”

As well, the Northwest Territories *Child and Family Services Act* places the mandatory periodic review of their child protection legislation under the purview of the Legislative Assembly or one of its Committees instead of the Minister. Section 88.1 of that *Act* sets out the following provisions:

“(1) Within five years after this section comes into force and every five years after that, the Legislative Assembly or one of its committees shall convene a comprehensive review of the provisions and operation of this *Act* and any other related legislation, policies, guidelines, plans or directives as the Legislative Assembly or the committee considers appropriate.

(2) The review must include an examination of the administration and implementation of this *Act* and the effectiveness of its provisions and may include recommendations for changes to this *Act*.”

Section 131.2 of the Alberta *Child, Youth and Family Enhancement Act* offers a different approach and stipulates that:

“(2) At least once every 5 years, a comprehensive review must be undertaken of this *Act* by a committee appointed by the Lieutenant Governor in Council.”

Although this Committee must report to the Minister, the appointments are made by the Lieutenant-Governor and not the Minister and the composition of this Committee must include “one or more members of each caucus represented in the Legislative Assembly” (*Alberta Child, Youth and Family Enhancement Act*, s. 131.2(3)(b)).

In another context, the British Columbia *Representative for Children and Youth Act* places authority for the 5-year periodic review of that legislation in the hands of a named Standing

Committee of the British Columbia Legislative Assembly - the Select Standing Committee on Children and Youth. Section 30 of that legislation calls upon this Standing Committee to “at least once every 5 years...undertake a comprehensive review of this Act or a review of portions of this Act.”

Compliance Rating:  Non-Compliance.

OCYA Analysis: The mandatory 5-year review should be more objective and led by a Standing Committee of the PEI Legislative Assembly. The various components of this recommendation have not been adopted, with the exception of requiring a CRIA analysis in clause (b) above.

OCYA Recommendation 17: Better Integration of *An Act respecting First Nations, Inuit and Metis children, youth and families* (Canada) (Adopted by Independent CRIA)

Recommendation: The provisions respecting the application of *An Act respecting First Nations, Inuit and Metis children, youth and families* need to specify that all Indigenous children and youth in PEI will be treated in accordance with the principles and standards set out in the federal legislation and should also reference the United Nations Declaration on the Rights of Indigenous Peoples.

Rationale: This incorporation of the federal legislation is a progressive measure that seeks to further the rights of Indigenous children and youth in the province. Clarity is essential to ensure that it operates as intended and that no children or youth fall through the cracks.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 18: Inclusion of Preamble or Statement of Principles (Adopted from Independent CRIA)

Recommendation: The legislation should include a Preamble or Statement of Principles that clearly situates the child at the centre of decisions and includes some of the key thematic rights of the UNCRC including non-discrimination and the participation rights of children and youth. A Preamble or Statement of Principles could also incorporate the language of Katelynn’s Principle that places children at the centre of all services provided to them and acknowledges their right to be heard.

Rationale: While the *CYFEA* [now *CYFSA*] is required to be construed and applied in a manner consistent with the UNCRC, specific provisions guaranteeing some of the key thematic rights of the UNCRC such as nondiscrimination and the participation rights of children and youth would provide stronger support for the implementation of specific rights. Under s. 19(2) of the *PEI Interpretation Act*, Preambles form part of the enactment, unlike section headings, and can thus be a valuable aid in establishing the underlying rationale for the legislation and in interpreting other provisions capable of more than one meaning in the same statute.

The removal of a Preamble in the proposed *CYFSA* is a clearly retrogressive step. The Preamble to Ontario’s *Child, Youth and Family Services Act*, contains some potential model language. As well, the current PEI *Child Protection Act* incorporates some important rights-based language, which has been removed without any apparent reason. The repeal of a Preamble or Statement of Principles in the proposed *CYFSA* once again violates the general human rights principle of the non-retrogression of established human rights.

Compliance Rating:  Non-Compliance.

OCYA Analysis: The elimination of a Preamble is a retrogressive step. No piece of legislation is perfect, and there will always be questions of interpretation that can be illuminated by a Preamble. Subsection 19(2) of the PEI *Interpretation Act* states that Preambles form part of the enactment, unlike section headings. In addition, Subsections 11(1) and (2) of the PEI *Interpretation Act* address principles of interpretation and the remedial construction of provincial legislation, having regard to “the scheme of the *Act*, the object of the *Act* and the intention of the Legislative Assembly.”

Notably, PEI continues to enact Preambles. For example, the Preamble to the PEI *Residential Tenancy Act*, which, among other things, “recognizes housing as a human right affirmed in the International Covenant on Economic, Social and Cultural Rights to which Canada is a party.”

OCYA Recommendation 19: Duty to Report

Recommendation: The proposed *CYFSA* should be amended to make explicit that the duty to report is a personal duty that cannot be delegated and that the continuing obligation to report applies to every person.

