Mary Birdsell
Executive Director

55 University – Suite1500
Toronto, ON M5J 2H7
T: 416-920-1633
www.jfcy.org

birdsem@lao.on.ca

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Submissions on Bill 89
Supporting Children, Youth and Families Act, 2016
Legislative Assembly of Ontario - Standing Committee on Justice Policy

By email: Christopher Tyrell - ctyrell@ola.org

Please accept the following submissions by Justice for Children and Youth, regarding Bill 89 – *Supporting Children, Youth and Families Act*, 2016

Outline

These submissions are presented in 5 parts:

A - an introduction to our organization and expertise;

B - brief comments on the purpose and role of Bill 89;

C - a discussion of cornerstone elements of a necessary child rights culture shift;

D - summary comments on key necessary amendments; and

E - a detailed list and discussion of all necessary amendments to Bill 89 (which is attached in Schedule 1).

A - Who We Are: Justice for Children and Youth (JFCY)

JFCY is a specialty legal clinic funded by Legal Aid Ontario. We are a child rights organization. For almost 40 years our practice has focused exclusively on the legal issues facing children and youth. We are the only such organization in Canada. We provide legal services, including legal information, advice and representation to low-income children and youth across Ontario in a variety of legal areas including

child welfare, youth criminal justice, education, child support, social assistance, privacy, health, mental health, immigration, and others. We also provide public legal education for young people, and adults, including professionals, who work with young people; and engage in law reform initiatives regarding child and youth rights.

In addition to providing direct service to individual youth, JFCY acts in 'test case' litigation to assist courts in addressing child and youth rights issues – including acting as *amicus curiae*, and intervening at Courts of Appeal and the Supreme Court of Canada.

Most of our clients have multiple legal concerns, and come to us with complex personal, social and legal issues. JFCY clients are frequently involved in the child welfare system - they are often Society or Crown Wards, are otherwise in care, or their families are accessing voluntary services. Our clients are also frequently involved in the youth criminal justice system, many are affected by both systems simultaneously. Further, our clients are often facing legal issues in schools, in the mental health system, and in many other contexts including social welfare, employment, and housing. They face social, legal, and historical discrimination and barriers in many contexts.

JFCY also operates a unique legal service that is specifically directed at homeless, street involved and unstably housed young people – Street Youth Legal Services (SYLS). For almost 20 years, SYLS has provided legal services to street involved young people, 16 – 24 years old, on a wide range of legal matters. SYLS provides legal education to street youth and street youth-serving agency staff, and has taken part in research, advocacy and litigation on issues affecting street-involved young people. A key component of the SYLS program is providing legal options to unstably housed young people to help them find the support necessary to stabilize their lives. Many of these young people, although involved in the child protection / welfare system, still find themselves homeless.

Our submissions and recommendations are based on our unique perspective and extensive experience providing services, education and advocacy for children and youth across many legal contexts.

B - Bill 89: Challenges, purpose and opportunity

We commend the Government for proposing new legislation that:

- puts children at the centre of the child protection system;
- recognizes that children's rights are an important part of any system designed to safeguard their interests;
- implements the important recommendations of the Inquests into the deaths of Katelynn Sampson and Jeffrey Baldwin; and
- seeks to ensure that 16 and 17 year old children are offered access to protection services.

Promoting a culture respectful of, and attentive to, child and youth rights is challenging. Society often struggles to meaningfully treat children 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)[1], is acknowledged by the Supreme Court of Canada as being the most universally accepted human rights instrument in history.[2] Giving life to this articulation of children's human rights requires both a culture shift and a rigorous attention to detail in crafting appropriate legislation.

Child protection regimes have an inauspicious history of failing to adequately recognize and support the rights of children. As a general matter, the child welfare system has treated children and young people like property, has failed to respect

[1] *Convention on the Rights of the Child, 1989,* C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25,
[2] *R. v. Sharpe,* [2001] 1 S.C.R. at para 177.

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; the over representation of racialized, socially and economically disadvantaged and isolated children and families; deaths of children while in the care of protective services; the over-representation of children with previous involvement in child welfare among homeless youth; the overrepresentation of LGBTQI2S youth in the child welfare system, and; the overrepresentation of children involved with child welfare in the youth and adult criminal justice systems, including incarcerated young people.

We stand at a moment of tremendous opportunity for a sea change in the respect and dignity we offer to children when we seek to protect them; a moment of tremendous opportunity to meaningfully participate in truth and reconciliation. We ask this Government to dedicate the rigour required for the task of legislative drafting, in order to ensure that we achieve the change in the child welfare system that children require.

C - Culture Shift: Moving forward with children and human rights at the centre

We need a major culture shift in the area of child protection: to move from focussing primarily on the system to focusing primarily on the child and their 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 in danger of harm, and the supports that we 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.

Above all, our legislation must ensure that we do no harm. However, we know that in the past we have done tremendous harm.

To foster a child rights culture shift, it is our submission that there are 4 thematic cornerstones that must be present throughout the new legislation:

1. **It must be child rights focused**. There must be meaningful language and recognition of children's rights throughout the legislation. A meaningful recognition of all rights in the UNCRC, including: the right to protection from harm, the right to a voice and meaningful participation in decisions that affect them, a recognition of the evolving capacities of children, and the right to culture, heritage and identity.

2. **It must be trauma informed.** The legislation must acknowledge that the children we seek to protect have 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 where they are at," respect their dignity and choice, their ability to participate or refuse to participate, their evolving capacities, and the legal rights that belong to them in other contexts (eg. *Health Care Consent Act*, *Personal Health Information Protection Act*, *Children's Law Reform Act*, and in the common law). We must provide services that are appropriate and beneficial to children – beneficial and supportive from their point of view. If a child is not responding to the service we are providing, we must not resort 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.

3. **It must be focused on truth and reconciliation** for Indigenous children and families, and it must be grounded in **anti-oppression principles** in order to ameliorate social, economic, race-based and other forms of discrimination, and social exclusion.

4. **It must integrate recommendations from the Inquests** into the deaths of children in our care over the last few decades, including James Lonnee, David Meffe, William Edgar, Ashley Smith and others.

D - Overview of main areas for necessary amendments

In our review of the *Supporting Children, Youth and Families Act*, 2016, we have identified places where we feel the legislation needs to be amended in order to meet these requirements. Building on the general themes developed above, and before we get to our detailed list of proposed amendments set out in Schedule 1, we set out in this section a general overview of four key areas for amendment (which are further developed, along with others, in Schedule 1).

1. Child rights foundation: ensure child rights language

Including the language of "rights" throughout the legislation is necessary to promote and ensure a rights-respecting environment and culture. We have included specific examples throughout our proposals in Schedule 1 where language should be changed to meet this need. For example, the Bill uses the expression "views and wishes" – we propose that in each instance the phrase should read "views, wishes, and rights".

Additionally we propose an end to using the language of "residential placements" and "residential services" as it harkens back too directly to "residential schools". We propose that this language be changed to "housing placements" and "housing services". We also believe that the language of "housing" is more accurate in terms of what service is being provided – it is shelter, but other services must accompany

the housing in order for us to meaningfully provide protective services to our children.

2. Respect for evolving capacities and meaningful participation of children

As children grow, develop and mature, their "capacities" evolve. Meaningful participation will look different as a child grows and develops. The UNCRC recognizes the right to respect for the evolving capacities of children, and the right to have a voice and to meaningfully participate in decisions that affect the child. The UNCRC requires that we respect all rights as interconnected and indivisible. So we must respect, 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, to have their evolving capacities respected, etc., all at the same time.

There are many instances where the Bill does recognize these interconnected rights: a child's consent is required for adoption at age 7, once a child is 12 they are generally entitled to participate in hearings, and there is the very welcome recognition that services need to be available for 16 and 17 year olds even if they have not previously received services. We make a variety of proposals that seek to ensure that children's evolving capacities and participation are respected consistently.

Significantly, we propose that services to 16 and 17 years olds must be provided only with their consent. In order for protective services to be meaningful, supportive, helpful, and respectful, 16 and 17 year olds must be able to consent or refuse to receive services. We addressed this issue extensively in our oral submissions to the Committee. We propose a number of amendments that address this issue and these are detailed in our Schedule 1.

3. Prohibition of mechanical restraints, and use of secure-isolation / secure de-escalation only as a last resort

In line with an evolving public and professional understanding in a number of contexts, including mental health settings and adult incarceration settings, we propose the prohibition on the use of mechanical restraints, and the use of secure de-escalation (or solitary) rooms. In the alternative, if mechanical restraints and secure de-escalation rooms is to continue, the resort to their use must be limited so that they are only used in emergency settings and for the shortest periods of time (in any event never more than an hour). The use of mechanical restraints and de-escalation rooms are the most dramatic, intrusive, and harsh ways to deprive another person of their liberty, agency and dignity. There is no context in which these techniques do not feel punitive for the person on whom they are forced. There is a growing understanding that these techniques are experienced as traumatic, and can have lasting negative impacts on children and adults, even when used infrequently.

In order to honour recommendations from numerous child death Inquests, including James Lonnee, David Meffe, William Edgar, and Ashley Smith – all of whom died in the context of the use of mechanical restraints or seclusion rooms – we must reconsider our use of these techniques.

