



February 23, 2022

VIA Email: gamcneillymla@assembly.pe.ca

MLA Gordon McNeilly, Chair
Standing Committee on Health and Social Development
PEI Legislative Assembly
165 Richmond Street
Charlottetown, PE C1A 1J1

Dear Mr. McNeilly:

Re: Submission Regarding the Proposed PEI *Child, Youth and Family Services Act*

I write to you today, in my role as an Independent Officer of the PEI Legislative Assembly pursuant to the PEI *Child and Youth Advocate Act*, to provide the attached written submission entitled *Submission to the PEI Legislative Assembly Standing Committee on Health and Social Development regarding the proposed PEI Child, Youth and Family Services Act - A Rare Moment in Time: An Opportunity to Establish a Culture Shift in Child Protection Legislation that Recognizes PEI Children and Youth as Individuals with Rights to be Respected and Voices to be Heard* as prepared by the Office of the Child and Youth Advocate in response to the proposed PEI *Child, Youth and Family Services Act*.

Inherent in my statutory authority is the responsibility to promote the rights of children and youth in relation to Government legislation. The opportunity to formally review PEI child protection legislation occurs only periodically, and generally once every five years. In recognition of this critically important legislation affecting the lives of children, youth and their families in this province, it is my position that the proposed *Child, Youth and Family Services Act* does not go far enough in promoting and protecting the human rights of children and youth in PEI and that it would be a timely and accountable safeguard for this proposed legislation, once introduced as a government bill, to be referred to the Standing Committee on Health and Social Development for its review and consideration of possible amendments before the bill's enactment.

Such a referral to the Standing Committee on Health and Social Development would provide the Committee with the opportunity to hear and be informed by the views of other persons, including those of our Office, of interested PEI children and youth, and of Ms. Cheryl Milne, the author of the Independent CRIA, on the impacts of this pivotal government legislation. It should be noted that PEI's youngest and most vulnerable citizenry do not generally have the same opportunity as adults to express their views in matters of significant legislative reform. Additionally, the pandemic has demonstrated the ability to accommodate the virtual participation of many interested stakeholders and subject-matter experts and this could apply to Standing Committee hearings as well.

On January 24, 2021, I was provided with a draft of a proposed bill entitled the *Child, Youth and Family Services Act*. The first iteration of the bill was entitled the *Child, Youth and Family Enhancement Act*. Unfortunately, neither bill has sought to harmonize its provisions with those presently found in the

existing *Child and Youth Advocate Act*. In fact, there appears to be an incremental effort to strictly limit our Office's jurisdiction in accessing records in the custody of the Director of Child Protection, notwithstanding the broad authority accorded to me pursuant the *Child and Youth Advocate Act*. Additionally, nine of the ten recommendations of an independent Child Rights Impact Analysis (CRIA) commissioned by our Office do not appear to have been incorporated in the latest iteration of the proposed bill and the tenth recommendation, addressing periodic reviews, has been only partially addressed.

The Submission, as attached, incorporates the ten recommendations of the independent CRIA commissioned by our Office and adds ten supplementary recommendations, with statements of rationale, as formulated by our Office. As the title of this Submission suggests, this is a rare moment in time when the proposed *CYFSA* provides us with the opportunity to establish a child protection culture shift that recognizes PEI children and youth as individuals with rights to be respected and voices to be heard. In our estimation, it is vitally important for the Legislative Assembly - and the Standing Committee on Health and Social Development – to take the time to get this right in order to avoid unintended negative consequences. This culture or paradigm shift in child rights awareness and implementation will take a concerted effort on everyone's part, but the potential benefits are enormous.

A further recommendation offered by our Office in our Submission that may be of interest to the Standing Committee is one that calls for future mandatory periodic reviews of the legislation to be convened and conducted by a Standing Committee of the PEI Legislative Assembly instead of the Minister of Social Development and Housing. This is with a view to making these periodic reviews less partisan and more focused on promoting children's rights.

In closing, I would request that this letter and the attached written submission be distributed to all Standing Committee members at the earliest opportunity.

I would welcome the opportunity to provide additional information and my availability is at the discretion of the Standing Committee on Health and Social Development.

