

Submission to the Standing Committee
on Justice Policy
Bill 165, An Act to establish and
provide for the office of the Provincial
Advocate for Children and Youth

Presented by Cheryl Milne, Staff Counsel
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Justice for Children and Youth (“JFCY”) is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights. JFCY prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. It also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth. The clinic also provides public legal education to youth and youth-serving agencies.

Justice for Children and Youth supports the enactment of Bill 165 as a positive step toward effective advocacy for the rights of children and youth in the province of Ontario. By empowering an independent advocate to specifically promote the views and preferences of children and youth, Ontario is moving in the right direction toward a comprehensive acknowledgement of their human rights.

JFCY is entirely supportive of the establishment of an independent voice for the rights of the most vulnerable children in Ontario. JFCY is all too familiar with the difficulties faced by young people in the care of children's aid societies and children's mental health facilities including rights violations and lack of resources. The current Office of the Child and Family Services Advocacy has done tremendous work in advocating for youth in our youth justice system through reviews that have highlighted the voices of those youth as well as participation in coroner's inquests. It has helped to publicize the sometimes dire situation faced by Aboriginal children in Ontario's north and the plight of children with complex disabilities who require intense services away from their families. The difficulties faced by the Office were well documented in the review completed for the Ministry of Children and Youth Services in August, 2004 (the "Review").¹ It is encouraging to see the recommendations from this report come to fruition in Bill 165.

Overall JFCY is supportive of the approach taken by the legislation. The definition of advocacy that emphasizes the promotion of the views and preferences of children and youth sets a tone that aims to empower young people and is consistent with Article 12 of the United Nations *Convention on the Rights of the Child* which states as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

¹ Whitehead, P., et al. (2004) *A New Model for Child & Youth Advocacy in Ontario*, prepared for the Ministry of Children and Youth Services.

The Act also addresses a key concern expressed in the Review that the role of the existing office was too vaguely defined. Bill 165 sets out clear powers and functions which make it clear that the Provincial Advocate has the capability to promote the rights of children in the Province, particularly the most vulnerable children and youth in some form of state care, and to educate children and their caregivers about those rights.

The comments that follow are focused on those areas which we believe need clarification or enhancement for better and more comprehensive advocacy for children and youth in the Province. We have also chosen not to repeat recommendations (except to the extent that we think specific emphasis should be made) that have been made by Defence for Children International-Canada whose report we have reviewed and support.² Those recommendations are attached as Appendix B to this submission.

Recommendations for Improvement

Preamble/Statement of Purpose

A preamble to legislation serves to provide guidance to interpretation of the legislation as a whole. A statement of purpose or declaration of principle serves a similar function but are distinct interpretative rules in respect of every provision of the legislation. For example, the preamble to the *Youth Criminal Justice Act*, establishes the overall aims of the legislation of accountability and rehabilitation as well as acknowledging the specific rights of young people under the *Canadian Charter of Rights and Freedoms* and the United Nations *Convention on the Rights of the Child*. That legislation also requires that a young person be dealt with in accordance with a more detailed declaration of principle. Similarly, the *Child and Family Services Act* sets out a statement of its purpose in which the paramount purpose is to “promote the best interests, protection and well-being of children”.

Bill 165 seeks to empower youth through the advocacy powers of the Provincial Advocate. A preamble which encompasses the overall aims of the legislation, to acknowledge the voice of children and youth in the province and to further acknowledge the special rights and interests of children and youth under the UN *Convention on the Rights of the Child* (the “*Convention*”) will help to provide guidance to the office and those with whom the Provincial Advocate will be interacting. The enactment of Bill 165 is an act that is consistent with and furthers the obligations of the Ontario government under the *Convention* to acknowledge the views and wishes of children and youth and in particular to undertake all “appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the *Convention*”. Specific reference to it, albeit only in a preamble, moves in the right direction toward legislative measures to promote the rights of children under the *Convention* and to promote the *Convention* itself. Bill 165 will be the most significant piece of legislation to address children’s rights in the Province. It is fitting that its governing principles should be premised on the most significant international human rights document affecting children in the province, the country and the world, and one which the government of Canada with the specific consent of Ontario has ratified.

RECOMMENDATION: Bill 165 should contain a preamble or statement of purpose which acknowledges the following:

- 1. WHEREAS children and young persons have special rights and freedoms including those in the *Ontario Human Rights Code, Canadian Charter of Rights and Freedoms, and the United Nations Convention on the Rights of the Child;***
- 2. WHEREAS it is acknowledged that children in the care of the state and institutions, young persons in the youth justice system, and children with complex special needs, require effective advocacy to protect their rights, promote their views and preferences, ensure the quality of services that they receive and to help prevent their abuse;**
- 3. WHEREAS information about the rights of children and young persons should be made available to children, young persons and their parents and caregivers;**

² Geigen-Miller, M. (2007) *Position on Bill 165: Provincial Advocate for Children and Youth Act, 2006*, Defence for Children International-Canada.

