



September 2, 2023

Via Email: outofhomecare@ontario.ca

Ministry of Children, Community and Social Services
101 Bloor St. W, 6th Floor
Toronto, ON, M5S 3L7

Re: Proposal No.: 23-MCCSS010 and 23-MCCSS011

Please accept the following submissions by Justice for Children and Youth (“JFCY”) with respect to proposed legislative amendments to the *Child, Youth and Family Services Act* (“CYFSA”) and proposed regulatory amendments strengthening oversight for children in out-of-home care. We thank the Ministry for the opportunity to provide our submissions.

Outline

JFCY’s submissions will primarily address Proposed Regulatory Amendments #2, #3, and #7 of Proposal 23-MCCSS011, and the further legislative and regulatory changes necessary to advance the rights, interests, and dignity of children in care. We strongly commend the Government’s commitment to ameliorate existing concerns about the well-being and safety of children in out of home care settings, increase transparency, and foster accountability of licenced care providers, and provide greater oversight and scrutiny of licensed care at all stages, supported by increases enforcement measures and tools.

The well-being, dignity and safety of children must be the top priority of service providers entrusted with the safety and well-being of children and young people in residential care, who are often in care because of their previous experiences of maltreatment and harm. The systems that support children must seek to ameliorate, and not perpetuate, that harm.

We propose further amendments to the proposed legislative and regulatory changes to protect the rights of children in out-of-home care in accordance with Canada’s international human rights obligations and the values enshrined in the Canadian *Charter of Rights and Freedoms* (the “Charter”).

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These submissions are presented in three parts:

- A. An introduction to our organization and expertise;
 - B. Commentary with respect to the proposed amendments;
 - C. Concluding remarks.
- A. ***Who We Are: Justice for Children and Youth (“JFCY”)***

JFCY is a non-profit specialty legal clinic and child rights organization with core funding from Legal Aid Ontario. For 45 years, our organization has focused exclusively on the legal issues facing children and youth, and promoting their human rights and dignity. We provide legal services, including advice, information, and representation to low-income and vulnerable children and youth in matters affecting their interests, including in the spheres of child welfare, youth criminal justice, and education. We are the only such organization in Canada.

Most of our clients have multiple legal concerns and come to us with complex personal, social, and legal issues, including circumstances that have brought them into contact with the child welfare system. In 2022, youth with identified involvement with the Children’s Aid Society represented almost 50% of all intake calls to JFCY. We provide multidisciplinary, developmentally appropriate, and trauma-informed legal and non-legal support to our clients.

Our submissions and recommendations are based on our unique perspective and expertise providing services, education, and advocacy across diverse legal areas affecting children and youth engaged with the child welfare system.

B. Submissions on Key Areas of Review

i. Proposed Regulatory Amendment #2: Prohibited Practices

We applaud the introduction of *Proposed Regulatory Amendment #2: Prohibited Practices* to delineate the scope of prohibited practices, increase accountability, and foster the dignity of children in care, and the express prohibition of practices and conduct that are abusive, assaultive, and harmful.

We propose further amendments to expand the scope of the identified prohibited practices to reflect the lived reality of children in out-of-home care, in line with Canada’s international human rights obligations.

While insufficient data is currently available in the Ontario context, data from other jurisdictions indicates a significant overrepresentation of marginalized communities, including 2SLGBTQIA+ youth in out of home care.¹ As front line service providers, many young people accessing services have experienced discriminatory, hate-based conduct not only within their family of origin, but in kin and out of home care settings. We encourage the incorporation of express language into the amended regulations to expressly identify the use of all discriminatory language, including anti-2SLGBTQIA+ statements, as a prohibited practice.

¹ Ontario Association of Children’s Aid Societies, “Overrepresentation of 2SLGBTQ+ young people in child welfare” accessed online at: <https://oacas.libguides.com/c.php?g=715117&p=5132947>

Recommendation: Amend the identified prohibited practices within the scope of s. 109, O Reg 156/18, and accompanying ss. 32 and 119 to protect youth in care and expressly condemn discriminatory conduct, as a derogatory action towards youth putting their safety and well-being at risk, as follows:

“The use of threats or derogatory or racist or otherwise discriminatory language, including anti-2SLGBTQIA+ language, directed at or used in the presence of the child or young person”

We propose additional amendments that would prohibit the use of corporal punishment by caregivers in out-of-home settings, consistent with social science evidence, international human rights standards, and the recommendations of expert organizations². Even minimal use of physical force creates a risk of physical and psychological harm, and is recognized as a violation of human rights.

Recommendation: Amend the identified prohibited practices within the scope of s. 109, O Reg 156/18, and accompanying ss. 32 and 119 to protect youth in care and expressly prohibit use of physical force as a disciplinary or corrective measure.

We applaud the inclusion of threats to the young person’s feelings of security within their placement and other sources of support as “prohibited practices”, including regulations to limit threats to withhold visits, threats of discharge, and obstructing a child’s employment.

We propose additional amendments to include threats of criminal justice or police involvement to punish a child for a caregiving, disciplinary, or child welfare matter as a prohibited practice. In accordance with the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, youth detention must be treated as an avenue of last resort.³ The use of criminal justice involvement to address behavioural issues is in breach of this commitment, and has been subject to condemnation by Canadian courts.⁴

Despite this, in our experience as frontline service providers, youth in out-of-home care continue to face disproportionate involvement at all stages of the youth criminal justice system. This includes disproportionate threats of police involvement by out-of-home caregivers, increased opposition to the young person’s release by workers and caregivers, and attempts to utilize release conditions to address unrelated behavioural issues.

