



Office of the Child and Youth Advocate/PEI

A Child Rights Lens:

**Submission to the Department of Justice and Public Safety
in Response to**

Proposed Amendments to the

***PEI Change of Name Act
and
PEI Vital Statistics Act***

October 30, 2023



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Minister Bloyce Thompson
Deputy Minister Jonah Clements
Department of Justice and Public Safety and Attorney General
P.O. Box 2000
Charlottetown, PE C1A 7N8

Dear Minister Thompson and Deputy Minister Clements:

RE: Proposed Amendments to the PEI *Change of Name Act* and the PEI *Vital Statistics Act*

Introduction

On behalf of the Office of the Child and Youth Advocate, I wish to express support for the progressive package of proposed amendments to the PEI *Change of Name Act* and *Vital Statistics Act* developed by the Department of Justice and Public Safety and set out in its Public Consultation document, dated February 2022 to address discriminatory impacts on the basis of age, gender expression and gender identity.

https://www.princeedwardisland.ca/sites/default/files/publications/vitalstatisticsact_changeofnameact_consultationreport_may.pdf

The 12 recommendations advanced by our Office in this written submission reflect support for all of the proposed amendments insofar as they represent an important first step towards a further assessment of the impact of these amendments in one year's time through the application of a Child Rights Impact Assessment (CRIA) process, in consultation with the Office of the Child and Youth Advocate.

In providing the views of our Office, and advancing recommendations, I am exercising my statutory authority pursuant to s.12(2)(h) of the *Child and Youth Advocate Act*, where I may "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." In addition, pursuant to s. 12 (1) (e) of the *Child and Youth Advocate Act*, I am responsible for "promoting the rights of children and youth in relation to Government legislation, policies, protocols, practices and reviewable services to children and youth" (see

<https://canlii.ca/t/54x0r>). It is the intention of the Office of the Child and Youth Advocate to monitor implementation of all recommendations and report publicly.

On behalf of our Office, I wish to express appreciation to the Department of Justice and Public Safety for developing these proposed amendments, as well as to the following groups: the many children and youth who continue to bravely share their lived experience and challenges in actualizing their rights with Advocacy Representatives in our Office; family members and professionals who continue to advocate for children's rights; and reviewable service providers and government senior leaders who work together in the spirit of collaboration with the Office of the Child and Youth Advocate in the promotion of the realization of rights for all PEI children and youth.

Preparation of this submission by the Office of the Child and Youth Advocate was informed by:

- the lived experiences of children and youth receiving individual advocacy support from the Office of the Child and Youth Advocate;
- the views of child and youth members of the Child and Youth Advisory Committee of the Office of the Child and Youth Advocate;
- information gathered from a jurisdictional scan of related provincial and federal statutes;
- information gathered from other members of the Canadian Council of Child and Youth Advocates;
- ongoing monitoring of relevant provincial and national media;
- an analysis of relevant jurisprudence;
- a scan of international best practice models of child rights implementation;
- an analysis of proposed amendments to the *Change of Name Act* and *Vital Statistics Act* through a child-rights informed lens; and
- an invitational meeting hosted by the Office of the Child and Youth Advocate to gather views from relevant community organizations to learn more about lived experiences to help inform our analysis and recommendations.

This submission is informed by the United Nations Convention on the Rights of the Child (UNCRC); the United Nations Declaration on the Rights of Indigenous Peoples (see https://social.desa.un.org/sites/default/files/migrated/19/2018/11/UNDRIP_E_web.pdf); and the commentaries provided by the United Nations Committee on the Rights of the Child (Committee that monitors the implementation of the UNCRC by ratifying nations), to include General Comments, Guidance Statements and Concluding Observations to Canada.

The Office of the Child and Youth Advocate is recommending that the Department of Justice and Public Safety expedite tabling a Bill in the PEI Legislature to support proposed amendments to both the PEI *Change of Name Act* and the *Vital Statistics Act*. This is essential in our estimation since it has now been 18 months since the last date set for providing responses to the Consultation document,

which was April 29, 2022 and there are increasing episodes of age and gender expression discrimination occurring against trans and gender diverse children and youth in various sectors.