4. AND WHEREAS it is acknowledged that children and youth often need assistance to express their views and preferences in the context of the institutions providing services to them;

Definition of “child” and “young person” (s.1)

The proposed legislation adopts the definition of “child” under the *Child and Family Services Act*. In our view this is too restrictive and potential leaves out the young people who are over the age of 18 but still receiving services under that legislation. Although the aim of the legislation is to focus on the rights of children, there should remain discretion for the Provincial Advocate to be able to advocate for young people who continue to receive services beyond their 18th birthday, especially during the crucial transition to independence or to the receipt of adult services. A similar recommendation was made in the Review in respect of young persons in the youth criminal justice system and those still in receipt of child welfare services past age 18.³

RECOMMENDATION: the definition of “youth” should include a person over the age of 18 who is receiving services under the relevant legislation at the discretion of the Provincial Advocate.

Functions and Powers of the Advocate (ss. 13 and 14)

As noted by other advocacy groups, most notably Defence for Children International-Canada, Bill 165 excludes from the Advocate’s mandate specific reference to students in provincial residential schools, young people in police custody and young people in receipt of non-custodial services in the youth justice system. These three groups should be explicitly added to the functions of the Advocate. These additions to the functions listed in Bill 165 are consistent with the current jurisdiction of the Office of the Child and Family Services Advocacy and should be continued explicitly in the legislation.

³ Whitehead, *supra* at note 1, at p. 22.

JFCY agrees that the most vulnerable children are those in state care or receiving special services at home due to their complex needs. However, the Provincial Advocate for Children and Youth should also have the mandate to advocate for all children and youth in the province who are receiving provincial services, and in particular education and health. JFCY is aware of the complexities involved in empowering the Advocate to provide advocacy within independent school boards and health care providers. We believe that this is an opportune time to acknowledge that all children and youth are deserving of a voice in the systems that have such a significant impact on their lives. At the very least, the Advocate could serve an important function in addressing systemic complaints in these areas. By leaving such important jurisdictional issues to *possible* regulations in the future is to continue to treat children in the silo-like manner that the establishment of the Ministry of Children and Youth Services sought to minimize.

Whereas the current Office has had considerable experience advocating within the residential schools operated by the Province of Ontario, we would also suggest that the mandate of the independent Provincial Advocate also address other students in residential settings. For example, Justice for Children and Youth have acted for and advised young people who have attended residential private schools and who have complained to us about significant rights abuses from unprofessional treatment to forms of physical or emotional abuse. If the young person is over the age of 16 years, child protection services have no mandate to investigate. There is little scrutiny of the treatment of the students by the Ministry of Education beyond the curriculum. Whereas the vast majority of private schools, owing to the involvement of parents in their administration, are well-run, it is imperative that there be some avenue for the advocacy for the rights of children and youth in those few which require closer scrutiny.

It is quite reasonable to allow time for further consultation with the relevant service providers and young people on the implementation of these additional functions. JFCY strongly believes that by explicitly flagging these areas in the legislation, the impetus to conduct these consultations will be ensured. It is conceivable that proclamation of the

provisions we recommend could be delayed for a specific period of time to properly consider the implications. JFCY jointly, as a member of the Child Advocacy Project, has recommended a two step approach that would place the jurisdiction for education within the regulations under the proposed Act with a review by the Advocate with the goal of enshrining this jurisdiction within the legislation itself. In the following recommendation JFCY adds health and private residential schools to the recommendation made as part of CAP.

RECOMMENDATION: Section 13 should be immediately amended to include the following:

- 1. Amend s.13 (b) to read: “provide advocacy to young persons who are being dealt with under the *Ministry of Correctional Services Act* and the *Youth Criminal Justice Act*;**
- 2. Add the following section: provide advocacy to children who are pupils of provincial schools established under section 13 of the *Education Act*.**

RECOMMENDATION: Include education within the jurisdiction of the Provincial Advocate through the regulations made under the *Act*;

RECOMMENDATION: Following the passage of Bill 165, the Provincial Advocate should review the Act, and the current role of the Children’s Lawyer, in order to identify the best manner in which to include education, including private residential schools, and health services areas within the jurisdiction of the Provincial Advocate, and that the Act then be amended to include education and health within the Provincial Advocate’s jurisdiction.

RECOMMENDATION: Section 14 should be amended to be consistent with the addition of the jurisdictional areas described above.