4. Rights to "Sibling access", and enhanced protection of the sibling relationship

Children in care have a right to family and to identity. Relationships with siblings are significant, lifelong relationships that are all too often the casualties of child protection system involvement. The severing and loss of these relationships are often overlooked or unintended. We propose amendments to the Bill to ensure that we take great intentional care to protect sibling relationships, and the possibility of future sibling relationships (eg. when very young children are involved), regardless of the nature of the child protection services provided, and regardless of what is

happening with the adults concerned. We must start with the understanding and presumption that maintaining sibling relationships is in the best interest of all affected children. This has in fact been adopted in Ontario case law related to sibling access.[3]

E - Detailed List of Necessary Amendments (see Schedule 1)

Attached in Schedule 1 is a detailed list of the amendments we believe are necessary to move Ontario's child protection regime to a place that adequately protects the rights of children and young people in Ontario.

JUSTICE FOR CHILDREN AND YOUTH

[3] *Children's Aid Society of Oxford County v. M.(T.),* [1999] O.J. No. 5867 at paras 24, 34-35; *Children's Aid Society of the Niagara Region v. D.M.,* [2002] O.J. No. 1461, para 99-100; *CAS Niagara Region v. J.C,* [2007] OJ No. 1058 at para 26.

SCHEDULE 1: SPECIFIC RECOMMENDATIONS & COMMENTARY

PREAMBLE and PART I – PURPOSES AND INTERPRETATION

COMMENTARY

The preamble includes important recognition of children as the centre of service provision, and a recognition that the system must at its core: 1) recognize children as independent rights holders and take a rights-based approach to providing service to children; 2) incorporate the United Nations *Convention on the Rights of the Child*, the United Nations *Declaration on the Rights of Indigenous Peoples*; 3) take an anti-racist and anti-oppression approach; and 4) take a truth and reconciliation approach.

We applaud the aspirational statements contained in the Act. As we are all aware, a culture shift is being sought by the enactment of the *Supporting Children Youth and Families Act*. In order to ensure the impact of these core values we propose amendments that will firmly secure their adherence in the legislated framework. Rights based language must be more purposefully included throughout the legislation. Without strong and clear rights based language the approach will not be realized.

Throughout the Act we propose making specific reference to children's rights. Additionally, to ensure a robust rights respecting approach it must be very clear that rights that apply to children in other legislative and common law contexts also apply in the context of this Act.

Throughout the Act, in conformity with a modernization of and a truth and reconciliation approach to this legislation, the language of "residential" services should be recognized as potentially offensive and associated with the historical harm of residential schools. We recommend a change from the language of "residential services" to "housing services". This is also

more consistent with the French language version that uses the phrase: “placement en etablissement”.

It is also important for the Bill to recognize the disproportionate criminalization and over-incarceration of youth who are receiving protective services. The *Youth Criminal Justice Act* (*YCJA*), emphasizes that custody should not be used as a substitute for appropriate child protection, mental health, or other social measures. In practice, however, we see that youth in care continue to be overrepresented in the criminal justice system. We propose an amendment that explicitly states that in response to behaviour of youth in care, the criminal justice system should be used as a last resort, and not as a substitute for appropriate child protection services and supports.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

PURPOSES

1. (1) The paramount purpose of this Act is to promote the best interests, protection, **rights** and well-being of children.

(1.1) This Act shall be interpreted and applied in a manner that complies with the United Nations *Convention on the Rights of the Child*, and the United Nations *Declaration on the Rights of Indigenous People*

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1. (2) The additional purposes of this Act, so long as they are consistent with the best interests, protection, **rights** and well-being of children, are to recognize the following:

[…]

3. Services to children and young persons ~~should~~ **shall** be provided in a manner that,

[…]

vii. respects the child as an independent rights holder, whose dignity, humanity, right to be free from discrimination, to be protected from harm, to have their evolving capacities respected, and recognizes that

these and other children's rights are interconnected and indivisible, and

viii. respects and ensures enforcement of the rights that belong to children in other statutory and common law frameworks.
[…]

7. Appropriate sharing of information, including personal information, in order to plan for and provide services is essential for creating successful outcomes for children and families. **Appropriate sharing of information requires respect for and compliance with legal frameworks that protect the privacy of information including children's rights to privacy.**

8. Provision of protective services should include all necessary forms of care and support to assist children to grow to adulthood in a positive way. The over-use of the criminal justice system in response to the behaviour of children in care is to be remedied. Resort to the criminal justice system should only occur as a last resort, and not as a substitute for appropriate care, service and support.

INTERPRETATION

2. (1) In this Act,

[…]
"Children's Lawyer" may include another competent lawyer chosen by the child or young person, unless the reference to the Children's Lawyer is in the context of a function or responsibility that can only be performed by the Children's Lawyer

~~"residential care"~~ **"housing care"** means boarding, lodging and associated supervisory, sheltered or group care provided for a child away …; ("soins en établissement")

~~"residential placement"~~ **"housing placement"** means a place where residential care is provided; ("placement en établissement", "placé dans un établissement")

PART II – CHILDREN'S AND YOUNG PERSONS' RIGHTS

COMMENTARY

Part II sets out a number of overarching rights of children and young people. The rights already included in the Bill are important, but incomplete.
(See **s.3** of the Bill)

There should be a presumption in favour of access and openness.
(See **s.9(2)** of the Bill)

Part II guarantees children access to advocates, the Ombudsman, and even members of parliament. It is equally important that a child or young person has access to their lawyer.
(See **s.10(3)** of the Bill)

It is unclear from the current Bill who performs an "assessment" to determine incapacity in the context of providing consent for certain agreements. The capacity determination must be articulated more clearly. The absence of capacity can only be determined by a health practitioner, subject to review under the *Health Care Consent Act*.
(See **s.20(3)** of the Bill)

No services should be provided to anyone 16 or older without that person's consent. Additionally, the Act should make clear that where a young person has withdrawn from parental control, it is the young person's consent, not the parent's consent that is the relevant consideration.
(See **s.21(1)** of the Bill)

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

RIGHTS OF CHILDREN AND YOUNG PERSONS RECEIVING SERVICES

3. Every child and young person receiving services under this Act has the following rights:

[…]

7. To all rights granted under the *United Nations Convention on the Rights of the Child*.

8. To be provided opportunities and supports to plan for their transition out of the care of a Children's Aid Society, either as a young person or adult.

9. To be informed of their legal rights and any supports or assistance available to them to pursue these rights.

10. To be supported in the exercise of their legal rights and entitlements, including but not limited to rights under the *Health Care and Consent Act*, *Personal Health Information Protection Act*, *Youth Criminal Justice Act*, and the *Immigration and Refugee Protection Act*.

RIGHTS OF CHILDREN IN CARE

7. (1) For greater certainty, the rights under section 3 of a child in care apply to decisions affecting them, including decisions with respect to,

[…]
(c) the child's or young person's discharge from a ~~residential~~ **housing** placement or transfer to another ~~residential~~ **housing** placement.

(2) The child's or young person's views with respect to the decisions described in subsection (1) shall be given due weight, in accordance with the child's or young person's age and maturity, **and in recognition of the evolving capacities of the child,** as required by paragraph 2 of section 3.

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8. Upon admission to a ~~residential~~ **housing** placement, a child in care has a right to be informed, in language suitable to their understanding ~~and to the extent that is practical given their level of understanding,~~ of,

(a) their rights under this Part;
[…]

(f) the rules governing day-to-day operation of the ~~residential~~ **housing** care, including disciplinary procedures.

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8. (1) Every service provider shall post in a conspicuous, accessible place, the rights which a child is guaranteed under s. 3-8, 17(1), 63, 64, 65, 149, in child appropriate language.

8. (2) Where a service provider becomes aware that a child or young person objects to their placement, the service provider shall within 72 hours:

> **a) notify the child of their rights consistent with s. 63 & s. 65 of the Act;**
>
> **b) notify the child of their right to contact the Provincial Advocate for support and assistance; and**
>
> **c) notify the local Residential Placement Advisory Committee.**

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9. (2) A child in care who is in extended society care under an order made under paragraph 3 of subsection 98 (1) or clause 113 (1) (c) is ~~**not**~~ entitled as of right to speak with, visit or receive visits from a member of their family, **unless a court orders otherwise.** ~~except under an order for access made under Part V (Child Protection) or an openness order or openness agreement made under Part VIII (Adoption and Adoption Licensing).~~

[…]

(6) a child or young person shall be informed of their right to speak to the Provincial Advocate for Children and Youth or a member of the Provincial Advocate for Children and Youth's staff, or their lawyer if they disagree with a decision to read or examine their communications before such reading or communication is carried out.

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10. (3) Despite subsection (2), the service provider may not suspend visits from,

> (a) the Provincial Advocate for Children and Youth and members of the Provincial Advocate for Children and Youth's staff;

(b) the Ombudsman appointed under the Ombudsman Act and members of the Ombudsman's staff; ~~or~~

(c) a member of the Legislative Assembly of Ontario or of the Parliament of Canada, **or**

(d) a child's or young person's lawyer,

unless the provincial director determines that suspension is necessary to ensure public safety or the safety of staff or young persons in the facility.

