REPRESENTATIVE FOR
CHILDREN AND YOUTH

Select Standing Committee on Children and Youth

Review of the Representative for Children and Youth Act

Final Submission of the Representative for Children and Youth

February 15, 2012

Introduction

This is the final submission of the Representative for Children and Youth (RCY) to the Select Standing Committee in support of the Committee's deliberations under s. 30 of the *Representative for Children and Youth Act* (*RCYA*):

> 30. To determine whether the functions of the representative described in section 6 are still required to ensure that the needs of children are met, the standing committee, within 5 years of the coming into force of section 6, must undertake a comprehensive review of this Act or a review of portions of this Act.

Background

On Oct. 6, 2011, the Representative appeared before the Standing Committee and presented a detailed written submission.

On Oct. 20, 2011, the ministry's Deputy Minister appeared before the Standing Committee on behalf of the Ministry of Children and Family Development (MCFD). The Deputy Minister also provided a written submission.

On Nov. 3, 2011, the Hon. Ted Hughes, Q.C., author of the *BC Children and Youth Review*, appeared before the Standing Committee.

On Nov. 17, 2011, the Representative had a productive meeting with MCFD's Deputy Minister to discuss the recommendations.

Following the Nov. 17, 2011 meeting, legal counsel for the Representative and the ministry exchanged correspondence to confirm areas of common ground, and to identify those where the recommendations might be improved.

With benefit of these additional consultations, and the further deliberation the Representative has undertaken as part of a "section by section" review of the *RCYA*, the Representative makes the following submissions.

A draft of this submission was provided to MCFD on Feb. 13, 2012, and a copy of this Final Submission was shared on Feb. 15, 2012.

The Representative's Statutory Mandate

For convenient reference, the Representative's statutory mandate as set out in s. 6 of the *RCYA* is reproduced below:

6. The representative is responsible for performing the following functions in accordance with this Act:

(a) support, assist, inform and advise children and their families respecting designated services, which activities include, without limitation,

(i) providing information and advice to children and their families about how to effectively access designated services and how to become effective self-advocates with respect to those services,

(ii) advocating on behalf of a child receiving or eligible to receive a designated service, and

(iii) supporting, promoting in communities and commenting publicly on advocacy services for children and their families with respect to designated services;

(b) monitor, review, audit and conduct research on the provision of a designated service by a public body or director for the purpose of making recommendations to improve the effectiveness and responsiveness of that service, and comment publicly on any of these functions;

(c) review, investigate and report on the critical injuries and deaths of children as set out in Part 4;

(d) perform any other prescribed functions.

Ministry's Recommendation

Retain 6(a), (c) and (d), but re-evaluate two years from now the necessity for the s. 6(b) "monitoring" function

The ministry's Oct. 27, 2011 written submission to the Committee recommended maintaining the Representative's mandate as set out in *RCYA* sections 6(a) [advocacy] and 6(c) [critical injury and death reviews and investigations].

MCFD did however propose that in two years, the mandate in s. 6(b) should be narrowed by repealing the words "monitor," "review" and "audit," and to leave in place only the *research* function. The ministry suggested that this repeal would be subject to the Select Standing Committee being satisfied in two years that the ministry had made sufficient progress in establishing "a set of performance measurements, quality assurance programs and a public reporting system … sufficient to assure British Columbians that vulnerable children and youth are protected as they should be": Ministry Submission, p. 6.

In Mr. Hughes' presentation to the Standing Committee, this ministry recommendation was endorsed, with the proviso that a more realistic period of time would be three years rather than two years.

At the Nov. 17, 2011 meeting, the Representative and the Deputy Minister agreed that in order to carry out this recommendation, a formal sunset clause is not appropriate, because the proposed repeal depends on subsequent conditions being met. It would be legislatively inappropriate for a statute to provide that a formal repeal might take place on a Standing Committee's later "satisfaction" with ministry policy.

It is common ground between the Representative and the ministry that the most straightforward approach would be to enact a review provision modeled on the present s. 30 of the *RCYA* and reading as follows:

> *30. To determine whether s. 6(b) of this Act should be amended by deleting the words "monitor, review and audit", the standing committee, no later than April 1, 2015, must undertake a review of those functions to determine whether they are still required to ensure that the needs of children are met*

Such a provision would allow the Select Standing Committee to review this focused issue in three years, to consider the progress the ministry has made in addressing the objectives outlined by MCFD's Deputy Minister, and to make whatever recommendations to government it considers appropriate concerning this issue.