Respectfully,



Marvin M. Bernstein, B.A., J.D., LL.M. (ADR)
Child and Youth Advocate/PEI
PEI Office of the Child and Youth Advocate

cc: Hon. Dennis King
Hon. Peter Bevan-Baker
Mr. Sonny Gallant
Hon. Brad Trivers



Office of the Child and Youth Advocate/PEI

**Submission to the
PEI Legislative Assembly
Standing Committee on Health and Social Development
regarding the proposed
*PEI Child, Youth and Family Services Act***

**A Rare Moment in Time:
An Opportunity to Establish a
Culture Shift in Child Protection Legislation that Recognizes
PEI Children and Youth as Individuals with Rights
to be Respected and Voices to be Heard**

February 23, 2022

Introduction

The opportunity to formally review PEI child protection legislation occurs only periodically, and generally, once every five years. It is imperative that we use this opportunity judiciously and make our very best efforts to get this right. PEI is too small and there is too much at stake to get it wrong.

The 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*. Given that this is critically important legislation affecting the lives of the most vulnerable and disadvantaged children, youth and families in the province, it would be a timely and accountable safeguard for a Standing Committee of the PEI Legislative Assembly to review the proposed legislation with the rigor and care it deserves.

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 *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 with dignity and respect at all times.

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. This submission is intended to propose a better way forward in child protection law reform and to promote a child rights respecting child protection culture. It is not to express criticism of the front-line staff who are doing this essential work.

We also wish to acknowledge that government has made a number of progressive changes in the proposed PEI *Child, Youth and Family Services Act (CYFSA)* (many of which had been raised at an earlier time by our Office although some of these changes do not go far enough) which include:

- a change in the proposed title to the legislation (from the earlier version of draft legislation, entitled the PEI *Child, Youth and Family Enhancement Act* to the PEI *Child, Youth and Family Services Act*)
- an explicit reference to the United Nations Convention on the Rights of the Child (UNCRC)
- a provision stating that the best interests of the child shall be the paramount consideration in decisions and actions taken by the Director of Child Protection, a review panel, the courts or any other person acting pursuant to the proposed *CYFSA*
- increasing the age of Extended Services from 21 to 25 years
- a stronger emphasis on prevention through family intervention plans (although the definition of a “family intervention plan” should have a stronger focus on the child and their best interests)
- the facilitation of custody applications for grandparents and other alternative caregivers where it is in the best interests of the child to do so
- a restoration of the provision for mandatory periodic reviews of the legislation (although it does not go nearly far enough in ensuring a process that is non-partisan and focused on children’s rights)
- a provision that the child’s views and preferences should be considered as part of the best interests of the child definition (deleting ‘where appropriate’, although it does not include a

reference to giving due weight to the child's views and preferences according to their age and maturity)

- a change in the mandatory child protection reporting duty to enact a personal duty for everyone and an ongoing duty for professionals (although the personal nature of the reporting duty should be made more explicit and the ongoing reporting duty should not be limited to professionals)
- the elimination of a minimum age at which a Court can order legal representation for children and youth (although it should also establish criteria for a court order for such legal representation)
- a change from the stigmatizing language of "apprehension" to the more neutral term of "removal"
- a reference to a panel of up to three persons, appointed by the Minister, for an administrative review (although the full extent of the complaints process should be transparent in the legislation and not be buried in regulations)

Having said that, the proposed PEI *Child, Youth and Family Services Act*, as it now stands, is not child rights-based legislation and falls far short of achieving the culture or paradigm shift required to put children and youth at the centre of services and decisions affecting them. It is especially disappointing that there has been so little government movement in incorporating the Recommendations from the Independent Child Rights Impact Assessment (CRIA) commissioned by our Office.

An additional concern is the Department of Social Development and Housing's refusal to make amendments which would have harmonized the provisions of the proposed PEI *Child, Youth and Family Services Act* with the requirements of the PEI *Child and Youth Advocate Act*. Instead, that Department has taken increasing steps through successive versions of draft child protection legislation to severely limit the Child and Youth Advocate's authority to access records in the custody of the Director of Child Protection, even though that jurisdiction is clearly set out in the PEI *Child and Youth Advocate Act*.