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12. (2) A child in care has a right,

(a) to participate in **and contribute to** the development of their individual plan of care and in any changes made to it;

(b) to **access** ~~receive~~ meals **and other food** that are well-balanced, of good quality and appropriate for the child or young person;
[…]

(g) to continue, develop, and maintain relationships with peers, friends, siblings, and adults who form part of the child's support network.

(h) if the child is not a citizen of Canada, to be advised of their status, and to be supported to engage a lawyer who can assist the child to make any and all available claims under the *Immigration and Refugee Protection Act*, *Citizenship Act,* or any subsequent legislation.

SERVICE PROVIDERS' DUTIES IN RESPECT OF CHILDREN'S AND YOUNG PERSONS' RIGHTS

14. (1) Service providers shall respect the rights of children and young persons as set out in this Act **and any other applicable legislation, regulations, or international treaties.**

COMPLAINTS AND REVIEWS

17. (1) A service provider who provides ~~residential~~ **housing** care to children or young persons or who places children or young persons in ~~residential~~ **housing** placements shall establish …

CONSENTS AND VOLUNTARY SERVICES

20. (3) A person's nearest relative may give or withdraw a consent or participate in or terminate an agreement on the person's behalf if it has been determined on the basis of an assessment, not more than one year before the nearest relative acts on the person's behalf, that the person does not have capacity.

(3.1) For clarity, an assessment of capacity under subsection (3) refers to an assessment by a health practitioner in accordance with the *Health Care Consent Act,* including the right of the person to seek a review of the assessment under s.32 of the *Health Care Consent Act.*

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21. (1) A service provider may provide a service to a person who is 16 or older only with the person's consent. ~~except where the court orders under this Act that the service be provided to the person.~~

(1.1) Where a young person has withdrawn from parental control, a service provider shall not involve the young person's parents in the service(s) in any way without the express, written consent of the young person.

(2) A service provider may provide ~~residential~~ **housing** care to a child,

(a) if the child is younger than 16, with the consent of the child's parent;

(a.1) if the child is 16 or older, with the consent of the child; and
[…]

**** Throughout subsections 21(5) and (6) the word "residential" should be replaced with "housing" ****

PART III – FUNDING AND ACCOUNTABILITY

COMMENTARY

This Part only allows children 12 or older to request reviews of their residential placement. Such reviews should not be limited by age, but should instead be triggered by the capacity of the individual child.

The results and recommendations of any reviews should be made available to the child.

Child complainants should have a choice between s. 63 and s. 65 based on whether they are comfortable with an informal process or not. The mandate of the complaints system should function as a community watchdog of residential / housing placements. Children must have direct access to the more formal process of the Board where they can challenge the institutional nature of their care. Otherwise, significant complaints may remain unresolved for a prolonged time frame which is inconsistent with meaningful access to justice.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

REVIEW BY RESIDENTIAL PLACEMENT ADVISORY COMMITTEE

63. (1) An advisory committee shall review,

> […]
> (b) every residential placement of a child ~~12 or older~~ **who is capable of understanding the nature and consequences of a review and** who objects to the residential placement and resides within the advisory committee's jurisdiction,

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63. (3) An advisory committee shall conduct a review under this section in an informal manner and in the absence of the public, and in the course of the review ~~may~~,

> (a) **where the child objects to the placement, shall** interview the child

(a.1) may interview members of the child's family and any representatives of the child and family;

(b) **shall** interview persons engaged in providing services and **may interview** other persons who may have an interest in the matter or may have information that would assist the advisory committee;

(c) **shall** examine documents and reports that are presented to the committee; and

(d) **shall** examine records relating to the child and members of the child's family that are disclosed to the committee.

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63. (5) In conducting a review, an advisory committee shall,

[…]
(g) consider whether any administrative or staffing issues exist that may render the placement inappropriate, including but not limited to a pattern of complaints or any negative reports produced by the Provincial Advocate.

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64. (1) An advisory committee that conducts a review shall advise the following persons of its recommendations as soon as the review has been completed:

[…]
4. The child, ~~where it is reasonable to expect the child to understand~~ **in a manner appropriate to the child's age and level of maturity.**

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65. (1) A child who is ~~12 or older~~ **capable of understanding the nature and consequences of an application to the Board** and is in a residential placement to which the child objects may apply to the Board for a determination of where the child should remain or be placed, ~~if the residential placement has been reviewed by an advisory committee under section 63 and,~~

~~(a) the child is dissatisfied with the advisory committee's recommendations; or~~

~~(b) the advisory committee's recommendations are not followed.~~

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65. (4) The parties to a hearing under this section are,

[…]

(b) **unless the child has withdrawn from parental control,** the child's parent or, where the child is in a society's lawful custody, the society;

PART V – CHILD PROTECTION

COMMENTARY

We are pleased to see important change regarding the rights of children in this part. The recognition that children have rights in other legal contexts that should be clearly recognized here is an important component of a rights respecting approach. We propose amendments to ensure consistency on this issue.

We are very pleased to see new access to services provided for 16 and 17 year olds. However, we are very concerned that there is an incomplete recognition of the evolving capacities and unique developmental and legal status of these older children. We submit that a rights based, trauma informed and harm reduction approach to 16 and 17 year olds requires that their consent be obtained before imposing child protection services on them.

The consent of 16 and 17 year olds is clearly required in s. 101 regarding access. We propose amendments that would see consent required of 16 and 17 year olds in all sections under this part.

We propose amendments that consistently recognize and respect the unique developmental and legal status of 16 and 17 year olds, that improve their access to services when they are directly seeking services, and that safeguard their sense of personal agency and dignity so that supports offered to them will be useful and meaningful.

With that said, we are very concerned about the inclusion of a separate subsection - 73(2)(o) – that would leave the circumstance of 16 and 17 year olds to the regulations. We propose that this section be deleted.

We propose amendments that will improve the awareness and actualization of the right of children to “sibling access”. That is that siblings are entitled to maintain relationships with one another, separate from any limitations being placed on the contact between children and adults. Even when a child is being removed from the care of a parent, siblings must be encouraged to, and be able to seek access to one another. There should be a sibling access order included in all protection orders, which can be rebutted if in the individual case it is contrary to the best interests of the affected children.

Regarding the Duty to Report it is our submission that as long as the consent of children who are 16 and 17 is required for any action under this part, then the duty to report should be universally applicable to all children. However we propose that Regulations should be developed directing the way in which child welfare agencies respond to reports made regarding 16 and 17 year olds. In order to respect the dignity and agency of older children / teenagers we propose that once a report has been received by a child welfare agency, the agency will begin by contacting the child directly, and the investigation must be limited to contact with the child, unless the child consents to contact with additional 3rd parties, including parents, family members, and / or service providers.

Section 137 makes it an offence to "detain or harbour" a child. While we agree that it should be an offence to detain a child, we propose that the word "harbour" be deleted from this section. There is a substantial risk that this is overly broad – a child might, on their own volition, seek out a person if they consider that person to be a person of safety. A person that a child considers to be a person of safety should not be penalized for assisting that child. Relationships that a child considers to be protective should be safeguarded and possibly encouraged. JFCY supports submissions made by other interested parties that raise a concern that people from racialized communities are vulnerable to an overbroad and punitive approach to their efforts to be supportive and helpful to a child through the use of the word "harbour" in this section.

We propose amendments to change the language of "residential" placements to "housing placements" in order to modernize the language, and get away from terminology similar to "residential schools". We have not included each such reference in the detailed sections below – but continue to recommend this change in language.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

INTERPRETATION

73. (2) A child is in need of protection where,

[…]

~~(o) the child is 16 or 17 and a prescribed circumstance or condition exists.~~

73. (3) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that the person considers relevant:

> 1. The child's views and wishes**, and rights** given due weight in accordance with the child's age and maturity.
>
> […]
> 9. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent, **and the merits of a plan proposed by the child if there is one**.

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73. (5) For the purposes of the definition of "place of safety" in subsection (1), a person's home is a place of safety for a child if,

> (a) the person is a relative of the child or a member of the child's extended family or community; and
>
> (b) a society or, in the case of a First Nations, Inuk or Métis child, a child and family service authority, has conducted an assessment of the person's home in accordance with the prescribed procedures and is satisfied that the person is willing and able to provide a safe home environment for the child; **and**
>
> **(c) supports may be provided to assist a willing person to be able to provide a safe home environment for the child.**

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74. (2) No temporary care agreement shall be made in respect of a child who is 12 or older unless the child is a party to the agreement.

(2.1) Any agreements with 16 or 17 year olds shall be made under section 76.

(3) Subsection (2) does not apply where it has been determined on the basis of an assessment, **done by a qualified health care practitioner,**

not more than one year before the agreement is made, that the child does not have capacity to participate in the agreement because of a developmental disability.