Youth Services During Transition to Adulthood

A. The Representative's original submission

The Representative's submission identified the legal conflict that arises within the *RCYA* from the fact that "child" is defined as person under 19 years of age, but "designated services" is expressly defined to include "services for youth and young adults during their transition to adulthood."

Because the Representative can only undertake individual advocacy on behalf of a child (s. 6(a)(ii)), this statutory conflict has raised legal problems in cases where a vulnerable young person in need of advocacy for transitional services is about to reach his or her 19th birthday. To resolve the issue, the Representative originally proposed amending the definition of "child" as follows:

> "child" means (a) a person under 19 years of age"; or
>
> (b) for the purposes of s. 6(a) or 6(b), any youth or young adult receiving services during their transition to adulthood.

This proposal has raised three issues.

B. Statutory solution

The first issue raised by this proposal was whether a statutory solution was necessary or whether, as submitted in the ministry's original submission, the matter could be addressed by protocol or by regulation.

The Representative understands that the ministry has since taken legal advice and has agreed that a statutory amendment is necessary to address the problem.

C. Limited to advocacy

The second issue was whether the amendment should apply solely to the advocacy function in s. 6(a) of the *RCYA*, or whether it should include s. 6(b) as well, as originally proposed by the Representative.

In view of the ministry's comments and Mr. Hughes' comments to the Standing Committee, the Representative is satisfied that the amendment only needs to focus on s. 6(a) in order to resolve the conflict.

D. What transitional services?

The third issue is whether further clarity is desirable with regard to the scope of the "transitional services" for which individual advocacy would be provided.

The Representative has given this question considerable thought in light of the ministry's comments and the experience and capacity of our advocates.

The solution proposed below seeks to avoid two extremes.

On the one hand, it seeks to avoid overextending the Representative's proper role by creating the expectation that the Representative will be an advocacy service for any young adult dealing with any "transitional" matter, despite the young adult having little or no prior connection to designated services.

On the other hand, it seeks to avoid unduly limiting the Representative's advocacy role, by recognizing that the existing statutory phrase "services for youth and young adults during their transition to adulthood" was chosen for a reason. Too narrow or categorical an approach to "transitional services" can cause meritorious cases to fall through the cracks, particularly since transitional services are not static – they are to be found in different statutory and funding arrangements and they undergo change from time to time.

Our proposed solution is as follows:

> *"child" means (a) a person under 19 years of age, and*
>
> *(b) for the purpose of s. 6(a) of this Act, a person between the ages of 19 and 24 years of age, if:*
>
> *(i) the person is seeking or receiving services under the* Community Living Authority Act,
>
> *(ii) the person is subject to an agreement with a young adult under 12.3 of the* Child, Family and Community Service Act, *in relation to the services provided under the agreement, or*
>
> *(iii) the person has received a reviewable service under the* Child, Family and Community Service Act *within 15 months of their 19th birthday, and the service respecting which the person requests advocacy is recognized in a written policy of the representative as a service for which advocacy may be provided.*

The need for advocacy for persons seeking or receiving Community Living BC (CLBC) services was discussed with the Committee in our original submission. Since that discussion, the government formally announced on Jan. 19, 2012 a plan to further support CLBC clients, one aspect of which will be: "An expansion of the representative

for children and youth's mandate, allowing her to follow youth involved with her office after they transition to CLBC." Proposed section (b)(i) provides a legislative solution to carry out this policy.

Draft section(b)(ii) supports young adults receiving youth agreements under s. 12.3 of the *Child, Family and Community Service Act*, and will correspond to the supports provided in that section:

12.3 (1) Subject to the regulations, a director may make a written agreement with a person who, until the person's 19th birthday,

(a) received support services or financial assistance, or both, under section 12.2,

(b) was in the continuing custody of a director or the permanent custody of the Superintendent of Family and Child Service, or

(c) was in the guardianship of a director of adoption or of a director under section 29 (3) of the *Family Relations Act*.

(2) The agreement may provide for support services or financial assistance, or both, to assist the person while

(a) enrolled in an educational or vocational training program, or

(b) taking part in a rehabilitative program.

(3) The agreement may be renewed or, after an interval, another agreement under this section may be made, but, whether one or more agreements are made,

(a) the total of the terms of all agreements with all directors, and all renewals to all agreements, relating to the same person must not exceed 24 months, and

(b) no agreement may extend beyond the person's 24th birthday.

Draft section (b)(iii) seeks to address the balance between unduly expanding and unduly limiting the Representative's advocacy role. It provides that if a person not falling within (b)(i) or (ii) seeks advocacy, the person must fall within a class of vulnerable persons who were in receipt of MCFD services within the 15 months previous to their 19th birthday, and then only in respect of adult services in respect of which the Representative has by written policy decided to provide advocacy. This time frame will ensure that needed services have been planned and considered in advance.