Recommendation: Expand the general rules proposed to be described as prohibited practices within s. 109, 82, and 119, O. Reg. 156/18, to include a prohibition on utilizing or threatening criminal justice involvement for the purposes of punishment or behaviour modification in child welfare matters not engaging criminal conduct.

² Durrant, JE, Ensom, R, and Coalition on Physical Punishment of Children and Youth (2004). *Joint Statement on Physical Punishment of Children and Youth*. Ottawa: Coalition on Physical Punishment of Children and Youth, available online: http://js-advocacy.ca/pdf/joint_statement_e.pdf (accessed September 2, 2023).

³ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules, A/RES/40/33)

⁴ See, e.g. *R v M(S)*, 2006 ONCJ 220.

ii. Proposed Regulatory Amendment #3: Prescribed Offences

We commend the inclusion of improper and unjustified physical restraint, mechanical restraint, and secure de-escalation (or “solitary”) as prescribed offences under the CYFSA. These amendments recognize the significant harm occasioned through the exercise of these coercive measures, including the risk of serious physical injury and emotional trauma to the child.

We urge amendment to the underlying provisions of the CYFSA to prohibit the use of mechanical restraint and secure de-escalation rooms in their entirety, and to impose meaningful restrictions on the use of physical restraints. In the alternative, we urge the Ministry to clarify the scope of the appropriate use of physical force and extraordinary measures.⁵ We repeat and reiterate our past submissions with respect to necessary safeguards, protections, and accountability measures within the CYFSA.

The exercise of these coercive measures goes to the core of the child’s Charter protected rights to life, liberty and security of the person. Multiple inquests have raised concerns about the use of physical force and extraordinary measures, and their profound impact on the life and safety of children in Ontario.⁶ A fundamental shift in how physical force and isolation are exercised in the child protection context is critical to raising standards of care and respecting the rights of youth in out of home care.

Recommendation: Amend s. 10(4), O Reg 155/18 to include that physical restraint must immediately cease in circumstances “[w]hen there is a risk that the use of physical restraint itself will endanger the health or safety of the child or young person or cause physical injury to the child”. In accordance with the Supreme Court of Canada’s decision in *Canadian Foundation for Children, Youth and the Law v Canada*, “the application of force that results in physical harm”⁷ is by its very essence unreasonable, and not shielded from the scrutiny of criminal law in the context of a criminal assault.

If the use of mechanical restraint and secure de-escalation are not prohibited, we strongly recommend changes to the underlying legislative provisions to further foster clarity, accountability, and transparency, and to increase the safety and well-being of young people in care. Extraordinary measures constitute one of the most extreme exercises of state power against some of the most vulnerable in our society. Pursuant to the *1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, the use of closed or solitary confinement of children is prohibited.

Recommendation: Remove conditions permitting the use of mechanical restraints and secure de-escalation in the context of “property damage” pursuant to s. 156(2) and s. 174(3)(a)(i) of the CYFSA. We respectfully suggest that given the severity of the infringement on the young person’s liberty and security of the person, damage to property absent a risk of harm to another person is never so substantial as to justify the risk of harm

⁵ Please see [Justice for Children and Youth, Submissions on Bill 89 – Supporting Children, Youth and Families Act, dated April 4, 2017 at p. 8, 41-54.](#)

⁶ This includes, *inter alia*, inquests into the deaths of James Lonnee, David Meffe, William Edgar, and Ashley Smith.

⁷ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), [2004] 1 SCR 76.

occasioned to the child. This risk is exacerbated by the reality that the state was entrusted with the well-being and safety of the child.

Recommendation: Create uniform de-briefing procedures in the context of the use of coercive force under Regulation 155/18, including physical and mechanical restraint, and secure de-escalation, including the timely provision of meaningful information in age based language regarding a child’s rights, avenues for advocacy, and complaints procedures. In particular, we propose the amendment of s. 12(4.1)(iii) to include the requirement that the child be provided with information for the Ombudsman’s office and the right to counsel. We urge the standardization of these de-briefing procedures to ensure the meaningful engagement, participation, and transparency in the exercise of all extraordinary measures and use of coercive force, including in the context of s. 61 and 77.

iii. Proposed Regulatory Amendment #7 – Requirements for Information Sharing

We applaud the introduction of amendments to increase oversight and to implement standardized practices and requirements with respect to information sharing and service coordination. As advocates for children and youth, many of our clients face serious, real world impacts due to the absence of service coordination and inconsistency in file transfer practices. As highlighted in the Devon Freeman Inquest, this can lead to tragic consequences, including essential information regarding the care and well-being of a child “falling through the cracks”, and inadequate service provision.

Recommendation: Implement the jury verdict recommendations, and in particular, recommendation 31 to implement a “one care team per family” system to foster relationship building, knowledge development and open communication; acquiring and reviewing relevant information and documents related to the young person; and providing training to ensure that material information is clearly flagged in the file transfer process.

C. Concluding remarks

We thank the Ministry for its consideration of these submissions. We welcome any opportunity to discuss these submissions and any other aspect of the Ministry’s work with children and young people receiving child welfare or child well-being services, and support efforts to continue to improve the quality of care for vulnerable children and young people across Ontario.

JUSTICE FOR CHILDREN AND YOUTH