---

75. (3) Where notice of a wish to terminate a temporary care agreement is given by or to a society under subsection (1), the society shall as soon as possible, and in any event before the agreement terminates under subsection (2),

> (b) where the society is of the opinion that the child would be in need of protection if returned to the person referred to in clause (a), bring the child before the court under this Part to determine whether the child would be in need of protection in that case**, subject to section 76 (approach to be taken for 16 and 17 year olds).**
>
> […]

(4) Where a temporary care agreement expires or is about to expire and is not extended, the society shall, before the agreement expires or as soon as practicable thereafter, but in any event within 21 days after the agreement expires,

> […]
> (b) where the society is of the opinion that the child would be in need of protection if returned to the person referred to in clause (a), bring the child before the court under this Part to determine whether the child would be in need of protection in that case**, subject to section 76 (approach to be taken for 16 and 17 year olds).**

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76. (1) The society and a child who is 16 or 17 may make a written agreement for services and supports to be provided for the child where,

(a) the society has jurisdiction where the child resides; and
(b) the society has determined that the child is or may be in need of protection;
(c) ~~the society is satisfied that no course of action less disruptive to the child, such as care in the child's own home or with a relative, neighbour or other member of the child's community or extended family, is able to adequately protect the child~~

(1.1) In an agreement for services, a society:

(a) shall treat a child's request for services as a demonstration of need; and

(b) shall not require parental involvement as a term of the agreement.

LEGAL REPRESENTATION

77. […]
legal representation is deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes, **and rights,** given due weight in accordance with the child's age and maturity, that the child's interests are otherwise adequately protected.

PARTIES AND NOTICE

78. (4) A child 12 or older who is the subject of a proceeding under this Part is entitled to receive notice of the proceeding and to be present at the hearing, unless the court is satisfied that being present at the hearing would cause the child emotional harm **that cannot be reasonably accommodated** and orders that the child not receive notice of the proceeding and not be permitted to be present at the hearing. **The child is entitled to make submissions or express their views and wishes to the court regarding possible emotional harm.**

COMMENCING CHILD PROTECTION PROCEEDINGS

80. **(2.1) if the child is 16 or 17, the child shall not be brought to a place of safety unless the child consents.**

[…]

(7.1) if the child is 16 or 17, the child shall not be brought to a place of safety unless the child consents.

SPECIAL CASES OF APPREHENSION OF CHILDREN

81. (1) A justice of the peace may issue a warrant authorizing a child protection worker to bring a child to a place of safety if the justice of the peace is satisfied on the basis of a child protection worker's sworn information that,

[…]
(c) if the child is 16 or 17 years old, the child has consented to being brought to a place of safety.

[…]
(4) A peace officer or child protection worker may without a warrant bring the child to a place of safety if the peace officer or child protection worker believes on reasonable and probable grounds that

[…]
(c) if the child is 16 or 17 years old, the child has consented to being brought to a place of safety.

---

83. (2) A person who apprehends a child under subsection (1) shall,

(a) at the earliest possible opportunity seek to understand the child's views and opinions about why the child has or was withdrawn from the person's care, and

(b) unless action under subsection (7) is appropriate, return the child to the person with care and control of the child as soon as practicable and where it is not possible to return the child to that person within a reasonable time, take the child to a place of safety.

(2.1) A person who apprehends a child under subsection (1) shall advise the child of their right to contact the Provincial Advocate for Children and Youth to obtain information about their rights.

HEARINGS AND ORDERS

85. (10) No person except a party or a party's lawyer **or a child's lawyer** shall be given a copy of a transcript of the hearing, unless the court orders otherwise.

91. (4) The court shall not make an order under clause (2) (c) or (d) unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm and that the child cannot be protected adequately by an order under clause (2) (a) or (b).

(4.1) If the child is 16 or 17, the court shall not make an order under clause (2) without the child's consent.

[…]

(6) A temporary order for care and custody of a child under clause (2) (b) or (c) may impose,

> […]
> (c) reasonable terms and conditions on the society that will supervise the placement **and support the child,** but shall not require the society to provide financial assistance or to purchase any goods or services**; and**

(6.1) A temporary order for care and custody of a child under clause (2) (b) or (c) shall include a term for sibling access granting access between the child and all siblings, and sibling access shall only be limited if there is a determination that access is contrary to the best interests of an affected child.

ASSESSMENTS

95. (3) An order under subsection (1) shall specify a time within which the parties to the proceeding may select a person to perform the assessment and submit the name of the selected person to the court.

(3.1) If the child is to be the subject of an assessment ordered under subsection (1), the child shall be provided an opportunity to participate in the choice of the assessor in accordance with the age, maturity and development of the child.

[…]

(10.1) regardless of the child's age, a child who seeks to have a report provided to him or her, shall be given the opportunity to make

submissions or to make his or her views, wishes and rights known to the court under clauses (9) and (10).

** Prior to section 96 a new heading would be useful

– we propose “ORDERS OF THE COURT” **

ORDER WHERE CHILD IN NEED OF PROTECTION

98. (1) Where the court finds that a child is in need of protection and is satisfied that intervention through a court order is necessary to protect the child in the future, the court shall make one of the following orders or an order under section 99, in the child’s best interests:

[…]

(10) No order respecting a child who is 16 or 17 years old shall be made under this section without the child’s consent.

99. (1) Subject to subsection (6), if a court finds that an order under this section instead of an order under subsection 98 (1) would be in a child’s best interests, the court may make an order granting custody of the child to one or more persons, other than a foster parent of the child, with the consent of the person or persons.

(1.1) No order respecting a child who is 16 or 17 years old shall be made under this section without the child’s consent.

ACCESS

101. (1) The court may, in the child’s best interests,

(a) when making an order under this Part; or

(b) upon an application under subsection (2),

make, vary or terminate an order respecting a person’s access to the child or the child’s access to a person, and may impose such terms and conditions on the order as the court considers appropriate.

(1.1) When making orders under this Part, the court shall make an order respecting access between the child and the child's siblings, on a rebuttable presumption that sibling access is in the best interests of all affected children.
[…]

(3.1) The society shall inform the child and his or her siblings of the right to seek "sibling access", and shall inform all affected children of their right to speak to the Provincial Advocate, and a lawyer about this right.

[…]
(6) No application shall be made under subsection (2) by a person other than a society, **or a sibling of the child,** within six months of,

[…]
(7) No person or society, **other than a sibling of the child,** shall make an application under subsection (2) where the child,

---

102. **(9) Sibling access orders shall be presumed to continue, on a rebuttable presumption that sibling access is in the best interests of all children. No order for sibling access shall be terminated unless there is a determination that continued sibling access is contrary to the best interests of an affected child.**

INTERIM AND EXTENDED SOCIETY CARE

106. (2) (e) takes into account the child's views and wishes, **and rights,** given due weight in accordance with the child's age and maturity, and the views and wishes of any parent who is entitled to access to the child.

---

106. (7) If a child is in extended society care under an order made under paragraph 3 of subsection 98 (1) or clause 113 (1) (c) and has lived continuously with a foster parent for two years and a society proposes to remove the child from the foster parent under subsection (6), the society shall,

[…]

(c) Give notice to the child in a manner that is respectful of his or her age and stage of development.

---

106. (9) Upon receipt of an application by a foster parent, **or a child,** for a review of a proposed removal, the Board shall hold a hearing under this section.

---

106. 13. The following persons are parties to a hearing under this section:

5. The child, if the child sought the review.

REVIEW

113. (1) **(e) no order respecting a child who is 16 or 17 years old will be made under this section without the child's consent.**

---

117. (7) After reviewing a complaint, the Board may,

[…]

(f) make such order as may be prescribed, **which will be binding on the society.**

DUTY TO REPORT

122. ~~(4) Subsections (1) and (2) do not apply in respect of a child who is 16 or 17, but a person may make a report under subsection (1) or (2) in respect of a child who is 16 or 17 if either a circumstance or condition described in paragraphs 1 to 11 of subsection (1) or a prescribed circumstance or condition exists~~.

Additional Commentary: ** As long as no action can be taken with respect to 16 and 17 year olds without their consent, then we propose the removal of this section. We make this proposal in recognition of the need to encourage, rather than confuse or discourage the "duty to report", and in order to maximize the protection of children. However, if 16 and 17 year

olds are to be subject to apprehension without their consent then we propose that the section must remain. **

POWERS OF A DIRECTOR

132. (2) (c) the views and wishes **and rights** of the child, given due weight in accordance with the child's age and maturity.

OFFENCES, RESTRAINING ORDERS, RECOVERY ON CHILD'S BEHALF AND INJUNCTIONS

137. If a child is the subject of an order for society supervision, interim society care or extended society care made under paragraph 1, 2 or 3 of subsection 98 (1) or clause 113 (1) (a) or (c), no person shall,

[…]
(b) detain ~~or harbour~~ the child after the person or society referred to in clause (a) requires that the child be returned;

PART VI – YOUTH JUSTICE

COMMENTARY

In the Youth Justice Part of the Act we encourage ongoing attention to a meaningful child rights approach – including commitment to the UNCRC, and the UN *Standard Minimum Rules for the Administration of Juvenile Justice* (*Beijing Rules*) – and the significance of the broader issues of systemic discrimination, and truth and reconciliation. We propose amendments to enhance the respect for children's rights, and to promote amelioration of discrimination and historical wrongs.