The "written policy" requirement will enable the Representative to take a measured, considered and staged approach to adding adult services, taking into account the Representative's advocacy capacity and resources, the need to learn about and consult with other ministries before an adult service is added, and the need to explore what other complaint or advocacy services exist in relation to a particular adult service.

It has been pointed out that "transition services" may arise in several government program areas ranging from adult mental health to income assistance to employment and advanced education. The Representative recognizes it is not desirable to have advocacy staff deciding what cases are or are not meritorious on an idiosyncratic basis, and it is not desirable for advocates to become adult case managers. The written policy requirement will ensure that there is, after considered discussion and assessment, certainty for both RCY advocacy staff and clients as to what services qualify for advocacy, while providing the flexibility to add or delete adult services as circumstances warrant, adapt to program change in this area, and avoid the delays inherent if additions or deletions were dependent on a formal regulation.

Children in Care and Education

A. The Representative's original proposal

The Representative's proposal here was that the legislation clarify that the advocacy mandate includes the ability to advocate in respect of individualized education plans for children in care. The proposal recognized that the change could lawfully be made by amending the statutory definition of "designated services" or by passing a Regulation to the same effect, pursuant to s. 29(2)(a) of the *RCYA*. The proposal was that if a statutory amendment were pursued, it could be achieved by amending the definition of "designated services" as follows:

> **"designated services"** means any of the following services or programs for children and their families provided under an enactment or provided or funded by the government:
>
> (a) services or programs under the *Adoption Act*, the *Child Care BC Act*, the *Child Care Subsidy Act*, the *Child, Family and Community Service Act*, the *Community Living Authority Act* and the *Youth Justice Act;*
>
> (b) early childhood development and child care services;
>
> (c) mental health services for children;
>
> (d) addiction services for children;
>
> (e) services for youth and young adults during their transition to adulthood;
>
> (f) individualized education plans for a child in care; and
>
> (g) additional services or programs that are prescribed under section 29 (2) (a);

This proposal has also given rise to three issues.

B. Policy or protocol?

The first issue is whether the proposed change can be addressed by way of a policy or protocol, as originally suggested in the MCFD Submission. It is our understanding that the ministry now agrees that such a change requires either an amendment to the *RCYA* or a Regulation.

C. Statute or regulation?

The second issue concerns which option – as between a statutory amendment or a regulation – is more appropriate. Our present view is that, consistent with the Standing Committee's role which is focused on a review of the *Act*, and to ensure that amendments fully reflect the Standing Committee process, a statutory amendment is the preferred approach.

D. Nature and scope of amendment

The final issue concerns the nature and scope of such an amendment. Taking into account the submissions that have been made to the Committee, the Representative believes it would be prudent to clearly specify that this amendment is focused on the advocacy mandate in s. 6(a). As such, it is proposed our original proposal be revised to clarify this point:

> **"designated services"** means any of the following services or programs for children and their families provided under an enactment or provided or funded by the government:
>
> (a) services or programs under the *Adoption Act*, the *Child Care BC Act*, the *Child Care Subsidy Act*, the *Child, Family and Community Service Act*, the *Community Living Authority Act* and the *Youth Justice Act;*
>
> (b) early childhood development and child care services;
>
> (c) mental health services for children;
>
> (d) addiction services for children;
>
> (e) services for youth and young adults during their transition to adulthood;
>
> (f) for the purpose of s. 6(a) of this *Act*, individualized education plans for a child in care; and
>
> (g) additional services or programs that are prescribed under section 29 (2) (a);

The ministry has made the point that even without the proposed amendment, the Representative's mandate "already includes children in care (including their plans of care which have an educational component)."

Since the Representative can already advocate with MCFD regarding the educational component of a plan of care, the ministry has asked for clarification regarding whether the reference to "individualized education plans" is intended to be defined as it is in the *School Act* (i.e., applicable only where a child has special needs). Ministry counsel has asked as follows:

> IEPs will not be required for all children in care (as that term is defined in the CFCSA). Again, it is my understanding from my discussions with my client that the intent is not to require IEPs for all children in care regardless of whether they are special needs, but I would appreciate your confirmation in this regard.

The Representative confirms that this understanding is correct.

Additional Amendments

In accordance with advice from the Clerk following our consultation with the ministry, the Representative has undertaken a "section by section" review of the *RCYA*, to identify other amendments which would improve the operation of the *Act*.

