REPRESENTATIVE FOR
CHILDREN AND YOUTH

June 22, 2012

Ref: 19629

Geoffrey D. Cowper, Q.C.
BC Justice Reform Initiative
2900 – 550 Burrard Street
Vancouver BC V6C 0A3

Dear Mr. Cowper:

Re: Green Paper: Modernizing British Columbia's Justice System

In my capacity as British Columbia's Representative for Children and Youth, I welcome the opportunity to comment on the Government's Green Paper, *Modernizing British Columbia's Justice System* (February 2012).

As Representative, my perspective on justice reform is informed by my ongoing oversight of services to children and youth. Pursuant to the *Representative for Children and Youth Act,* my work involves monitoring, reviewing and auditing designated services (s. 6(b)), reviewing and investigating the deaths and critical injuries of children receiving reviewable services (s. 6(c)) and issuing special reports (s. 20).

The pivotal role played by the justice system in protecting vulnerable children, and in promoting their best interests, is reflected in several justice system recommendations I have made as Representative, which are collected in Appendix "A" to this submission.

The Green Paper

One of the biggest challenges in undertaking a review of any public "system" is arriving at a conclusion about what precisely is the problem. A question stated too narrowly, or problem misdiagnosed, is likely to lead to answers that risk making things worse than they were before.

My impression in reading the Green Paper is not that its concern for more timely and cost effective justice is wrong. My concern is that it is incomplete. While there is considerable emphasis on resourcing problems, and on tying resourcing requests to "systems performance" (p. 5), "performance metrics" (p. 17) and "business analysis" (p. 22), the Green Paper does not ask what I consider to be much more important questions. What are the key outputs we want the justice system to serve – for example, is the justice system achieving the quality of justice we want it to achieve?

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In particular how does the justice system serve the most vulnerable members of society, such as children who need protection, children who are the victims of crime, and Aboriginal children who are disproportionately represented in both categories?

To ask these hard questions requires reviewers to be open to all points of view. This includes asking including whether it is necessary to restore and even increase funding in order to improve system performance.

The history leading up to the enactment of the *Representative for Children and Youth Act* illustrates what can go wrong if reform processes focus on only one "performance metric" – typically, the metric which is easiest to measure – cost. One has only to read the Hon. Ted Hughes' *BC Children and Youth Review (April 2006)* to recognize that in the wake of the 2002 "core services review", the overwhelming emphasis on reducing budgets caused significant damage to the child protection system, and to the public's confidence in that system.

A meaningful conversation about justice reform also requires distinguishing among those areas in which reform initiatives are evidence-based, from those where they are normative and values based. In the Green Paper, the best illustration of this is to be found in the Appendix, and its discussion of the "Ten Challenges, Ten Proposals".

The first three "challenges" in particular, make reference to a "Justice System Culture" that interprets judicial independence too broadly, is resistant to systems thinking and relies on tradition and subject matter expertise over business analysis and public administration. Despite the negative way in which those points have been framed, I would venture to say that many reasonable observers would characterize those parts of our justice system as positives – as safeguards that are necessary to ensure that the justice system is not compromised by being treated purely as a branch of a government bureaucracy. What a Treasury Board analyst might regard as being an impediment to efficiency and cost-saving, a member of the public might well regard as a strength and fundamental safeguard that protects the public from undue executive encroachment on the delivery of justice, individual liberty and the rule of law.

Child Protection

The general points I have made above can be illustrated quite specifically with regard to an area of the justice system that my work as Representative regularly requires me to consider, namely, the operation of the judicial component of the child protection system in British Columbia. That review amply demonstrates, in my view, that while creative efficiencies must be encouraged, there is only so much the system can do in the face of limited budgets. At a certain point, the discussion must turn to the question of increasing budgets.

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The problem of "backlogs and delays" identified in the Green Paper (Message from the Minister) is not a new one. With regard to child protection court proceedings, it has been studied for some time. In 1998, the Ombudsman issued a report recommending that the Ministry of Attorney General and the Ministry for Children and Families strike a committee to explore the reasons for delays in court decisions regarding children and youth: "*Getting There: Response to the Recommendations of the Gove Inquiry into Child Protection*".[1]

The same year, the Chief Judge of the Provincial Court issued a report: "*Delay and Backlog in the Provincial Court of British Columbia, 1998"*, in which he stated:

> A child who is apprehended in Surrey may have to wait a year for a decision about whether or not he or she should have been taken from his or her parents. If it is decided that a child needs to be taken from his or her parents, it may take years before the future case of the child is finally decided. Some of that delay is the responsibility of the overloaded court. There are 1,000 children in care in Surrey and each of them requires court hearings and conference, some multiple hearings, many of which are lengthy.[2]

The Government in 2001 announced the "Surrey Court Project", a working group to pilot what the group called a "Facilitated Planning Meeting", seeking to effectively use mediation techniques at an early stage in child protection proceedings to attempt resolve those cases out of court.