Rationale: While s. 12(1) of the proposed *CYFSA* has removed the phrase “or cause to be reported” which is included in s. 10(1) of the PEI *Child Protection Act*, it does not go far enough in making explicit the personal nature of the reporting duty.

As a result of a series of Ontario Inquests, the reporting duty was amended some years ago and now reads in s. 125(3) of the Ontario *Child, Youth and Family Services Act, 2017* as “A person who has a duty to report a matter ...shall make a report directly ...and shall not rely on any other person to report on the person’s behalf.” Similarly, the Ontario ‘ongoing duty to report’ applies to every person (s. 125(2)) and is not restricted to persons performing professional or official duties, as it is in the proposed PEI legislation.

If the dominant policy consideration is to protect children and cast a broad safety net, the provision in the proposed *CYFSA* that screens out most of the population would appear to frustrate that policy objective.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 20: Definition of 'Youth'

Recommendation: The definition of “youth” in s. 1(o) of the proposed *CYFSA* as meaning “a child who is 16 or 17 years of age” should be amended to conform with the definition of “youth” in s. 1(n) of the *PEI Child and Youth Advocate Act* so as to read “means a person over the age of 12 years and under the age of 18 years.” This is the definition that is currently set out in s. 1(y) of the *PEI Child Protection Act*.

Rationale: The inconsistency between the definition of ‘youth’ between s. 1(o) of the proposed *CYFSA* and s. 1(n) of the *PEI Child and Youth Advocate Act* may lead to confusion in interpretation and application.

Rating Compliance: Non-Compliance.

OCYA Analysis: To ensure the alignment between the proposed *CYFSA* and the *PEI Child and Youth Advocate Act*, the Advocate proposes the specification of “a youth who is 16 to 17 years of age” under s.17(2) of the proposed *CYFSA*.

To facilitate consistency between the *CYFSA* and the *PEI Child and Youth Advocate Act*, the definition of “youth” pursuant to section 1(o) of the *CYFSA* ought to mean “a person who is over the age of 12 years and under the age of 18 years. As stated, the present *PEI Child Protection Act* defines “youth” pursuant to 1(y) as “a person over the age of 12 years and under the age of 18 years.” The Office of the Child and Youth Advocate seeks to avoid confusion and promote harmonization of the proposed *CYFSA* with existing legislation.

OCYA Recommendation 21: Inclusion of Parental Educational Neglect

Recommendation: The proposed legislation should include parental educational neglect as part of the definition of ‘emotional harm’ which can ground a finding that a child is in need of protection.

Rationale: While circumstances beyond their control may inhibit parents from facilitating their child’s attendance at school, evidence from systemic and individual advocacy by the PEI Office of the Child and Youth Advocate has indicated that chronic absenteeism of students has become a serious issue for Island children and youth. In addition to the promotion of academic development, schools offer children and youth a safe space to interact socially with peers. Having students in classrooms provides teachers with the opportunity to monitor their safety and well-being.

Chronic school absenteeism from a young age has significant negative consequences that can last a lifetime. When children and youth are routinely absent from school without reason, they are falling behind in the curriculum, missing opportunities to participate in school-related activities and becoming socially isolated. For some children and youth, chronic school absenteeism results in the child or youth disconnecting altogether from school and silently disappearing from the educational system.

There are many reasons why a child may be absent from school, ranging from anxiety, mental health, addictions, fear of harassment and bullying, and poverty. However, on occasion, chronic school absenteeism may be a symptom of a larger child protection concern, such as where the child is being abused, neglected or exposed to family violence. The inclusion of the failure to meet a child’s educational needs as part of the definition of emotional harm provides child protection workers with the authority to make inquiries without preconceived notions and offer support, where appropriate, without necessarily bringing a child into care.

Given that the proposed definition of ‘emotional harm’ includes “failure of the parent or other person to meet the emotional, social, cognitive or psychological needs of the child”, it would be preferable to expand this provision to read: “failure of the parent or other person to meet the emotional, social, cognitive, educational or psychological needs of the child.”

Article 28 of the UNCRC requires State Parties to make primary and secondary education free to all children and youth. Under Article 29 of the UNCRC, State Parties must ensure education of children satisfies the following criteria:

- a) the development of the child’s personality, talents and mental and physical abilities to their fullest potential;
- b) the development of respect for human rights and fundamental freedoms and for the principles enshrined in the Charter of the United Nations;
- c) the development of respect for the child’s parents, his or her cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- d) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and the friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; and
- e) the development of respect for the natural environment.

Compliance Rating: ████████ Full Compliance.

Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 22: Right of Children to Personal Information

Recommendation: The proposed legislation should include the right of the child to access their own personal information, regardless of age, on the basis of their presumed capacity, unless the Director of Child Protection has reasonable grounds to believe that the child does not have the requisite capacity.