A. Appointment of Representative when House is not sitting

Section 5(2) provides that if the representative's office is vacant (for example, because her term of office has expired), and the Assembly is not sitting or scheduled to sit within five days, the standing committee may appoint an acting representative until a person is appointed under section 2.

There are two difficulties with this section. One arises from our understanding that the Standing Committee is not normally constituted if the House has been dissolved. The second arises because there is no vehicle for an existing representative to continue beyond his or her term of office where an acting representative has not been appointed.

To address the first difficulty, the Representative recommends a provision be added allowing the Lieutenant Governor in Council to appoint an acting Representative if the standing committee is no longer constituted because the House has been dissolved.

To address the second concern, the solution would be an amendment to s. 2(5), as follows:

> *2(5) Despite subsections (3) and (4), the representative appointed under this section, whether for a first or second term, shall continue to hold office as representative beyond the expiry of the term of office until a new appointment has been made under subsection (1) or an acting representative has been appointed under 5.*

The proposed amendment would ensure legal continuity where the Standing Committee has not been constituted. It would also provide that while the Standing Committee retains its power to make an acting appointment, it has discretion to refrain from appointing an acting representative where, in all the circumstances (including an existing appointment process), such an appointment would be disruptive or not otherwise in the public interest.

B. Sharing the results of individual reviews with the ministry

This issue arises in the exercise of the critical injury and death review and investigation function. As the committee is aware, formal investigations represent a small fraction of the critical injury and death cases the representative reviews in the ordinary course of business.

While s. 16 of RCYA authorizes the Representative to share with public bodies the results of formal investigations, as well as the results of aggregate reviews (reviews that have been aggregated and anonymized), the RCYA does not expressly authorize the Representative to disclose and discuss the results of an individual review with the relevant public body.

The Representative's experience has disclosed that there are occasions where, separate from the formal and costly investigation process, it would be useful to sit down with the ministry on a less formal basis and to be able to discuss learning opportunities that arise from individual review files the Representative has examined, without otherwise compromising the confidentiality of the records for other purposes under the *Act*.

To this end, the Representative proposes a new s. 16(2.1) and (2.2):

> *(2.1) The representative may disclose the results of an individual review to the public body, or the director, responsible for the provision of a reviewable service that is the subject of the report.*
>
> *(2.2) A disclosure made under this section is not otherwise disclosable by the representative or the public body under this Act or under the* Freedom of Information and Protection of Privacy Act.

C. Clarifying the threshold for investigations

Section 12(1)(a) requires that the representative may investigate a critical injury or death if, after the completion of a review, the representative determines, *inter alia,* that "a reviewable practice, or the policies or practices of a public body, may have contributed to the critical injury or death".

This formulation sometimes gives rise to the incorrect perception that the Representative is required to conclude that the service may have somehow "caused" the death. That perception is incorrect, it is unfair to service providers and introduces legalities regarding "causation" that are inappropriate in this context.

The reality is of course that in the vast majority of cases, the immediate cause of death or critical injury was something or someone else. What investigation often reveals is that, behind the immediate events, was child welfare practice that played (or should have played) a significant or material role in managing the risks to a child or youth. The existing statutory definition is clearly meant to capture that reality.

Given the purpose and importance of investigations, the Representative believes it would be desirable to clarify the legislative intent with a new s. 12(1.2):

> *12 (1.2) For the purposes of subsection (1), the representative may determine that a reviewable service, or the policies or practices of a public body may have contributed to the critical injury or death where she is of the opinion, based on the review, that a reviewable service, policy or practice played or ought to have played a significant role connected to the risks that existed for the child prior to the death or critical injury.*

The reference to "ought to have played" ensures that the mandate captures circumstances where, for example, a child protection report was made but no or insufficient protective action was taken.

D. Relaxing one of the bars to investigation

Section 13 of the *RCYA* sets out three absolute bars to an investigation. The first relates to criminal proceedings. The second relates to coroner's proceedings. No amendments are suggested with regard to those two bars.

The third bar requires the Representative to defer an investigation until the earlier of one year or the completion of a ministry's internal investigation. With regard to this bar, the Representative believes that the absolute requirement to await a ministry review is unduly limiting, particularly if the ministry itself has no objection to the Representative commencing her investigation, and especially given our experience that in investigations taking place after the one-year period, the Representative and the ministry have been able to successfully proceed with their respective tasks without conflict.