Relevant Provisions of Federal and Provincial Legislation

It is the position of the Office of the Child and Youth Advocate that all persons, regardless of age, have an inherent human right pursuant to federal, provincial and international law to have their gender identity and gender expression respected.

While this submission will focus on the relevant provisions of the UNCRC and relevant commentaries, it is important to touch briefly on protections against discrimination available through both federal and provincial legislation.

Federally, sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* <https://laws-lois.justice.gc.ca/eng/const/page-12.html> are relevant here. Section 7 guarantees to each individual “the right to life, liberty and security of the person”, while section 15 guarantees the right to non-discrimination on the basis of age and sex. The full provision states:

“15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability?”

Provincially, section 13 of the PEI *Human Rights Act* <https://www.princeedwardisland.ca/sites/default/files/legislation/H-12%20-Human%20Rights%20Act.pdf> prohibits discrimination on the grounds of age, sexual orientation, gender identity and gender expression, among other things. The full provision provides:

“13. No person shall discriminate against an individual or a class of individuals in any manner prescribed by this Act because of the age, colour, creed, disability, ethnic or national origin, family status, gender expression, gender identity, marital status, political belief, race, religion, sex, sexual orientation, or source of income of any person with whom the individual or the class of individuals associates..”

Relevant Provisions of the UNCRC and Related Commentaries

Child’s Right to Non-Discrimination

The UNCRC serves as an international legal framework on children’s rights for which, as a ratifying State Party, the government of jurisdiction has responsibility to demonstrate compliance.

Legislation, regulations, policy, program and service delivery decisions of government must take into account the best interests of the child and government must take all appropriate legislative and administrative measures to ensure each child has the protection and care necessary for the child's well-being, to include the child's human right to gender expression and gender identity: See articles 3 and 4 of the UNCRC.

Fostering a child rights culture in legislation, policies, protocols and practices is predicated upon the use of meaningful "rights" language and a recognition of children's rights, as encompassed and 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.

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. Children's rights are universal, interconnected, inalienable and indivisible. This means 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 evolving capacities respected – must occur all at the same time.

Article 2 of the UNCRC affords children entitlement to the same protections from discrimination as adults, while considering their special status as children dependent on the adults who care for them.

Article 2 requires that existing legislation be reviewed to ensure it does not include provisions that discriminate between different groups of children, to include children transitioning gender expression and identity. The UN Committee on the Rights of the Child, General Comment No.5 (2003) states:

"Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination."

(para. 12, p. 4), see <https://www.refworld.org/docid/4538834f11.html>)

Balance Between Child's Evolving Capacity and Parental Guidance

Article 5 of the UNCRC balances a triangular relationship of responsibilities and accountabilities among the child, the parent or caregiver, and the government. This balance recognizes that parents' rights and duties must be exercised in accordance with the child's rights and the child's evolving capacities. When children are younger, for example, they need more protection, as developmentally their capacity to consider and understand consequences is evolving. As the child grows older, the child develops increasing capacity to understand consequences and make informed choices as a rights-holder.

On October 11, 2023, the United Nations Committee on the Rights of the Child issued a Statement entitled *Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child* available at

<https://www.ohchr.org/sites/default/files/documents/hrbodies/crc/statements/CRC-Article-5-statement.pdf> to clarify the concepts of parental guidance and evolving capacities of the child, as enshrined in article 5 of the UNCRC:

"The Committee reiterates that article 5 affirms that all children have rights, irrespective of their age, and that, as they grow, develop, mature, and expand their social circle beyond their family, they are entitled to an increasing level of responsibility, agency, and autonomy in the exercise of those rights. Children's evolving capacities must be recognized and respected by those adults who provide direction and guidance over children's lives." (para. 5, p.2)

"...The Committee notes that parents' responsibilities, rights and duties to guide their children is not absolute but, rather, delimited by children's status as rights holders. The provision of direction and guidance by parents must be exercised in a manner to respect and ensure children's rights. Article 18 of the Convention, which underlines the primary responsibility of parents, or legal guardians, for the upbringing and development of the child, states that the best interests of the child will be their basic concern." (para. 7, p.2).