Rationale: All children should be free to access their personal information, regardless of age, based on the principle of presumed capacity. Article 17 (e) of the UNCRC calls upon States to ensure the access to information of children and to “encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her

well-being, bearing in mind articles 13 [Sharing Thoughts Freely] and 18 [Responsibility of Parents].” (Article 17 UNCRC)

Compliance Rating:  Full Compliance.

OCYA Analysis: Full compliance with this Recommendation is appreciated.

OCYA Recommendation 23: Explanation of Plan of Care and Consideration of Children’s Views

Recommendation: The proposed legislation should specify that a plan of care for a child in care will not be effective unless the plan of care has been explained to the child in a manner appropriate to the child and the Director of Child Protection has considered the views of the child.

Rationale: Section 47(4)(k) of the proposed *CYFSA* requires the Director of Child Protection to inform children in care about, and where reasonably possible, participate in developing or amending the plan of care for the child. The PEI Office of the Child and Youth Advocate is concerned the phrase “where reasonably possible” may limit meaningful participation of children and youth in the development of Plans of Care.

Compliance Rating:  Full Compliance.

OCYA Analysis: Full Compliance with this Recommendation is appreciated.

OCYA Recommendation 24: Agreements with Youth

Recommendation: Youth who are 16 or 17 years of age should have the right to enter into an agreement with the Director of Child Protection, who determines that there are reasonable grounds to believe that the youth is in need of protection, for admission to care, or for supports and services, independent of parental consent, on the basis of the youth’s presumed capacity, unless the Director of Child Protection has reasonable grounds to believe that the youth does not have the requisite capacity.

Rationale: While the current PEI *Child Protection Act* s. 13 provides authority for the Director of Child Protection to enter into an agreement with a child who is 16 or 17 years of age for the provision of child protection services, to include supports and services, it is silent on the right of the child to seek admission to the protective care of the Director of Child Protection, and only allows for the child’s independent consent in prescribed exceptional circumstances.

Compliance Rating:  Non-Compliance

OCYA Analysis: Section 17 of the proposed *Child, Youth and Family Services Act* does not address this OCYA recommendation. This recommendation was advanced as the result of a gap in Departmental services as voiced by children and youth in receipt of individual advocacy support provided by the Office of the Child and Youth Advocate. A legal remedy is required to support

the right of a youth to be able to seek admission to the protective care of the Director of Child Protection, in addition to receipt of supports and services provided by the Director of Child Protection, as determined on reasonable grounds that the youth is in need of protection, independent of parental consent and without any of the qualifying circumstances listed in s. 17 (2)(c).

OCYA Recommendation 25: Criteria for Agreements with Parents

Recommendation: The conditions required for a temporary or permanent agreement between a parent and the Director of Child Protection should be restored to those set out in the current *Child Protection Act*, subject to removing minimal age requirements, and including the obligations of the Director of Child Protection: to explain to the child in a manner appropriate to the child, the reasons for, and the nature, effect and implications of the proposed agreement; to consider the views of the child; to cause further assessment to be made, where the child proposes an alternative or expresses opposition to the proposed agreement; and to be satisfied that the agreement is in the best interests of the child.

Rationale: While section 18 of the existing *Child Protection Act* obligates the Director of Child Protection to explain, in a manner appropriate to the child, the reasons for and the nature, effect, and implications of the proposed agreement with the child, this requirement is subject to the child being 12 years old or more. For permanent agreements, only children 12 years old or more will cause further assessment to be made to the plan of care if the child expresses opposition to same (PEI *Child Protection Act*, s 20(3)(d)).

In the Concluding Observations of the UN Committee on the Rights of the Child to Canada in 2022, the Committee emphasized the necessity for meaningful consideration of children’s views for all decision-making processes relating to children, including child welfare decisions. (UNCRC Concluding Observations to Canada 2022, para. 22). In accordance with these Concluding Observations, the Office of the Child and Youth Advocate seeks to “ensure that hearing the views of the child are a requirement for all official decision-making processes that relate to children, including custody cases, child welfare cases, and cases concerning criminal justice, immigration, and the environment”. (UNCRC Concluding Observation to Canada 2022, para. 22(c)).

Response: Substantial Compliance.

Analysis: In viewing sections 18 and 20 of the proposed *CYFSA*, it is important to remember that the views and best interests of children will be safeguarded by sections 8(2) and 6(2) of the proposed *CYFSA*. However, the Office of the Child and Youth Advocate proposes that the language set out in s. 20(3)(b), (c) and (d) of the PEI *Child Protection Act* be retained.