As well, the significance of the *Canadian Charter of Rights and Freedoms* takes on additional significance in this Part because of the criminal justice system context. This includes proposed amendments that protect and advance rights to procedural protection, the right not to be arbitrarily detained, and the right to be free from unreasonable search and seizure

We also seek a commitment to incorporate the learning and wisdom that has come from Inquests into the deaths of children in custody, including the Inquests into the deaths of James Lonnee, David Meffee, and Ashley Smith. We cannot let the tragic loss of children over 2 decades go unanswered.

Given the stated goal of modernization and improved accountability and oversight we propose amendments that will meet these objectives through mandated reporting, and collection of demographic data that should be publically available. As well as amendments that ensure that inspections and investigations provide robust protections of the rights and security of young people deprived of their liberty.

We propose amendments that would ensure that secure custody is a measure of last resort – that the most serious consequences are reserved for the most serious offences – in compliance with rights prescribed in the *Youth Criminal Justice Act* (YCJA).

We propose amendments that ensure that young people have meaningful access to routes of review and appeal, and that they are informed of those rights.

We are deeply concerned about the use of mechanical restraints provisions. In order to be compliant with the *UNCRC*, the *Beijing Rules*, and the *Charter*, mechanical restraints should be prohibited. In the

alternative, if they are not prohibited, mechanical restraints must only be used in emergency situations as a last resort, and not as punishment but only as protection. If there are to be mechanical restraints provisions, these provisions should be consistent throughout the Act (as between Part VI and Part VII). Further commentary below.

PROPOSED AMENDMENTS & ADDITIONAL COMMENTARY

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

TEMPORARY DETENTION

Additional Commentary: The language in this section should be amended to make clear that secure detention or custody is a placement of last resort in each case. In determining the place of detention or custody of a young person, the provincial director should be required to give reasons for their placement decision to facilitate meaningful review by a youth justice court or the Custody Review Board.

Proposed Amendments:

145. (1) A young person who is detained under the Youth Criminal Justice Act (Canada) in a place of temporary detention shall be detained in a place of open temporary detention unless a provincial director determines under subsection (2) that the young person is to be detained in a place of secure temporary detention.

(2) A provincial director may detain a young person in a place of secure temporary detention if the provincial director is satisfied that it is necessary on one of the following grounds:

[…]

(2.1) For clarity, a provincial director shall not detain a young person under subsection (2) unless there is no less restrictive method that will alleviate the grounds for such detention.

(2.2) Where a young person is detained pursuant to subsection (2), the provincial director shall record the reasons for that decision.

[…]

(5) A young person who is being detained in a place of secure temporary detention and who is brought before a youth justice court for a review of an order for detention made under the *Youth Criminal Justice Act*

(Canada) or the *Criminal Code* (Canada) may request that the youth justice court review the level of their detention.

(5.1) Where a young person is detained in a place of temporary detention, the young person shall be informed of their right to have the place of detention reviewed by a youth justice court.

CUSTODY

Additional Commentary: The Act should provide for the concurrent jurisdiction of both the CRB and the youth justice court over detention-related reviews. The route to request a review of level of detention must be easy to access. A young person may be before a youth justice court as a matter of course, as such, we propose amendments that would allow the young person to ask the youth justice court to review detention-related issues at the same time that other matters are being heard. Youth justice courts have expertise in youth detention.

We also propose amendments to this section to improve a young person's right to procedural fairness including making CRB decisions binding, and ensuring that a young person's needs and connections to family and community are properly considered.

***Proposed Amendments*:**

149. (1) A young person may apply to the Board for a review of,

(a) the particular place where the young person is held or to which the young person has been transferred;

(b) a provincial director's refusal to authorize the young person's reintegration leave under section 91 of the Youth Criminal Justice Act (Canada); or

(c) the young person's transfer from a place of open custody to a place of secure custody under subsection 24.2 (9) of the Young Offenders Act (Canada) in accordance with section 88 of the Youth Criminal Justice Act (Canada).

(1.1.) A youth justice court may receive any application referred to under subsection (1), and subsections (2) to (7) apply to such applications with necessary modifications.

149. (5) The Statutory Powers Procedure Act does not apply to a hearing held under subsection (3).

(5.1) A young person has the right to make submissions and to be represented by counsel in any hearing held under subsection (3).

(5.2) For clarity, subsection (5.1) does not alter or nullify any common law procedural fairness rights of the young person by.

---

149. (7) After conducting a review under subsection (3), the Board may,

(a) ~~recommend~~ **direct** the provincial director **to**,

(i) where the Board is of the opinion that the place where the young person is held or to which the young person has been transferred is not appropriate to meet the young person's needs, ~~that the young person be transferred to another place~~ **transfer the young person to another place**,

(ii) ~~that the young person's reintegration leave be authorized~~ **authorize the young person's reintegration leave** under section 91 of the Youth Criminal Justice Act (Canada), or

(iii) where the young person has been transferred as described in clause (1) (c), ~~that the young person be returned~~ **return the young person** to a place of open custody; or

(iv) take other reasonable steps to ensure the appropriateness of the young person's placement, including steps to accommodate a young person's unique needs or circumstances; or

(b) confirm the decision, placement or transfer.

---

149. (8) The Board shall provide written reasons for any decision in an application brought under subsection (1).

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149. (9) While a young person is detained, the Board shall conduct a review to determine the continued appropriateness of the level of detention of that young person at least once every 30 days.

APPREHENSION OF YOUNG PERSONS WHO ARE ABSENT FROM CUSTODY WITHOUT PERMISSION

Additional Commentary: We propose amendments of this section to ensure its compliance with the *Charter*, especially sections 8 and 9.

Proposed Amendments:

150. (2) A peace officer, the person in charge of a place of open custody or that person's delegate, who believes on reasonable and probable grounds that a young person held in a place of open custody as described in section 147,

(a) has left the place without the consent of the person in charge and fails or refuses to return there; or

(b) fails or refuses to return to the place of open custody upon completion of a period of reintegration leave under clause 147 (b),

may, **pursuant to a warrant for apprehension, or in exigent circumstances without a warrant,** apprehend the young person ~~with or without a warrant~~ and take the young person or arrange for the young person to be taken to a place of open custody or a place of temporary detention.

---

150. (5) Where a person authorized to apprehend a young person under subsection (1) or (2) believes on reasonable and probable grounds that a young person referred to in the relevant subsection is on any premises, the person may,

(a) pursuant to a search warrant, enter the premises, or

(b) in exigent circumstances without a warrant, enter the premises,

by force, if necessary, and search for and remove the young person.

(6) A person authorized to enter premises under subsection (5) shall exercise the power of entry in accordance with the regulations

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INSPECTIONS AND INVESTIGATIONS

151. (1) The Minister may designate any person to conduct such inspections or investigations as the Minister may require in connection with the administration of this Part.

(1.1) Where the Minister or the Minister's designate has reasonable and probable grounds to believe that there is a substantial risk that a young person's physical safety or legal rights are in jeopardy, the Minister or the Minister's designate shall direct a person to conduct an inspection or investigation into the matter.

(2) **It is an offence for any** ~~Any~~ person employed in the Ministry ~~who~~ to obstruct~~s~~ an inspection or investigation or withhold~~s~~, destroy~~s~~, conceal~~s~~ or refuse~~s~~ to furnish any information or thing required for purposes of an inspection or investigation**.**

(2.2) Any person who commits an offence under subsection (2) may be dismissed for cause from employment.

SEARCHES

Additional Commentary: This broad search power may violate section 8 of the *Charter*. This is especially so if the search is of a person who is not in custody, or a person's vehicle, as in both of these circumstances there may be a notable high expectation of privacy. An anti-racist lens must be used to assess the appropriateness of such provisions. Limits of this exercise of power ought not to be left to regulations. For these reasons we recommend the removal of this provision entirely.

Proposed Amendments:

~~152. (1) The person in charge of a place of open custody, of secure custody or of temporary detention may authorize a search, to be carried out in accordance with the regulations, of the following:~~

~~1. The place of open custody, of secure custody or of temporary detention.~~

~~2. The person of any young person or any other person on the premises of the place of open custody, of secure custody or of temporary detention.~~

~~3. The property of any young person or any other person on the premises of the place of open custody, of secure custody or of temporary detention.~~

~~4. Any vehicle entering or on the premises of the place of open custody, of secure custody or of temporary detention.~~

~~(2) Any contraband found during a search may be seized and disposed of in accordance with the regulations.~~

~~(3) For the purposes of subsection (2), "contraband" means,~~

~~(a) anything that a young person is not authorized to have,~~

~~(b) anything that a young person is authorized to have but in a place where they are not authorized to have it,~~

~~(c) anything that a young person is authorized to have but in a quantity in which they are not authorized to have it, and~~

~~(d) anything that a young person is authorized to have but that is being used for a purpose for which they are not authorized to use it.~~

MECHANICAL RESTRAINTS

Additional Commentary: The Act mandates a child rights respecting approach, an anti-racist and truth and reconciliation approach, and the use of the best interests of the child as the guiding principle. This ensures promotion of the child's dignity, humanity and protection from harm. This framework must prohibit the use of mechanical restriants. If they are not

prohibited the Act must limit the use of mechanical restraints to the greatest extent possible. It must also ensure that when mechanical restraints are used, there are meaningful accountability measures in place. The mechanical restraints provisions must, at a minimum be consistent as between this Part and Part VII. Multiple Inquests have raised concerns about the use, and possible misuse of mechanical restraints, and we must take seriously the possible risks to the child, and the traumatic impact of their use on children and teenagers.