Role of the Child and Youth Advocate

The Office of the Child and Youth Advocate has a unique statutory role in Prince Edward Island in providing public oversight of government funded programs and services to children and youth. The Office is independent, impartial and non-partisan. Similar to the Auditor General, the Child and Youth Advocate does not report to government, but reports to the Legislative Assembly through the auspices of the Speaker of the PEI Legislature.

As an independent officer of the PEI Legislative Assembly, and pursuant to the PEI *Child and Youth Advocate Act*, the Child and Youth Advocate is responsible for, among other things, "representing the rights, interests and viewpoints of children and youth" and "promoting the rights of children and youth in relation to Government legislation..." In addition, the Child and Youth Advocate has 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."

Outline

This Submission is presented in five parts:

1. Reform of Child Protection Legislation – Challenges and Opportunities
2. Culture Shift: Moving Forward with Child and Youth Human Rights at the Centre
3. Five Thematic Cornerstones to Foster a Child Rights Culture
4. Degree of Department of Social Development and Housing's Acceptance of Independent CRIA Recommendations as Commissioned by the Office of the Child and Youth Advocate (OCYA)
5. Recommendations of the Office of the Child and Youth Advocate (OCYA)

1. Reform of Child Protection Legislation – Challenges and Opportunities

Promoting a culture respectful of, and attentive to, child and youth rights is challenging. Society often struggles to meaningfully treat children and youth as independent rights holders, and to give effect to the legal and social rights that we aspire to provide. The United Nations Convention on the Rights of the Child (UNCRC) is recognized as being the most universally accepted human rights instrument in history, with 196 nations globally ratifying this international treaty. Giving life to this articulation of children's human rights requires both a culture shift and rigorous attention to detail in crafting appropriate and impactful legislation.

Child protection regimes have an inauspicious history of failing to adequately recognize and support the rights of children and youth. The child protection system has, on far too many occasions, treated children and youth like property; has failed to respect their human rights and dignity; and has failed to promote a rights respecting approach to their care. We have, at this point in history, identified many of the ills of "the system": residential schools, the 60's scoop, policies of assimilation and purposeful destruction of the bonds of language, culture, tradition and community; and the over-representation in the 'in care' population of Indigenous and other racialized and economically disadvantaged children and youth.

As an important historical footnote, PEI's leadership at the time endorsed the vision of the UNCRC after its adoption by the UN General Assembly on November 20th, 1989, even before its ratification by Canada in 1991. On March 28th, 1990, the Honourable Roberta Hubley, the Minister Responsible for Human Rights for Prince Edward Island, made the following statement:

"Mr. Speaker, today it is my pleasure to inform this House and the citizens of Prince Edward Island that our Premier, by letter dated January 2, 1990, provided this Province's enthusiastic support for Canada's signing of the Convention.

Mr. Speaker, we look forward to signing and eventual ratification of this Convention by Canada and other countries and see it as an important vehicle to promote the rights of the children of Canada and around the world."

On December 13th, 2021, we celebrated the 30th anniversary of Canada's ratification of the UNCRC. After three decades, it is time to be aspirational and to set a high bar for PEI's implementation of children's rights in its child protection legislation. It is time for PEI to step up to the plate and be counted as a leader domestically and internationally in the promotion and protection of children's human rights.

We stand at a moment of tremendous opportunity for a dramatic change in the respect and dignity we offer to children and youth when we seek to protect and support them. We ask the Legislative Assembly to ensure that we achieve the transformative change in the child protection system that PEI children and youth require to thrive and reach their full potential.

2. Culture Shift: Moving Forward with Child and Youth Human Rights at the Centre

What is required is a major culture shift in the area of child protection: to move from focusing primarily on the perceived needs of children and youth, as determined by adults, to focusing primarily on children and youth and their inherent human rights.

Our child protection regime seeks to protect children from harm when things have broken down. We are legislating what will happen to and for children when they have been harmed, or are at serious risk of being harmed, and the supports that we had hoped would protect them, have not worked. It is the way in which we seek to meet our collective responsibility to protect all children from harm. While that is a critically important responsibility, our legislation must go further and create the conditions and rights respecting culture where actual or serious risk of harm can be prevented and children and youth can flourish.