Article 6 of the UNCRC recognizes the child's inherent right to life through a holistic lens with implementation measures to be aimed at achieving optimal development for all children. Unfortunately, the literature indicates that trans and gender diverse youth who are unable to use their preferred names and pronouns have a higher incidence of self-harm and suicides.

Since the Office of the Child and Youth Advocate opened, Advocacy Representatives have continued to bear witness to the painful, and often traumatic, lived experiences of children and youth, many of whom struggle, often feeling powerless and alone, for family and social acceptance of their inherent right to express their gender identity and preferred names/pronouns. Youth transitioning from the sex they were assigned at birth to their preferred gender identity, frequently express feelings of hopelessness and loneliness, often manifested with suicidal ideation and acts of self-harm.

Research evidence demonstrates a correlation between chosen name use and mental health among transgender children. It is noteworthy that the UNCRC does not define age thresholds, focusing instead on the child's evolving capacity to make informed decisions.

Capacity, Maturity and the Mature Minor Doctrine

Inherent to child development is the evolving capacity and maturity of independence and informed decision-making. The UN Committee on the Rights of the Child, General Comment No.12 (2009) states:

Maturity refers to the ability to understand and assess the implications of a particular matter and must therefore be considered when determining the individual capacity of a child. Maturity is difficult to define; in the context of article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child. (UN Committee on the Rights of the Child, 2009, p. 8-9, para 30.

See <https://www.refworld.org/docid/4ae562c52.html>)

In PEI, children are presumed to have capacity to make decisions for specific purposes in conformity with the entrenched common law Mature Minor doctrine, which was upheld by the Supreme Court of Canada in the case of *A.C. v. Manitoba (Director of Child and Family Services)* <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7795/index.do>. This doctrine asserts that the ability of a child to make personal decisions ought to be based on their capacity to do so, rather than their chronological age.

Furthermore, the proposed amendments lowering the age from 18 to 16 for purpose of enabling a youth to apply to change their name and/or gender designation without parental consent are in alignment with the PEI *Consent to Treatment and Health Care Directives Act* (see <https://canlii.ca/t/54404>) age threshold, which provides that that anyone over 16 years of age who is capable may make a health care directive (s. 20(1)). It is additionally noteworthy that the PEI *Consent to Treatment and Health Care Directives Act* addresses the issue of consent (ss. 4, 5 and 6), as directly linked to a presumption of capacity (ss. 3 and 7), with no minimum age threshold.

Recommendations Regarding Change of Name Act – Office of the Child and Youth Advocate

The Office of the Child and Youth Advocate supports proposed amendments to the *Change of Name Act*, R.S.P.E.I. 1988, Cap. C-31, s. 4(1) and 5 (1), as provided by the Department of Justice and Public Safety as a progressive first step forward, and makes the following recommendations:

- 1) The Department of Justice and Public Safety expedite tabling a Bill in the PEI Legislature to support proposed amendments to the PEI *Change of Name Act*;
- 2) The Department of Justice and Public Safety remove the requirement under the PEI *Change of Name Act* for parental consent for youth who are 16 or 17 years of age and wish to legally change their name;
- 3) The Department of Justice and Public Safety eliminate or reduce the fees payable when a youth 16 or 17 years of age applies for a change of name;
- 4) The Department of Justice and Public Safety expedite assessment of the impacts of proposed amendments to the PEI *Change of Name Act* through application of a Child Rights Impact Assessment (CRIA), in consultation with the Office of the Child and Youth Advocate, to be completed and reported to the public within one year of enactment of the proposed amendments, with a view to assessing whether the age requirement should remain the same or be further amended; and
- 5) The Department of Justice and Public Safety, as a ‘special circumstances’ exception to public notification of a lawful change of name, develop and implement an applicant statement or statutory declaration deposing that the recorded change of name application is being completed in good faith in furtherance of a change in gender designation, to ensure privacy and avoid personal risk of harm, and for no fraudulent purpose.