***Proposed Amendments*:**

Prohibition –

153. (1) The person in charge of a place of secure custody or of secure temporary detention shall ensure that no young person who is detained in the place of secure custody or of secure temporary detention is restrained by the use of mechanical restraints.

Alternative: Limitation -

153. (1) The person in charge of a place of secure custody or of secure temporary detention shall ensure that no young person who is detained in the place of secure custody or of secure temporary detention is,

(a) restrained by the use of mechanical restraints, other than in accordance with this section ~~and the regulations~~;

(b) restrained by the use of mechanical restraints as a means of punishment.

(2) The person in charge of a place of secure custody or of secure temporary detention may authorize the use of mechanical restraints on a young person who is detained in the place of secure custody or of secure temporary detention only if all of the following are satisfied:

(a) there is an emergency situation;

(b) the use of mechanical restraints is necessary to prevent serious bodily harm to the young person or others;

(c) the place of secure custody or secure temporary detention has established a policy on the use of mechanical restraints that complies with this Act; and

(d) the purpose and manner of the use of mechanical restraints complies with the established policy under subsection (2)(c).

(2.1) Where an inspection or investigation is conducted under s.151, the place of secure custody or secure temporary detention as the case may be, shall, as necessary and as soon as practicable, amend its policies to reflect the recommendations of inspection or investigation.

(2.2) For each occasion that mechanical restraints are used on a young person, the person applying those mechanical restraints shall prepare an occurrence report specifying the reasons for using such restraints, the alternatives considered, and the reason those alternatives were not appropriate.

(2.3) The Minister shall ensure that data regarding the use of mechanical restraints is regularly made available to the public.

~~(3) Despite subsection (2), mechanical restraints may be used on a young person who is detained in a place of secure custody or of secure temporary detention where it is reasonably necessary for the transportation of the young person to another place of custody or detention, or to or from court or the community.~~

PART VII – EXTRAORDINARY MEASURES

COMMENTARY

As in every Part of the Act we encourage ongoing attention to a meaningful child rights approach, with attention to the rights provided for under the UNCRC. These include the indivisible rights for decision making in the child's best interests, the right to be protected from harm, to be protected from discrimination, and respect for the child's evolving capacity. This approach also requires recognition of the significance of the broader issues of systemic discrimination, and truth and reconciliation. This is nowhere more acutely significant than in the context of depriving a child of their liberty because of their mental health issues. *Charter* rights may have additional significance in this Part because of the deprivation of liberty. We propose amendments to enhance the respect for children's rights, and to promote amelioration of discrimination and historical wrongs. This includes proposed amendments that protect and advance rights to procedural protection, the right not to be arbitrarily detained, and the right to be free from unreasonable search and seizure.

As described in previous Parts, we propose amendments that will improve accountability and oversight, through mandated reporting, and collection of demographic data that should be publically available. As well as amendments that ensure that inspections and investigations provide robust protections of the rights and security of young people deprived of their liberty.

We propose amendments that ensure that young people have meaningful access to: information about their rights; legal representation and information about how to access legal representation; information about their rights to review and appeal. And meaningful methods for participation in the decisions that affect them.

As in other Parts we propose amendments that ensure respect for children's rights granted by common law and other statutory regimes, including the *Health Care Consent Act*, and the *Personal Health Information Protection Act*.

Again we are deeply concerned about the use of mechanical restraints in this Part. In order to meet the objects of the Act, and to ensure that the child's best interests, and promotion of the child's dignity, humanity and protection from harm are at the core of all decisions and applications of

the Act, the use of mechanical restraints must be eliminated. In the alternative, if mechanical restraints are not eliminated, they must limited to the greatest extent possible. The Act must additionally ensure that when they are used there are meaningful accountability measures in place. Multiple Inquests have raised concerns about the use, and possible misuse of mechanical restraints, and we must take seriously the possible risks to the child, and the traumatic impact of their use on children and teenagers.

The use of mechanical restraints and secure de-escalation rooms are the most dramatic, intrusive, and harsh ways to deprive another person of their liberty, agency and dignity. There is no context in which these techniques do not feel punitive for the person on whom they are forced.

Additionally we are deeply concerned about the use of "secure de-escalation" rooms. Given that the provisions regarding "secure de-escalation" are virtually identical to the previous statute's provisions regarding "secure isolation", we are not confident that the change in language will change the way children are treated, or how they experience being placed in secure de-escalation rooms.

The public outcry regarding the use of secure isolation / secure de-escalation is because of an evolving understanding of the harm caused by the use of isolation rooms, not just for children but for adults. Serious psychological trauma and harm can result from secure isolation. The 1990 United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* states that the use of closed or solitary confinement of juveniles is prohibited. *The Istanbul Statement on the Use and Effects of Solitary Confinement* recommends that solitary confinement for children under the age of 18 be absolutely prohibited. The UN Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, Juan Méndez has said that we should "prohibit the imposition of solitary confinement of any duration for juveniles…".

We recommend an absolute prohibition on the use of "secure de-escalation rooms" or any form of solitary confinement. However, if an absolute prohibition is rejected, very careful limits must be in place to prevent harmful use. Even where there are clear limits in place we have seen tragic outcomes – for instance James Lonnee and Ashley Smith. The section does not recognize any of the recommendations from the Inquest into the death of Ashley Smith, nor does it fully incorporate

recommendations of the Provincial Advocate's Systemic Review of Secure Isolation in Ontario Youth Justice Facilities, 2015. If provisions permitting de-escalation rooms remain in the Act, we propose amendments that would narrow the use of de-escalation rooms by: ensuring a process of multiple interventions where the use of a de-escalation room would be the last resort; restricting their use to emergency circumstances where protection of the child or others necessitates use; mandating attempts to first attempt less restrictive de-escalation techniques; and enhancing the accountability mechanisms within the Act.

A rigorous attention to protecting the dignity, humanity, and rights of young people must be legislated if we are to prevent harm when using the most extreme and profound form of deprivation of liberty.

PROPOSED AMENDMENTS and ADDITIONAL COMMENTARY

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

SECURE TREATMENT PROGRAMS - Mechanical restraints permitted

Additional Commentary: The purpose includes "as a means of controlling the child's behaviour", suggesting that they may be used for discipline (and other purposes) rather than solely for the purpose of protecting the child or others. If the use of mechanical restraints is to continue, the provision should narrow the purpose of using mechanical restraints to a protective purpose in emergency circumstances only. This will ensure consistency with s.153(1)(b) which states that mechanical restraints cannot be used for punishment.

The provision also currently frames the use of mechanical restraints as a positive entitlement of administrators. This places the focus on the right of the administrator rather than on the rights of the child. It ignores the fact that the reason a provision like this exists is to place controls on a situation in which there is an enormous imbalance of power. The focus must be on protecting the child from misuse and possible abuse of power rather than on affirming the power of the more powerful party. The provision should be framed as a limitation not an entitlement. This is also consistent with s.153, which is framed as a limitation.

The young person should be informed of their right to seek a review.

The positioning of this section at the beginning of Part VII gives undue prominence to the use of what should be a tool of last resort. This section

should be moved to later in Part VII. There is no provision dealing with the enforcement of the Professional Advisory Body's recommendations.

***Proposed Amendments*:**

~~157. (1) Subject to subsection (3), an administrator may use and permit the use of mechanical restraints on a child as a means of controlling the child's behaviour.~~

Prohibition –

157. (1) An administrator shall not use or permit the use of mechanical restraints on a child.

Alternative: Limitation -

157. (1) An administrator shall not use or permit the use of mechanical restraints on a child unless

(a) there is an emergency situation, under the common law duty of a caregiver to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or others;

(b) the use of mechanical restraints is in accordance with this Part, the policies established under subsection (3) and the regulations;

(c) the purpose and manner of the use of mechanical restraints complies with the established policy under subsection (1)(b).

(1.1) Upon removing the mechanical restraints from the young person, the administrator shall inform a young person of the right to seek a review under s.175.

(1.2) Where an investigation and review is conducted under s.175 (review by a Professional Advisory Board), the administrator shall, as necessary and as soon as practicable, amend the policy of the Secure Treatment Program to reflect the recommendations of the Professional Advisory Board.

(2) An administrator is not required to obtain the consent of or on behalf of the child before using mechanical restraints under this section.

~~(3) An administrator shall ensure that mechanical restraints are not used on a child in a secure treatment program except,~~

~~(a) in accordance with this Part, the policies established under subsection (4) and the regulations; and~~

~~(b) in an emergency situation under the common law duty of a caregiver to restrain or confine a person when immediate action is necessary to prevent serious bodily harm to the person or others.~~

~~(4)~~ **(3)** A service provider that is approved to provide a secure treatment program shall,

(a) establish a policy on the use of mechanical restraints that complies with this Act and the regulations; and

(b) shall ensure that the administrator and the employees of the program comply with the policy.