3. Five Thematic Cornerstones to Foster a Child Rights Culture

To foster a child rights culture shift, it is our submission that there are five thematic cornerstones that must be present throughout the new legislation:

- 1. It must be child rights focused:** A child rights foundation is predicated upon the use of meaningful “rights” language and a recognition of children’s rights throughout the legislation. This encompasses a recognition of the rights articulated in the UNCRC, including: the right to protection from harm; the right to non-discrimination; the right to have their voices heard and meaningfully participate in decisions that affect them; a recognition of the evolving capacities of children; and the right to culture, heritage and identity.
- 2. It must respect the fundamental dignity of all children and youth and place them at the centre of all services and decision-making affecting them:** Too often the rights, interests and well-being of children and youth are simply given lip service, when in reality they are seen as subordinate to the needs and interests of adults or the convenience of systems of service-provision.
- 3. It must reflect respect for the evolving capacities and meaningful participation of children and youth:** As children and youth grow, develop and mature, their “capacities” evolve. The UNCRC recognizes the rights of children to have their evolving capacities respected and their right to meaningfully participate in decisions that affect them. The UNCRC requires that we respect all rights as interconnected and indivisible. This means that we must respect and uphold, and enforce a child’s right to be protected from harm; to be free from discrimination; to have an identity; to participate and have a voice, and to have their evolving capacities respected – all at the same time.

4. **It must be trauma informed:** The legislation must acknowledge that the children and youth we seek to protect have, in most instances, been subject to traumatic events, and possibly face future traumatic events such as being removed from their family. A trauma informed approach requires that we “meet children and youth where they are at,” respect their dignity and choice, their ability to participate or refuse to participate, their evolving capacities, and their legal rights that belong to them in other contexts. We must provide services that are appropriate and beneficial to children and youth – beneficial and supportive from their point of view. If a child is not responding to the service we are providing, we must not default to resorting to the criminal justice system or other punitive measures, but instead listen to what their words and actions are telling us and adapt our services to fit their needs. The system needs to serve and adapt to the child, not the other way around.

5. **It must modernize language and avoid perpetuating stigma and discriminatory practices:** The impact of stigmatizing and archaic language can be devastating for children and youth who are healing from neglect, abuse and other forms of maltreatment. We must change the lexicon in the child protection system to better affirm to children and youth that they are not offenders, victims, or the property of others, but rather individuals full of potential for achievement and success in each of their own ways. In addition, we must address discriminatory practices that contribute to service disparities and the over-representation ‘in care’ of Indigenous and other racialized groups of children and youth.

4. Degree of Department of Social Development and Housing’s Acceptance of Independent CRIA Recommendations Commissioned by the Office of the Child and Youth Advocate

The Office of the Child and Youth Advocate commissioned an Independent Child Rights Impact Assessment (CRIA) from a third-party subject-matter expert, having regard to the importance of establishing the best possible child protection legislation for children and youth in PEI. That Independent CRIA was previously released as part of a Child and Youth Advocate Office Report, titled *Promoting the Rights, Interests and Well-Being of Children and Youth – Learning Together* (December 2, 2021) available at www.childandyouthadvocatepei.ca.

While the Department of Social Development and Housing had committed to performing an internal Departmental CRIA, there was no opportunity for our Office to collaborate with the Department in terms of developing a CRIA instrument, a process of skilled and competent CRIA analysis, or training modules, notwithstanding several offers made by the Child and Youth Advocate, who himself had prior experience in working collaboratively with the governments of New Brunswick and Saskatchewan in developing and implementing a CRIA framework. Additionally, there had been a refusal by the Department to share the contents of that internal CRIA with our Office. Given the apparent limited child rights knowledge and training of Departmental staff, the commissioning of an Independent CRIA was seen as an ideal opportunity for our Office to model the competencies and child rights-based knowledge that are required to do this analysis at a high and evidence-informed level.

Unfortunately, the Department of Social Development and Housing has failed to accept nine of the 10 Independent CRIA Recommendations in their entirety and has only partially accepted the one other Recommendation (periodic reviews) stemming from that Independent CRIA analysis. This is clear when one considers that the Independent CRIA was performed in response to earlier draft legislation, the PEI *Child, Youth and Family Enhancement Act*, but those other nine Recommendations, and a critical element

of the tenth Recommendation (i.e., the requirement of a CRIA to support each mandatory periodic review), have not been accepted and do not appear in the next version, the proposed PEI *Child, Youth and Family Services Act*.