An Evaluation Report of the Project was published in 2003.[3] Its findings reflect some cost and time savings, but not surprisingly, no magic bullet in the absence of additional resources:

> *Cases which go to Protection Hearing*
>
> Whereas all the baseline cases (47/47) went to a protection hearing, only 14% (5/37) of FPMP cases did so. Instead, in the vast majority of cases where agreements were reached in a planning meeting, the social worker needed only to appear in court for a few minutes on the originally scheduled date, in order to confirm the agreement. This outcome clearly represents a savings in court and social worker time in FPMP cases.
>
> *Duration of Cases*
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> The average time from removal to a substantive presentation hearing, i.e. one at which a section 35 order is made, is approximately 50% longer for FPMP cases than for baseline cases (48.0 days versus 32.3 days). This is primarily accounted for by the time taken to hold the orientation and planning meetings. Even though this period of time extends this initial phase, two factors deserve emphasis. First, the parents are not left in limbo during this period.

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[1] The Report is available on the Ombudsperson's website at: http://www.ombudsman.bc.ca/images/resources/reports/Public_Reports/Public%20Report%20No%20-%2036.pdf
[2] http://www.ag.gov.bc.ca/dro/child-protection/surrey-court/surrey-court-backgrounder.pdf
[3] http://www.ag.gov.bc.ca/dro/publications/reports/surrey-court-FINAL.pdf

They are actively engaged in the orientation meetings with the mediator, and in the planning meetings with all parties. They are thus part of a process that is both providing them with information and moving the case towards a potential resolution. In fact, the vast majority of cases referred to mediation did result in agreement, with the result that a Section 35 order was made by consent. Secondly, in most instances, the ultimate effect of the orientation and planning meetings is to shorten overall case duration, as shown in the points which follow.

The average time from removal to commencement of protection hearings is also longer for FPMP cases, but only by approximately 9%.

The average time from removal to temporary order or supervision order is about 25% shorter for FPMP cases than for baseline cases.

As of March 15, 2003 the average time from removal to final disposition is significantly shorter for FPMP cases than for baseline cases, but the extent of this difference will likely narrow when the remaining 15 cases (50% of the overall comparison sample) are complete.

Whatever positive benefits the Facilitated Planning Process has had in British Columbia, it is obvious that in an area such as child protection, mediation and alternative dispute resolution have their limits. In a significant number of cases, the public interest in the protection of children cannot be mediated; they must be adjudicated in a timely fashion.

It is evident from the Provincial Court's Annual Reports over the past several years that the Court simply does not have the resources to ensure that those cases that require adjudication are addressed in a timely fashion.

One might expect that, all else being equal, an initiative such as the one discussed in the Green Paper to remove certain types of civil jurisdiction from the Provincial Court (for example, moving small claims jurisdiction into an administrative tribunal setting) may free up resources to enable the Provincial Court to dispense more timely justice in child protection cases.

The difficulty is that when cost becomes the overriding performance metric all else may not be equal. A subtraction in mandate often equates to a subtraction in resources, meaning that the real problem is not, in fact, solved. Indeed, since the "subtracted mandate" must be moved and funded elsewhere – likely to the administrative justice system, that part of the justice system not discussed in the Green Paper – there may be considerable pressures to reduce judicial funding levels in recognition that new budgets must be found for tribunal infrastructure and dispute resolution.

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Reports of the Representative for Children and Youth

My three most recent reports which involved the justice system have revealed failures of accountability and significant unintended consequences flowing from previous efforts to achieve efficiencies or lower cost.

In "*Honouring Kaitlynne, Max and Cordon: Make Their Voices Heard Now*" (March, 2012) the role of the tele-bail process in a case involving risks to children was examined. That process, created to reduce costs, eliminated Crown Counsel from weekend bail applications and left it to police to make their case to a Justice of the Peace via telephone. In that case, incomplete information and confusion as to whether it was police or the accused who was speaking resulted in the release of Allan Schoenborn shortly before he murdered all three of his children. I remain concerned that police in tele-bail hearings are being placed in a role they are not most qualified to perform, and often in circumstances where public safety is most at risk.

The Green Paper makes reference to the fact that although the number of people on bail remains relatively constant, they are spending longer and longer awaiting a court date. In "*Honouring Kaitlynne, Max and Cordon: Make Their Voices Heard Now",* I highlighted the need for supervised bail orders that can effectively enhance victim safety by careful monitoring of the behaviour of the accused, regardless of bail duration. Beyond simply seeking ways of shortening the length of time an accused person remains on bail, a searching examination of how bail supervision can engage with that accused most effectively would be a meaningful way of contributing to family safety in this Province.