COMMITMENT TO SECURE TREATMENT – Child entitled to be present

158. (8) The child who is the subject of an application under subsection (1) is entitled **to notice of the hearing,** to be present at the hearing**, and to participation in the hearing** unless

~~(a)~~ the court is satisfied that being present at the hearing would cause the child emotional harm **and there is no reasonable accommodation for the child that would sufficiently mitigate the harm.** ~~; or~~

~~(b) the child, after obtaining legal advice, consents in writing to the holding of the hearing without the child's presence.~~

(8.1) Where a child is entitled to be present at the hearing under s.158(8), the hearing may not proceed in the child's absence unless the child consents in writing to the holding of the hearing in the child's absence

(9) The court may require a child who has consented to the holding of the hearing without the child being present under clause ~~(8) (b)~~ **(8.1)** to be present at all or part of the hearing.

(9.1) Where a child has been excluded from the hearing, the court shall take reasonable steps to ensure that the child is meaningfully informed of the proceedings and its outcome in a manner consistent with the child's or young person's capacity to understand.

COMMITMENT TO SECURE TREATMENT – Assessment, Copies of the report

Additional Commentary: Assessment reports contain deeply private information. Copies of those reports should not be provided to people, including a band or native community that has no interest in the proceeding, especially where there is no opportunity to refuse to consent to such distribution. Similar to the requirement of subsection 4(d), which only provides the report to a parent who appears at the hearing, the band should only be entitled to the report if a representative of the band or native community appears at the hearing. Similar to subsection 5, the court may make an exception for a band or native community that does not appear at the hearing but is nonetheless "actively interested in the proceedings."

***Proposed Amendments*:**

160. (4) **Subject to subsection (6),** the court shall provide a copy of the report to,

[…]

(d) a parent appearing at the hearing;

[…]

(g) in the case of a First Nations, Inuk or Métis child, the persons described in clauses (a), (b), (c), (d), (e) and (f) and**,** a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities **who appears at the hearing.**

(5) The court may cause a copy of the report to be given to a parent **or a representative of the band or native community** who does not attend the hearing but is, in the court's opinion, actively interested in the proceedings.

COMMITMENT TO SECURE TREATMENT – Court may withhold report from child

Additional Commentary: The Act allows a report to be withheld from a child where "disclosure would cause emotional harm." This test of "emotional harm" may be overbroad. The *Personal Health Information Protection Act* (s. 52(e)(i)) sets a standard that is more precise. Using the language of that statute provides a consistent rights respecting standard for young people. Also, it is important to acknowledge that there may be reason to withhold the report from others in order to protect the child from harm.

***Proposed Amendments*:**

160. (6) The court may withhold all or part of the report from ~~the child~~ **any person referred to in subsection (4)** where the court is satisfied that disclosure of all or part of the report **could reasonably be expected to result in a risk of serious harm to the treatment or recovery of the child or a risk of serious bodily harm to the individual or another person** ~~to the child would cause the child emotional harm.~~

(6.1) When a copy of the report or any part of the report referred to in subsection (6) is provided to the child, the court shall take steps to explain the results of the report to the child in a manner consistent with the child's age and level of understanding.

(6.2) When the child is not provided with the report or any part of the report, the court shall take steps to explain the general nature of the report and its results in a manner consistent with the child's age and level of understanding.

EXTENSION OF PERIOD OF COMMITMENT

164. (5) The court may make an order extending a child's commitment to a secure treatment program only where the court is satisfied that,

(a) the child has a mental disorder;

(b) the secure treatment program would be effective to prevent the child from causing or attempting to cause serious bodily to themself or another person;

(c) no less restrictive method of providing treatment appropriate for the child's mental disorder is appropriate in the circumstances;

(d) the child is receiving the treatment proposed at the time of the original order under subsection 161 (1), or other appropriate treatment; ~~and~~

(e) there is an appropriate plan for the child's care on release from the secure treatment program; **and**

(f) there continues to be a substantiated risk that the child will cause serious bodily harm to themself or another person.

EMERGENCY ADMISSION – Notices required

168. (6) The administrator shall ensure that within 24 hours after a child is admitted to a secure treatment program under subsection (2),

(a) the child is given written notice of the child's right to a review under subsection (9), **of their right to contact the Provincial Advocate for Children and Youth, and their right to legal representation including the Children's Lawyer**; and

(b) the Provincial Advocate for Children and Youth and the Children's Lawyer are given notice of the admission.

(c) the administrator shall facilitate contact between the child and the Provincial Advocate for Children and Youth or the Children's Lawyer.

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168. (10) Where an application is made under subsection (9), the **Board shall as soon as possible make an interim order regarding whether the** child ~~may~~ **will** be kept in the secure treatment program until the application is disposed of.

POLICE ASSISTANCE – Apprehension of a child who leaves

169. (2) Where a child who has been admitted to a secure treatment program leaves the facility in which the secure treatment program is

located without the consent of the administrator, a peace officer may apprehend the child ~~with or without a warrant~~ **pursuant to a warrant for apprehension, or in exigent circumstances without a warrant,** and return the child to the facility.

SECURE DE-ESCALATION

Additional Commentary: If the use of secure isolation rooms is to continue, the criteria for secure de-escalation rooms should be set out in the Act itself, rather than regulations which are subject to less public scrutiny, transparency, and accountability. Including "behaviour" in this provision suggests that the purpose of using de-escalation rooms may be for discipline (and other purposes) rather than solely for the purpose of protecting the child or others. The provision should narrow the purpose of using de-escalation rooms to a protective purpose in emergency circumstances. This will also be consistent with s.153(1)(b) which deals with the use of mechanical restraints and which says that such restraints cannot be used for punishment.

***Proposed Amendments*:**

Prohibition –

170. ~~(1)~~ **No service provider or foster parent shall place in a locked room a child or young person who is in the service provider's or foster parent's care or permit the child or young person to be placed in a locked room, except if requested by the young person.**

Alternative: Limitation -

170. (1) A Director may approve a locked room that complies with ~~the prescribed standards~~ **this Act** and is located in premises where a service is provided, for use for the secure de-escalation of situations ~~and behaviour~~ involving children or young persons, on such terms and conditions as the Director determines.

(1.1) A director may not approve a locked room unless it complies with the following minimum specifications:

[Specifications of de-escalation rooms previously intended for use in the regulations should be inserted here]

Additional Commentary: Withdrawal of approval for a de-escalation room should be mandatory where the Act is contravened.

***Proposed Amendments*:**

170. (2) Where a Director is of the opinion that a secure de-escalation room is unnecessary or is being used in a manner that contravenes this Part or the regulations, the Director ~~may~~ **shall** withdraw the approval given under subsection (1) and shall give the affected service provider notice of the decision, with reasons

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SECURE DE-ESCALATION

Additional Commentary: We propose numerous amendments to reflect an intention to move away from the previous framework of secure isolation for children and youth.

Service providers must consider and attempt other de-escalation techniques before resorting to placing a child in a locked room. De-escalation should not be seen as equivalent to secure isolation. Secure de-escalation must be seen as a multi-faceted approach to volatile situations.

We propose clear limits on the exercise of this power that should prohibit the use of de-escalation rooms except in emergency situations where the safety and security of the child and others is at serious risk.

***Proposed Amendments*:**

171. (1) No service provider or foster parent shall place in a locked room a child or young person who is in the service provider's or foster parent's care or permit the child or young person to be placed in a locked room, except in accordance with this section and the regulations.

(1.1) Every service provider and foster parent shall, before placing a child or young person in a locked room, consider and, if possible, attempt to use less restrictive methods of de-escalation.

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171. (3) A child or young person ~~may~~ **shall not** be placed in a secure de-escalation room ~~where~~ **unless**,

(a) in the service provider's opinion,

[…]

(ii) no less restrictive method of ~~restraining the child or young person~~ **de-escalating the situation** is practicable; and

[…]

(b) where the child is younger than 12, a Director gives permission for the child to be placed in a secure de-escalation room because of ~~exceptional circumstances~~ **[replace with specific exceptional circumstances].**

Additional Commentary: if the goal is truly de-escalation, then the time must be limited to attainment of that goal, with a limit being an hour, except in the most exceptional circumstance.

Proposed Amendments:

171. (4) A child or young person who is placed in a secure de-escalation room shall be released **as soon as it is observed that the state of emergency that lead to the use of the de-escalation room has passed, but at the very longest** within one hour, unless the person in charge of the premises approves the child's or young person's longer stay in a secure de-escalation room in writing and records the reasons for not ~~restraining the child or young person~~ **de-escalating the situation** by a less restrictive method.

***Additional Commentary*:** We propose that the intervals be specified in the statute rather than in Regulations, and that the intervals be shorter than the initial time limit. However, if the intervals are to be specified in Regulations, the following amendments are recommended.

Proposed Amendments -

171. (6) **The Minister shall make regulations prescribing the procedures and protocols to be followed when** ~~Where~~ a child or young person is kept in a secure de-escalation room for more than one hour, **including but not limited to the intervals at which a child's or young person's placement in the de-escalation room must be reviewed.** ~~the person in charge of the premises shall review the child's or young person's placement in a secure de-escalation room at prescribed intervals.~~

(6.1) Where a child or young person is kept in a secure de-escalation room for more than one hour, the person in charge of the premises shall review the child's or young person's placement in a secure de-escalation room at the prescribed intervals, and on each interval that the child or young person is not released from the room the person shall record in writing the reasons for not de-escalating the situation by a less restrictive method.