OCYA Recommendation 26: Access to Information in the possession of the Office of the Child and Youth Advocate

Recommendation: The proposed legislation should include an exception to the Director of Child Protection’s right to access information about a child, where such information is in the possession of the Office of the Child and Youth Advocate, with a view to protecting the privacy of those children, youth and other individuals who engage with the Office of the Child and Youth Advocate.

Rationale: Subject to the reporting duty that would apply to the Office of the Child and Youth Advocate, all other information in the possession of the Office of the Child and Youth Advocate should remain confidential and not be accessible to the Director of Child Protection. According to Article 16 of the UNCRC, all children have the right to privacy and the right to legislated protection of Such privacy.

Compliance Rating: ■ Non-Compliance.

OCYA Analysis: To avoid confusion and promote consistent interpretation of the proposed *CYFSA* with the confidentiality provisions outlined in sections 10, and 15 to 19 of the PEI *Child and Youth Advocate Act*, a further exception should be carved out in subsection 53(2) of the proposed *CYFSA* to protect the privacy of information in the possession of the Office of the Child and Youth Advocate. This would, of course, be subject to the reporting duty set out in section 12 of the proposed *CYFSA*. Children and youth have an expectation of privacy when dealing with the Office of the Child and Youth Advocate. In this regard, section 10 of the PEI *Child and Youth Advocate Act* states that “[e]very child or youth who is receiving or is eligible to receive a reviewable service has a right to communicate with the Advocate privately and in confidence.” In addition, subsection 18(1) of the PEI *Child and Youth Advocate Act* places strict confidentiality obligations on the Office of the Child and Youth Advocate.

OCYA Recommendation 27: Preamble and Best Interests of the Child Considerations in *B.J.T. v. J.D.*, 2022 SCC 24

Recommendation: The proposed legislation should retain those provisions in the PEI *Child Protection Act* relied upon by the Supreme Court of Canada in the decision of *B.J.T. v. J.D.*, specifically in relation to the Preamble and ‘the best interests of the child’ considerations, which have now established settled jurisprudence and predictability in child protection matters.

Rationale: While the current PEI *Child Protection Act* contains a strong Preamble, which provides guidance for judicial interpretation of the legislation through a child rights lens, the proposed *CYFSA* does not contain a Preamble. The landmark case of *B.J.T. v. J.D.*, 2022 SCC 24 (“*B.J.T. v. J.D.*”) explicitly cited the Preamble of the PEI *Child Protection Act* (*B.J.T v. J.D.* at paras 95 and 98). In addition, the Supreme Court of Canada relied upon the best interests of the child considerations set out in s.2(2)(g) and (2)(h) of the current PEI *Child Protection Act*, which will be eliminated in the proposed *CYFSA*. This settled jurisprudence from the highest court in Canada in

interpreting the Preamble and the specific best interests of the child considerations in the current PEI *Child Protection Act* evidences the importance of consistency and predictability in interpretation that can promote the best interests of children in child protection matters.

Compliance Rating: ████████ Non-Compliance.

OCYA Analysis: To reiterate the rationale for the inclusion of a Preamble in Recommendation 18, section 19(2)(a) of the PEI *Interpretation Act* explicitly provides that Preambles form part of legislation. Recently enacted PEI legislation references international conventions to which Canada is a party to recognize the human rights of Islanders (see the PEI *Residential Tenancy Act*). In accordance with paragraph 7 of the UNCRC Concluding Observations to Canada in 2022, the PEI Office of the Child and Youth Advocate supports the incorporation of the UNCRC into the Preamble of the *CYFSA* to “ensure the equal implementation of its laws throughout the country”.

A cross-jurisdictional scan of Canadian Provinces and Territories evidences the inclusion of a Preamble in the majority of child protection legislation (presently Prince Edward Island, Nova Scotia, New Brunswick, Quebec, Ontario, Yukon, Northwest Territories, and Nunavut). For jurisdictions without a Preamble, a “Declaration of Principles” (Manitoba *The Child and Family Services Act*) or “Guiding Principles” (British Columbia *Child, Family and Community Service Act*, s. 2) is included in the legislation. As stated, the repeal of a Preamble or Statement of Principles in the proposed *CYFSA* violates the general human rights principle of the non-retrogression of established human rights.

Conclusion

The profound impact of the proposed *Child, Youth and Family Services Act*, as it affects the most vulnerable children and youth on PEI cannot be understated. As we have said, the proposed PEI *Child, Youth and Family Services Act* is historic, groundbreaking and aspirational legislation. It places children at the centre of service delivery and decision-making in matters affecting them. It is legislation that the Province can be proud of, but we can still do better and there is much to be done to support the successful implementation of this new proposed legislation. If we can achieve this objective, we would signal to Canada and the world that PEI is a leader in legislative reform that protects and advances the realization of human rights for its youngest citizenry.

Respectfully submitted on behalf of the Office of the Child and Youth Advocate this 14th day of November, 2023.



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