That same Report also examined the issue of charges related to violations of bail conditions. The Green Paper notes that such charges are growing, possibly because the longer people spend out on bail with conditions, the greater the chance they will violate those conditions. In the Schoenborn case, the issue was not bail duration, but rather the failure of the justice system to respond when breaches of bail conditions occurred. This is particularly critical in domestic violence situations where any reported bail violation must receive an immediate enforcement response.

In my Special Report "*The Impact of Criminal Justice Funding Decisions on Children in British Columbia*" (March 2012), the failure to fund translation services caused a very serious prosecution with allegations of multiple physical and sexual assaults to collapse, the result of placing budgetary constraints over victim and family safety.[4] Also relevant in this case were Crown case management practices, where the file was passed from an *ad hoc* Crown to a staff Crown at the last minute – an issue also identified in the Green Paper as being a significant impediment to justice outcomes.

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[4] See R. v. H.S.O., 2010 BCPC 0015

That Special Report and "*Honouring Christian Lee"* (September 2009) both pointed out serious issues with the provision of justice services to immigrant and refugee families, a factor that is not addressed in the Green Paper, despite significant demographic and ethnic shifts in our population that have a direct impact on the delivery of justice services. The need for our court system to respond to this changing demographic may well be an important factor in explaining some of the trends for which the Green Paper merely references "inputs" and "costs".

Although much of my recent work has identified significant impacts of the criminal justice system and its impacts on children, I have also raised significant concerns in relation to civil and family law processes. As noted above, delays in child protection proceedings are a major concern. My office is monitoring cases where repeated adjournments in child protection cases have stalled long-term planning for a child's future. With regard to the family law system, I have gone on record as supporting the *Family Law Act*, referenced in the Message from the Minister. However, because laws do not implement themselves, there is a significant concern that this important reform will fail unless access to justice can be achieved. This too, requires a candid discussion about resources.

One important area of the justice system that my office is currently reviewing concerns the rights of children to be represented by legal counsel in situations where their interests are affected. Apart from a few specific areas where arguments might be advanced for a constitutional right to State funded counsel, there is presently no systematic provision for legal representation for children in British Columbia. Other provinces have addressed this issue in different ways. Legal representation for children is provided in Alberta through a specifically funded Legal Representation for Children and Youth program. Ontario maintains a Children's Lawyer program. I submit that principles of fairness are undermined when vulnerable children do not have access to legal counsel in matters that affect them, to ensure that their rights and best interests are protected.

Meaningful justice reform also requires examining whether there are better ways to organize courts to address serious social problems such as domestic violence. I therefore recommend that any examination of judicial reform in this province should include renewed consideration of specialized domestic violence courts, something I have called for in two reports. Another structural change I strongly support is the creation of a unified family court, with the goal of providing integrated justice services to families in a more accessible and coordinated system.

These courts are able to take a problem solving approach that can be of great benefit to offenders and the communities they live in by more appropriately addressing the realities of highly vulnerable youth.

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One example is recognizing and taking into account special needs and circumstances. Children and youth who live with the cognitive challenges associated with Fetal Alcohol Spectrum Disorders often go unrecognized. The result is a recurring cycle of violations and breaches. Incarcerated, they are easy prey for hardened criminals. Supported, they have a much improved chance of avoiding such negative outcomes.

Aboriginal Children and Families

A recurring issue in my daily work is the apparent challenge in B.C. of ensuring Aboriginal children and families have equal and fair access to justice.

With the drive to "efficiencies", some of the people very deeply impacted by intergenerational trauma and loss may not have adequate or appropriate services and supports so that their children can thrive and develop with their peers. For example, in the youth justice system, recent cost reductions will have a great impact on Aboriginal girls who will serve closed custodial sentences in one centre and thus be away from families and connections important for their well-being.

In the child protection system and in family law, the impact on family engagement when significant delays occur is well known. Families drift apart and parents give up or lose contact with the courts. When they are not in attendance, “best interests” of the child is determined without the benefit of input from their parents. In such instances, the delay presents a systemic barrier to parental involvement and may result in a break for the child with their Aboriginal family, community and culture, with catastrophic consequences for identity and development.

For parents, especially mothers, the loss of the mother and baby program at Alouette prison a few years ago, despite clear evidence that keeping moms and babies together benefits bonding and resilience, will continue to impact child development among a group of already vulnerable children. The need to continue to support restorative justice approaches, where consistent with safety and sentencing principles, requires dedicated provincial investment, collaboration and training.

In numerous cases, I have become aware of or involved in advocacy efforts to connect Aboriginal children and families with appropriate legal counsel to address significant legal issues pertaining to their human rights, family status, and security. This has required informal networking as strong available supports to Aboriginal families are not readily available.