Confidentiality, Privacy and Access to Information

First and foremost, the Provincial Advocate must have unfettered access to children and youth including the right to enter premises to communicate with children or youth without having to give notice in advance. In addition, the Act should state clearly the child’s right to contact the Provincial Advocate and to communicate with the Advocate privately. Although we agree in principle with the requirement that there be consent to

collection, use or disclosure of a young person's personal information, the Bill could be improved in such a way as to further the aims of advocacy for children and youth and at the same time empowering the young person by providing better protection to their personal records. In regard to these issues, we are in agreement with the recommendations of Defence for Children International – Canada.

One area that we wish to highlight is the disclosure of and/or access to records in the possession of service providers under the *Child and Family Services Act*. If the proposed legislation is relying upon the provisions of that Act for the rules applicable to disclosure, then there will be serious gaps in the process, as much of that legislation remains un-proclaimed. Justice for Children and Youth clients have consistently had difficulties accessing their Children's Aid Society files, absent a court proceeding. Those young people who do end up with the information from their files are often given file summaries that fail to contain the information they seek. Rarely are they permitted to simply review the files kept on them. The Advocate should have greater powers to access records than are currently afforded the child or youth under law or policy.

In addition, the provisions that reference the *Personal Health Information Protection Act* as setting the guidelines, are setting up potential barriers to information from the very service providers who are being reviewed. If a young person is a Crown ward and incapable of consenting to collection or disclosure of information, the substitute decision maker will in most cases be the Children's Aid Society. In the event there is no consent that is obtainable, and the information is in the hands of an agency or service provider, it might be unlikely that information will be able to be gathered absent court order which the Advocate will not have the mandate to obtain.

The role of the Advocate in respect of individual complaints is restrained by such privacy provisions in that there is no apparent power to undertake proceedings to compel disclosure of information. This also impairs the Advocate's ability to engage in meaningful reviews and systemic reports to the legislature. The Advocate's mandate

would be significantly enhanced for the benefit of children and youth with increased information gathering powers.

RECOMMENDATION: JFCY recommends the following amendments suggested by Defence for Children International – Canada:

Strike out clause 14(4) and substitute the following:

- (4) (a) The Advocate has the right to enter any place where a child or youth is receiving services described in section 13.**
- (b) Upon entering a place to communicate with a child or youth, the Advocate shall notify the person in charge of that place or the person who has custody or control of the child or youth.**

Amend clause 18 by striking it out and substitute:

A provision that establishes standards for the collection and use of person information that are similar to those contained in the *Freedom of Information and Protection of Privacy Act*. These standards should be compatible with the Advocate’s duty of confidentiality and right of access to documents.

Add the following clause:

- 18.1 (1) The Advocate shall have the power to examine or copy any record or log book in the possession of an agency, service provider or facility for the purpose of performing his or her functions and powers under this Act.**
- (2) Nothing in this section abrogates solicitor-client privilege.**

Independence and Co-operation

JFCY does not practice and has no direct experience in the area of labour relations law. However, we have direct experience acting for young people who find themselves in the middle of labour action and agree with Defence for Children International-Canada’s comments on the increased need for advocacy for children and youth who are affected by lock-outs, strikes and other labour actions. Children and youth in residential facilities are extremely vulnerable at these times. JFCY asks that this aspect of the transition be carefully addressed to ensure maximum independence of the employees of the new Provincial Advocate.

Another aspect of effective advocacy for children and youth, is the co-operation of service providers in respect of the work of the Provincial Advocate. The Review⁴ suggested that the legislation require co-operation of the service providers for children who fall within the mandate of the Advocate and make it an offence for any person to impose any penalty or sanction on any person who seeks to enforce their rights or who discloses information to the Advocate. Such provisions are found in the legislation governing advocates in the provinces of Manitoba and Newfoundland.⁵ Although both of these provinces grant an investigative function to the child advocate, it is important that such a provision be included to better enable the Advocate to respond to complaints and conduct reviews.

RECOMMENDATION: The legislation should require the co-operation of service providers and their employees who provide services for children who fall within the mandate of the Provincial Advocate and should make it an offence to interfere with the an Advocate carrying out the lawful functions of the Office.

Deputy Advocates

Through its work in the youth justice system and with a staff member on the Inter-Ministerial Provincial Advisory Committee, JFCY is well aware of the areas that might need special attention by the Provincial Advocate in respect of the most vulnerable children in the Province. Although JFCY does not have a legal practice that focuses on the needs of Aboriginal children in the province, it is well aware of the extraordinary needs of this vulnerable group of children, especially in Ontario's north. We recommend that the Provincial Advocate be empowered to appoint a Deputy Advocate in this specific area. We would also suggest that the young people within the youth justice system would benefit from this attention as well. The current office has done admirable work in the contexts of coroner's inquests, research and advocacy to publicize the circumstances of the

⁴ Review, *supra* note 1, at p. 41.