Rationale

The Office of the Child and Youth Advocate is recommending that the Department of Justice and Public Safety expedite tabling a Bill in the PEI Legislature to support proposed amendments to the *Change of Name Act*. This is essential in our estimation since it has now been 18 months since the last date set for providing responses to the Consultation document, which was April 29, 2022 and

there are increasing episodes of age and gender expression discrimination occurring against trans and gender diverse children and youth in various sectors.

The proposed amendments to the PEI *Change of Name Act* would provide youth ages 16 and 17 with the legal ability to independently apply to change their name. If enacted, this amendment would serve to empower trans and gender diverse youth in the realization of their human rights pursuant to the UNCRC. This is a gradual and progressive first step, recognizing that ultimately a capacity regime may be a more rights-based criterion for determining eligibility to apply for a change of name in PEI. This lowering of the age threshold from 18 to 16 years of age is consistent with article 5 of the UNCRC and the consideration of a child's evolving capacity, as elucidated by the UN Committee on the Rights of the Child.

The elimination or reduction of fees for a 16 or 17-year-old youth who wishes to change their name would address the financial barriers preventing youth from seeking a name change without parental consent.

As the lowering of the age requirement from 18 to 16 is a prudent first step, the impacts of this amendment should be assessed over time to ascertain whether this new age threshold should remain in place or be further amended to allow for a different age or the implementation of a capacity regime.

Our Office also proposes a new amendment that the Department of Justice and Public Safety, as a 'special circumstances' exception to public notification, develop and implement an applicant statement or statutory declaration deposing that the recorded change of name is being completed in good faith, in furtherance of a change in gender designation, to ensure privacy and avoid personal risk of harm, and for no fraudulent purpose. This new amendment is required, in our estimation, since any legal change of name currently necessitates public notification in the Royal Gazette "except where special circumstances warrant." Such an amendment would make it clear that 'special circumstances' exist where the stated criteria are met.

Recommendations Regarding the Vital Statistics Act – Office of the Child and Youth Advocate

The Office of the Child and Youth Advocate supports proposed amendments to the *Vital Statistics Act*, R.S.P.E.I. 1988, Cap. V-4.1, s. 12(1)(b), 12(1.1), 16(1), 20(1)(a), 24(5)(c) and 32(1)(f), as provided by the Department of Justice and Public Safety as a progressive first step forward, and makes the following recommendations:

- 6) The Department of Justice and Public Safety expedite tabling a Bill in the PEI Legislature to support proposed amendments to the PEI *Vital Statistics Act*;
- 7) The Department of Justice and Public Safety remove the requirement for anyone 16 years and older to obtain a written statement from a medical practitioner to change the sex indicator on their birth certificate;
- 8) The Department of Justice and Public Safety add a new provision conferring jurisdiction on the PEI Supreme Court to waive a parental consent requirement in the best interests of a child applicant who is under 16 years of age;
- 9) The Department of Justice and Public Safety develop and implement policy to assist and support children under 16 years of age in applying for a waiver of parental consent;
- 10) The Department of Justice and Public Safety replace gender-specific language with gender-neutral language;
- 11) The Department of Justice and Public Safety eliminate or reduce the fees payable when a youth 16 or 17 years of age applies to obtain a change in gender designation and obtain an updated birth certificate; and
- 12) The Department of Justice and Public Safety expedite assessment of the impacts of proposed amendments to the PEI *Vital Statistics Act* through application of a Child Rights Impact Assessment (CRIA), in consultation with the Office of the Child and Youth Advocate, to be completed and reported to the public within one year of enactment of the proposed amendments, with a view to assessing whether the age requirement should remain the same or be further amended.

Rationale

The Rationale stated above to support the Office of the Child and Youth Advocate's Recommendations in respect of the *Change of Name Act* would also apply here to the *Vital Statistics Act*.