Additional Commentary – Failing to afford procedural protections for 16 and 17 year olds is a direct violation of the *UNCRC*, which makes clear that all children are entitled to the protections regardless of age. A principle recognized by the Supreme Court of Canada.[4] Removing these protections for children 16 or older may also be a violation of their *Charter* rights. Respect for the evolving capacities of children must not mean they are entitled to fewer protections as they get older.

Proposed Amendment:

171. (~~9) A service provider is not required to comply with subsections (5) and (8) with respect to a young person who is 16 or older and who is held in a place of secure custody or of secure temporary detention, but a service provider shall comply with the prescribed standards and procedures in respect of such young persons who are held in such places.~~

Additional Commentary: It is important that meaningful accountability measures are in put in place for the use of secure de-escalation rooms. We propose upfront planning and consideration of de-escalation protocols

[4] See for instance: A.B. (Litigation Guardian of) v. Bragg Communications Inc., 2012 SCC 46 para 17

for individual children to improve accountability and reduce the possibility for abuse. We propose that a young person be given notice of their right to request a review under s. 175.

Proposed Amendments [No current provisions - additions as follows]

171. (10) Where a child or young person is placed in a secure de-escalation room for reasons related to mental health, the person in charge of the premises shall as soon as practicable notify the Provincial Advocate for Children and Youth.

171. (12) Every service provider shall prepare a written plan for each child in its care regarding the use and limits on the use of a de-escalation room for that particular child. The plan shall also specify the alterative de-escalation techniques that must be attempted prior to placing the child into a de-escalation room which is to be used as a last resort.

171. (13) Upon release from a secure de-escalation room, the service provider shall inform a young person of the right to seek a review under s.175.

REVIEW OF SECURE DE-ESCALATION

172. **(1)** A person in charge of premises containing a secure de-escalation room shall review,

(a) the need for the secure de-escalation room; and

(b) the prescribed matters,

every three months or, in the case of secure custody or secure temporary detention, every six months from the date on which the secure de-escalation room is approved under subsection 170 (1), shall make a written report of each review to a Director and shall make such additional reports as are prescribed.

(2) A report prepared under subsection (1) shall include, but may not be limited to, a record of every time the de-escalation room was used and the reasons for its use.

(3) Service providers shall, as soon as practicable, inform the Provincial Advocate for Children and Youth each time that a child is placed into a secure de-escalation room.

PART VIII – ADOPTION AND ADOPTION LICENSING

COMMENTARY

We propose amendments that ensure that siblings are not left out of openness in adoptions proceedings. We seek amendments that can ensure that siblings have opportunities to maintain contact and develop and maintain relationships with one another. These sibling relationships can be a meaningful part of a child's development of important lifelong relationships, and should be supported regardless of relationships with and conduct of the adults in their lives.

There continue to be appropriate ways in which the Act acknowledges the evolving capacities of children, and we applaud that. We propose an amendment to the age of consent required in the change of name section. We propose that a change of name should require the consent of a child 7 or older, consistent with the consent required for adoption of a child who is 7 or older. This demonstrates a consistent approach to respect for evolving capacities, and acknowledges a child's right to identity.

We propose an amendment to ensure meaningful access to legal assistance in contexts where there are complex issues at stake.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

DECISION TO REFUSE TO PLACE CHILD OR TO REMOVE CHILD AFTER PLACEMENT - Parties

189. (9) The following persons are parties to a hearing under this section:

1. The applicant.

2. The society or licensee.

3. If the child is at least 7 years old, the child if the child wishes to participate.

4. In the case of a First Nations, Inuk or Métis child, the persons described in paragraphs 1 and 2 and a representative chosen by each of the child's bands and First Nations, Inuit or Métis communities.

5. Any person that the Board adds under subsection (10).

OPENNESS ORDERS – Notice of intent to place for adoption

***Additional Commentary*:** Unless the sibling is named in s.192, the sibling will not be able to seek an openness order under s.193

Proposed Amendment:

192. (2) In the circumstances described in subsection (1), the society shall give notice to the following persons:

1. Every person who has been granted a right of access under the access order.

2. Every person with respect to whom access has been granted under the access order.

3. Every sibling of the child, and where any sibling is less than 16 years old, the Children's Lawyer or another lawyer chosen by the sibling.

Additional Commentary: At 7 a child's consent is required before an adoption. Similarly, a 7 year old will most certainly have views and preferences about their own name. To change the child's name without their consent is contrary the child's right to an identity. A rights-respecting approach should be taken.

ADOPTION ORDERS – Change of name

203. (1) Where the court makes an order under section 196, the court may, at the request of the applicant or applicants and, where the person adopted is ~~**12**~~ **7** or older, with the person's written consent,

(a) change the person's surname to a surname that the person could have been given if the person had been born to the applicant or applicants; and

(b) change the person's given name.

ADOPTION ORDERS – Legal representation of child

208. (1) A child may have legal representation at any stage in a proceeding under section 191, 193, 194, 195, 204 or 205 and subsection 77 (2) applies with necessary modifications to such a proceeding.

(2) The Children's Lawyer may provide legal representation to a child under this Part if, in the opinion of the Children's Lawyer, such representation is appropriate.

(3) Where the court determines that legal representation is desirable, the court ~~may~~ **shall** refer the matter to the Children's Lawyer.

(4) Where the Children's Lawyer declines to provide legal representation under subsection (2), the child may be represented by another lawyer of the child's choosing, and the court shall make efforts to facilitate such representation.

OPENNESS AGREEMENTS – Child's views and wishes

209. (4) Before an openness agreement is made, the child's views, ~~and~~ wishes**, and rights** shall be taken into account and given due weight in accordance with the child's age and maturity.

PART X – PERSONAL INFORMATION

COMMENTARY

In this Part we propose amendments that recognize the importance of children, young people, and adults having informed control over information about them that is collected or disclosed. This is consistent with the principle of recognizing children as independent rights holders whose privacy and agency must be protected. The amendments support the position that a person's consent to the collection or disclosure of information should be required except in exceptional circumstances, and that consent is only valid when it is fully informed.

We also propose amendments that enshrine within this Act the rights and protections already available to children and others under other statutes, including the *Health Care Consent Act, Personal Health Information Protection Act,* and the *Youth Criminal Justice Act*.

We also recommend a redrafting of s.298, which deals with the review of a determination of incapacity. This provision is replete with references to "prescribed" information, restrictions, and requirements. Leaving the important issues at stake in this section to the regulations that will not be subject to public debate or review is not appropriate. It is also unclear from this provision what authority the review body will have, what standard it will follow, or what factors it will consider. In re-drafting this provision, the review process must be rights-respecting and independent of the service provider who made the initial determination of incapacity.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION BY SERVICE PROVIDERS

284. (2) A service provider may collect personal information indirectly for the purpose of providing a service and without the consent of the individual to whom the information relates if,

(a) the information to be collected is reasonably necessary to provide a service and it is not reasonably possible to collect personal information directly from the individual,

(i) **in a timely manner** that can reasonably be relied on as accurate and complete. ~~or~~

~~(ii) in a timely manner;~~

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291. (4) A consent to the collection, use or disclosure of personal information is knowledgeable if it is reasonable in the circumstances to believe that the individual to whom the information relates knows,

(a) the purposes of the collection, use or disclosure; and

(b) that the individual may give, withhold or withdraw consent, **and**

(c) that the individual may lose control over the information once consent is provided.

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300. A service provider shall take reasonable steps to ensure that personal information is not collected without authority **and that any collection is consistent with the *Health Care Consent Act*, *Personal Health Information Protection Act*, the *Youth Criminal Justice Act*, and any other law of Ontario or Canada.**

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305. (6) A service provider that believes on reasonable grounds**, and after due consideration of the rights under the *Personal Health Information Protection Act*,** that a request for access to a record of personal information is frivolous or vexatious or is made in bad faith may refuse to grant the individual access to the requested record and, in that case, shall provide the individual with a notice that sets out the reasons for the refusal and that states that the individual is entitled to make a complaint about the refusal to the Commissioner under section 307

PART XI – MISCELANEOUS MATTERS

COMMENTARY

Section 312 allows police record checks for "A person who provides or receives services under this Act." Presumably that includes children. However, this provision is in conflict with the principles of the *Youth Criminal Justice Act*. There is no nexus between a child's youth record and the child's right, need, or eligibility to access services under this Act. We propose an amendment that expressly excludes children and young people from this provision.

PROPOSED AMENDMENTS

(Amendments in **bold** for additions or ~~struck~~ for deletions as appropriate)

312. The Lieutenant Governor in Council may, by regulation, require the following persons to provide a police record check concerning the person to any other person or body in accordance with the regulations:

1. A person who provides or receives services under this Act**, except for any child or young person less than 18 years old.**

2. A person residing, employed or volunteering in premises where services are provided or received under this Act.

3. Such other persons who may be prescribed.