In view of this lack of acceptance by the Department of Social Development and Housing, we submit that all 10 of the Independent CRIA Recommendations commissioned by our Office should be included as OCYA Recommendations in this Submission.

5. Recommendations of the Office of the Child and Youth Advocate (OCYA)

The Office of the Child and Youth Advocate (OCYA) Recommendations and Rationale that follow are an amalgamation of the 10 Recommendations that were formulated as part of the Independent Child Rights Impact Assessment (CRIA) that was commissioned by the Office of the Child and Youth Advocate and 10 new Recommendations supplemented by our Office's review of the proposed *Child, Youth and Family Services Act*. In order to delineate between these two different sets of Recommendations, we have inserted "(adopted from Independent CRIA)" next to the Recommendations that we have incorporated from the Independent CRIA. In some cases, we have augmented the Recommendation and Rationale that we have adopted from the Independent CRIA.

OCYA Recommendation 1:

Incorporation of all 10 Independent CRIA Recommendations

The Department of Social Development and Housing 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.

OCYA Recommendation 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 *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* before its enactment, particularly 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 Housing's 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 our Office and PEI children and youth.

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

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*] lacks 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 to ensure that children and youth are aware of their rights and that individuals carrying out the obligations of the Director 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.

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

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 and Youth 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 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 and can be found in Appendix E of the Independent CRIA commissioned by our Office.

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 United Nations Convention on the Rights of the Child.

OCYA Recommendation 5 (adopted from Independent CRIA):**Independent Complaints Mechanism Accessible by Children and Youth In Care**

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 youth-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.

OCYA Recommendation 6 (adopted from Independent CRIA):

Coordination with the PEI *Child and Youth Advocate Act*

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.

OCYA Recommendation 7:

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

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 records when exercising advocacy and general review and investigation powers (independent of child deaths and serious injuries). 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.

OCYA Recommendation 8 (adopted from Independent CRIA):

Standing in Legal Proceedings and Legal Representation

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)

OCYA Recommendation 9:

Criteria for Appointing Legal Counsel for Children

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.

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

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.”

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

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. In this regard, 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.”

OCYA Recommendation 12 (adopted from Independent CRIA):

Definition of the Best Interests of the Child

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; and
- 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, 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 *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."

OCYA Recommendation 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.

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 court proceedings. This absolute discretion is inconsistent with 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.”

OCYA Recommendation 14 (adopted from Independent CRIA):

Criteria Articulated for Family Intervention Plans to Include Plan of Care

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.”

OCYA Recommendation 15 (adopted from Independent CRIA):

Periodic Review

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.”

OCYA Recommendation 16:

Mandatory Periodic Reviews to be Less Partisan and More Focused on Children's Rights

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

- (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* require, 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” (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.”

OCYA Recommendation 17 (adopted from Independent CRIA):

Better Integration of *An Act respecting First Nations, Inuit and Metis children, youth and families* (Canada)

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.

OCYA Recommendation 18 (adopted from Independent CRIA):

Inclusion of Preamble or Statement of Principles

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 non-discrimination 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 regressive 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.

OCYA Recommendation 19:**Duty to Report**

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.

OCYA Recommendation 20:**Definition of ‘Youth’**

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’ in the two statutes may lead to confusion in interpretation and application.

Conclusion

As the title of this Submission suggests, this is a rare moment in time when the proposed *CYFSA* provides us with the opportunity to establish a child protection culture shift that recognizes PEI children and youth as individuals with rights to be respected and voices to be heard. It is respectfully submitted that it is vitally important for the PEI Legislative Assembly to take the time to get this right in order to avoid unintended negative consequences. This culture or paradigm shift will take a concerted effort on everyone's part, but the potential benefits are enormous.

It is inevitable that best practices and common principles in the area of child protection will continue to change and evolve over time. For this reason, we look forward to participating in the mandatory and elective periodic reviews of this new legislation, and in the development of significant policies and regulations made thereunder, to ensure they are child rights-based and respect the voices and views of children and youth moving forward.

Respectfully submitted this 23rd day of February, 2022 on behalf of the PEI Office of the Child and Youth Advocate by:



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