In this regard, the Representative suggests adding a provision that would enable the Representative to proceed with her investigation earlier than one year if the public body has no objection:

> 13(1) Despite section 12, this Act does not authorize the representative to investigate the critical injury or death of a child
>
> (c) if a public body, or a director, responsible for the provision of a reviewable service has, at the time of the critical injury or death of the child, written procedures in place for investigating critical injuries or deaths and the public body or director investigates the critical injury or death of the child, until the earlier of
>
> (i) the completion of the investigation, or
>
> (ii) one year after the critical injury or death of the child, or
>
> 13(2) Subsection (1) does not apply if the public body provides written consent to an investigation by the representative despite section 13(1)(c).

E. Annual Report and Service Plan

Two issues arise here.

First, the *RCYA* sets out separate statutory provisions requiring the Representative to submit a service plan (s. 17) and an annual report (s. 19). Since both the service plan and the annual report must be delivered to the Speaker and laid before the Assembly and the Standing Committee, the Representative would like to have the flexibility to submit the service plan and annual report in a single document. To this end, a new s. 17(3) might read as follows:

> 17(3) The representative may submit a service plan under this section separately or as part of the annual report submitted under s. 19 of this Act.

Second, with respect to the Annual Report, the Representative observes that s. 19(1) requires the inclusion of *"financial statements for the representative prepared in accordance with generally accepted accounting principles".* The Representative has been advised by the Auditor General, who is responsible for auditing RCY accounts each year (s. 21(3)), that the phrase "generally accepted accounting principles" is a term of art which is not necessary for the purposes of its audit.

To this end, the Representative recommends that the phrase "generally accepted accounting principles" be replaced with *"Office of the Comptroller General guidelines".*

Representative's Reports and Children in Care

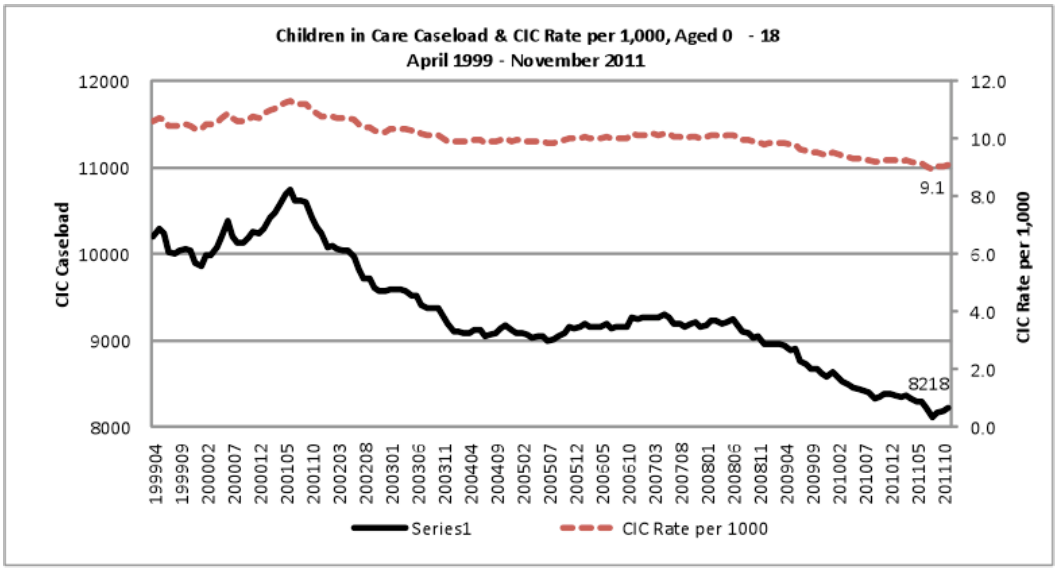
Before concluding this submission, the Representative wishes to provide the Committee with information in connection with a suggestion made by a Committee member at a previous meeting that publicity surrounding critical injury and death reviews leads to increases in the number of children in care.

With respect to the work of the Representative's Office, this view is not substantiated by the data:

- In 2001, the number of children in care (CIC) was just over 10,000 children in British Columbia. Since then, the CIC caseload trend showed a steady decline to approximately 9,000 CIC between 2004 and 2007, and remained stable during that period.

After 2007, the CIC caseload declined at a steady rate to approximately 8,200 cases by November 2011.

The Representative has issued numerous public reports since 2007 (vertical red line below indicates when the Representative began issuing public reports).



Conclusion

The Representative closes this report by emphasizing, as in the first submission, that the drafting suggestions made in this report are only suggestions. The Representative recognizes that final drafting decisions will be based on advice from legislative counsel, but did not consider it productive to suggest changes without proposing draft language.

The opportunity to continue to assist the Committee with its important deliberations is appreciated.