Another significant issue is the potential for exploitation of vulnerable Aboriginal litigants, either adults or guardians of children, through class actions and other settlements. Specific efforts are needed within the administration of justice and regulatory bodies to ensure that Aboriginal families are well served and do not become targets of unfair practices by virtue of their vulnerability.

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In criminal matters, we continue to see an over-representation of Aboriginal peoples, including young Aboriginal people. In my report *Kids, Crime and Care* (2009), I noted that nearly one-third of youth in B.C.'s criminal justice system were Aboriginal, and that Aboriginal youth were five times more likely to have been incarcerated than youth in the general study population.

These disturbing, long-standing patterns will not change by happenstance. They deserve serious consideration and must be addressed in any meaningful efforts to modernize and improve our justice system.

Conclusion

The justice system has a central role in safeguarding children, and I believe there are significant improvements that can be made to ensure the best possible outcomes for all children and youth in this province. This means taking extra care to ensure that the special needs and circumstances of all vulnerable children, including Aboriginal children, are taken into account in designing and administering all aspects of the justice system. Most important is the nurturing of a culture of responsibility within the system, where the well-being of children is put first.

As noted at the outset, a Green Paper on justice reform must have a perspective that properly captures all the questions that are relevant to the delivery of justice. As framed, however, the mandate does not appear to include a focus on identifying effective strategies for enhancing public safety, particularly the safety of children, prioritizing domestic violence cases, and a definition of system effectiveness that goes beyond fiscal sustainability. I am hopeful that the Justice Reform Initiative will take a wider and more comprehensive approach to addressing the challenges that face the system.

I welcome the opportunity to take part in the continuing dialogue around justice system reform and improving outcomes for children.

Yours truly,

Mary Ellen Turpel-Lafond
Representative for Children and Youth

pc: Honourable Shirley Bond, Minister of Justice and Attorney General
Honourable Mary McNeil, Minister of Children and Family Development
Honourable Chief Justice Robert Bauman, Supreme Court of BC
Honourable Chief Judge Thomas Crabtree, Provincial Court of BC
Richard Fyfe, Ministry of Justice
Stephen Brown, Ministry of Children and Family Development

Appendix A

Summary of Recommendations made relating to the justice system

Over the past four years, the Representative has made a number of recommendations related to the justice system in British Columbia. Many of these recommendations have focused on enhancing training, coordination, and cooperation across systems, as well as proposing substantive changes to the structure of our courts.

Amanda, Savannah Rowen and Serena: From Loss to Learning (2008)

- *Rec. 11 - That the Ministry of Public Safety and Solicitor General examine the feasibility of developing a specialized investigation resource to provide training, consultation and assistance to police investigating suspicious deaths of children.*

Kids Crime and Care: Youth Justice Experiences and Outcomes (2009)

- *Rec. 4 - That the Ministries of AG and PSSG examine policies and practices to ensure that youth in care are not being charged in situations where adolescents living with their families would not be charged.*

Honouring Christian Lee (2009)

- *Rec. 2 - That the Ministry of PSSG take the lead in a special initiative that focuses on the issue of safety of children and youth in domestic violence situations, by ensuring a coordinated, effective and responsive system in Greater Victoria and throughout B.C.*

- *Rec. 3 - That the MAG undertake a review and enact necessary changes to improve the administration of justice in criminal matters involving domestic violence, including establishment of domestic violence courts, to better protect the safety of children and their mothers.*

- *Rec. 4 - That the MAG undertake a review and enact necessary changes to improve administration of justice in family law matters in domestic violence cases, to better protect the safety of children and their mothers, and to ensure that the perspective of the child is considered.*

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Honouring Kaitlynne, Max and Cordon (2012)

- *Rec. 2 - Identifying and closing the gaps in policies and practices across government programs and services that touch the lives of children, including child welfare, adult mental health, criminal and family justice systems, police, victim services, education and income assistance.*

- *Rec. 7 - That the Ministry of Justice develop and implement a plan to improve legal processes related to domestic violence cases and successful prosecution of such cases. (Included another recommendation for creation of DV courts, priority for matters of family violence, effective monitoring and timely enforcement of bail orders,*

The Impact of Criminal Justice Funding Decisions on Children in BC (2012)

- *Rec. 1 - That the Ministry of Justice develop a policy that requires Senior Crown Counsel review all cases where a prosecution affecting the welfare or safety of a child would be adversely affected by procedural or investigatory barriers.*

- *Rec. 2 - That the Ministry of Justice ensure a reliable and appropriately funded system of access to accredited translation and interpretive services is available throughout all stages of an investigation and prosecution.*

- *Rec. 3 - The production of an annual aggregate report on the outcome of criminal prosecutions where a child has been a victim of violence.*