⁵ This legislation is found on pages 70 and 81 of the Review, *supra* note 1.

young people caught up in the youth justice system. Appointing a Deputy Advocate in this area would ensure continued attention and expertise in this area.

RECOMMENDATION: That the Provincial Advocate be empowered to appoint Deputy Advocates, particularly in respect of Aboriginal children and youth and Youth Justice.

Conclusion

Finally, we wish to comment on the children who, due to the complexity of their special needs, require services from different Ministries and service sectors, for example Ministry of Health and Long Term Care as well as Ministry of Children and Youth Services. The current Office has had a distinguished history of facilitating co-operation in the interests of these children through advocacy and the Inter-Ministerial Provincial Advisory Committee (IMPAC). Special mention should be made to providing assistance to children with complex needs within the legislation. JFCY supports the recommendations made by Defence for Children International – Canada and IMPAC in this regard.

JFCY is pleased to be able to make submissions on this important Bill to clarify strengthen the powers of the Provincial Advocate for Children and Youth. We look forward to working with the new Office in much the same way as we have in the past. We hope that the mandate and powers of the Advocate can be expanded as we suggest to better serve the needs of the most vulnerable children in Ontario.

APPENDIX A
SUMMARY OF RECOMMENDATIONS

1. Bill 165 should contain a preamble or statement of purpose which acknowledges the following:

- 1. WHEREAS children and young persons have special rights and freedoms including those in the *Ontario Human Rights Code, Canadian Charter of Rights and Freedoms*, and the United Nations Convention on the Rights of the Child;**
- 2. WHEREAS it is acknowledged that children in the care of the state and institutions, young persons in the youth justice system, and children with complex special needs, require effective advocacy to protect their rights, promote their views and preferences, ensure the quality of services that they receive and to help prevent their abuse;**
- 3. WHEREAS information about the rights of children and young persons should be made available to children, young persons and their parents and caregivers;**
- 4. AND WHEREAS it is acknowledged that children and youth often need assistance to express their views and preferences in the context of the institutions providing services to them;**

2. The definition of “youth” should include a person over the age of 18 who is receiving services under the relevant legislation at the discretion of the Provincial Advocate.

3. Section 13 should be immediately amended to include the following:

- 1. Amend s.13 (b) to read: “provide advocacy to young persons who are being dealt with under the *Ministry of Correctional Services Act* and the *Youth Criminal Justice Act*;**
- 2. Add the following section: provide advocacy to children who are pupils of provincial schools established under section 13 of the *Education Act*.**

4. Include education within the jurisdiction of the Provincial Advocate through the regulations made under the *Act*;

5. Following the passage of Bill 165, the Provincial Advocate should review the Act, and the current role of the Children’s Lawyer, in order to identify the best manner in which to include education, including private residential schools, and health services areas within the jurisdiction of the Provincial Advocate, and that the Act then be amended to include education and health within the Provincial Advocate’s jurisdiction.

6. Section 14 should be amended to be consistent with the addition of the jurisdictional areas described above.

7. JFCY recommends the following amendments suggested by Defence for Children International – Canada:

Strike out clause 14(4) and substitute the following:

(4) (a) The Advocate has the right to enter any place where a child or youth is receiving services described in section 13.

(b) Upon entering a place to communicate with a child or youth, the Advocate shall notify the person in charge of that place or the person who has custody or control of the child or youth.

Amend clause 18 by striking it out and substitute:

A provision that establishes standards for the collection and use of person information that are similar to those contained in the *Freedom of Information and Protection of Privacy Act*. These standards should be compatible with the Advocate's duty of confidentiality and right of access to documents.

Add the following clause:

18.1 (1) The Advocate shall have the power to examine or copy any record or log book in the possession of an agency, service provider or facility for the purpose of performing his or her functions and powers under this Act.

(2) Nothing in this section abrogates solicitor-client privilege.

8. The legislation should require the co-operation of service providers and their employees who provide services for children who fall within the mandate of the Provincial Advocate and should make it an offence to interfere with the an Advocate carrying out the lawful functions of the Office.

9. That the Provincial Advocate be empowered to appoint Deputy Advocates, particularly in respect of Aboriginal children and youth and Youth Justice.

APPENDIX B

RECOMMENDATIONS BY DEFENCE FOR CHILDREN
INTERNATIONAL - CANADA

<http://dci-canada.org/CARIO/Bill165.pdf>