Since the doors of the Office of the Child and Youth Advocate opened on July 15, 2020, trans and gender diverse children and youth seeking advocacy support continue to express feelings of social

isolation and hopelessness. The United Nations Committee on the Rights of the Child recognizes the lived experience of societal discrimination for many transgender and gender diverse children and youth:

Rejection leaves trans and gender-diverse children and adolescents vulnerable to mental health problems, including feelings of isolation and depression, and can lead to self-harm and suicide. It is, therefore, crucial to create safe and affirming spaces where these young people can be directly supported to help them address the prejudice and discrimination they may face. (United Nations Committee on the Rights of the Child (CRC) et al., 2017. See <https://www.ohchr.org/en/press-releases/2017/05/embrace-diversity-and-protect-trans-and-gender-diverse-children-and>)

In addition to the various UNCRC articles previously cited, article 8 has specific application to the proposed amendments to the *Vital Statistics Act*. That article requires that “State Parties undertake to respect the right of the child to preserve his or her identity.” The United Nations Committee on the Rights of the Child has called upon governments to realize the rights of transgender and gender diverse children pursuant to article 8:

We call on States to facilitate quick, transparent and accessible legal gender recognition and without abusive conditions, guaranteeing human rights for all persons, respectful of free/informed choice and bodily autonomy. Coercive medical interventions/procedures should, therefore, never be employed. Regardless of their legal gender markers, young trans and gender-diverse people should be allowed to use their own names and pronouns, and to dress according to their self-defined gender identity and expression. (United Nations Committee on the Rights of the Child (CRC) et al., 2017. See <https://www.ohchr.org/en/press-releases/2017/05/embrace-diversity-and-protect-trans-and-gender-diverse-children-and>)

In the provision of individual advocacy to children and youth seeking support from the Office of the Child and Youth Advocate, as reiterated through consultative engagement with relevant community organizations, it is evident that many transgender and gender diverse children and youth do not have their right to preferred gender identity accepted and respected by their parents. Researcher Peter Dunne (2017) states:

A model of gender recognition which vests consent rights exclusively in parents ignores the well-documented precariousness in which many trans youth live. Existing research illustrates that trans minors are disproportionately represented among both homeless youth (Pollock and Eyere, 2012, p. 217) and children who are in state care (Kennedy, 2008, p. 288) For many reasons, including rejection and abuse, trans young persons are often estranged from their birth families (Hussey, 2014, p. 1134) and may

live on the streets, in informal accommodation or social services placements (Wahlquist, 2017). These children frequently have no contact with their parents, and an absolute requirement for parental consent would create an insurmountable bar to recognition.

(Dunne, 2017, p. 322. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3270387)

Our Office's proposed amendment to the PEI *Vital Statistics Act* calling for the removal of the requirement for anyone 16 years and older to obtain a written statement from a medical practitioner to change the sex indicator on their birth certificate is supported by the person's right to self-identification, having regard to their lived experience. This not something that can be observed or diagnosed by a medical practitioner.

Our Office supports a proposed amendment that would provide legal recourse for children under 16 years of age to make application to the PEI Supreme Court for an order waiving the parental consent requirement in the best interests of the child. Recognizing that this remedy would present navigation and other challenges to such children, our Office is also proposing an amendment that the Department of Justice and Public Safety develop and implement policy to assist and support children under 16 years of age in applying for a waiver of parental consent. We are envisioning that this could take the form of various court administration, advocacy, mediation and legal supports.

Our Office additionally supports a proposed amendment under the *Vital Statistics Act* replacing gender-specific language with more appropriate and respectful gender-neutral language.

Conclusion

As we approach National Child Day on November 20th, and recall the historical significance of the United Nations General Assembly adopting the UNCRC in 1989, it is the position of the Office of the Child and Youth Advocate that the Recommendations advanced by our Office in this written submission, many of which are in support of amendments already proposed by the Department of Justice and Public Safety, would be another important step forward in the progressive realization of children's human rights in PEI. The enactment of the proposed amendments would also go some distance in meeting the Department's stated intent, as set out in its consultation document, "to support a more inclusive gender designation process for Islanders."

Respectfully submitted on behalf of the PEI Office of the Child and Youth Advocate,



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Office of the Child and Youth Advocate/PEI