Review of the *Representative for Children and Youth Act*:

Final Submission to the Select Standing Committee on Children and Youth by the Representative for Children and Youth

NOVEMBER 2022

REPRESENTATIVE FOR
CHILDREN AND YOUTH

November 30, 2022

Ms. Kelli Paddon, MLA
Chair, Select Standing Committee on Children and Youth
Province of British Columbia
Parliament Buildings
Victoria, B.C. V8X 1X4

Dear Ms. Paddon,

As you know, pursuant to section 30(1) of the *Representative for Children and Youth Act*, the Select Standing Committee on Children and Youth has been undertaking a comprehensive review of the Act to determine whether the functions of the Representative described in s.6 are still required to ensure that the needs of children, youth and young adults as defined in that section, are met.

I would like to thank the Committee for the interest and attention it has demonstrated to addressing this important matter, especially the full day on Nov. 4, 2022 dedicated to hearing from a number of parties, including my Office, who had made written submissions during the consultation process.

After considering our initial submission in April, the written submissions from other parties, the comments made during the Nov. 4 Committee meeting, and engaging in internal consultations, we have formulated our enclosed final report and recommendations.

Sincerely,

Dr. Jennifer Charlesworth
Representative for Children and Youth

pc: Ms. Karan Riarh
Committee Clerk, Legislative Assembly

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EXECUTIVE SUMMARY AND CONSOLIDATED LIST OF RECOMMENDATIONS

Summary

Section 30 of the *Representative for Children and Youth Act* (*RCY Act*, or Act) requires the Select Standing Committee on Children and Youth (the Committee) to carry out a comprehensive review of the Act every five years. The current review began in March 2022, when the Committee formulated a workplan. On April 22, 2022, the Committee heard briefings from the Representative for Children and Youth (the Representative), the Ministry of Children and Family Development (MCFD) and the Ministry of Attorney General.

In advance of the April meeting, the Representative submitted a comprehensive report which set out initial recommendations for amendments to the *RCY Act* and identified additional options for consideration by the Committee. It was hoped that this initial submission would be helpful to the Committee and others in serving as a platform for the identification of key issues and considerations

The Committee invited British Columbians to provide written input into the legislative review between May 10 and July 27, 2022. Written submissions were received from 14 parties, including: Adoptive Families Association of BC, BC Association of Aboriginal Friendship Centres, BC Complex Kids Society, BCEdAccess Society, Community Living BC (CLBC), Inclusion BC, Indigenous Child and Family Services Directors, Interior Health Authority, Native Courtworker and Counselling Association of BC, Office of the Human Rights Commissioner, Public Guardian and Trustee of British Columbia, Society for Children and Youth of BC, Union of BC Indian Chiefs, and Vancouver Island Health Authority.

The Representative also shared the Office's initial report with interested parties and independently met with several, including senior representatives from: the Ministry of Health, Ministry of Mental Health and Addictions, Ministry of Social Development and Poverty Reduction, CLBC, Public Guardian and Trustee, Inclusion BC and the Society for Children and Youth of BC.

The Committee also invited the parties that had made written submissions and the Representative to make an oral presentation and respond to questions on Nov. 4, 2022.[1]

After considering all the above-described information and engaging in internal discussions, the Representative has formulated the Office's final recommendations, which are set out below. In the interest of providing context and a full consideration of the issues, much of the background and discussion set out in the Representative's initial submission are repeated in this final submission, with the addition of references to and discussion of the written and oral submissions made by other parties. With respect to the options identified in the Representative's initial submission, this submission takes a final position on those options and explains the Representative's rationale for each of them. Finally, several proposals for amendments were made by other parties that were not identified in the Representative's initial submission. This final submission also addresses the most salient of these helpful suggestions.

[1] Twelve of the listed parties and the Representative appeared; the B.C. Association of Friendship Centres and Interior Health Authority did not.

The final submission and recommendations are not organized according to the numbered sequence of the provisions of the *RCY Act* but rather according to the breadth and scope of issues, beginning with larger-picture issues and moving to narrower, though still important, matters that are more operationally related. Accordingly, after recounting the historical context of the origins and evolution of the Office over the past 16 years, the submission begins by addressing the most fundamental of questions, which is set out in s.30 of the Act: are the functions of the Representative still required? After affirmatively answering that, yes indeed, all the functions are still required, the submission moves on to examine the role that international human rights instruments could and should play in relation to the Representative's functions, as well as the significant implications of and need for changes in light of the rapidly emerging and changing context of Indigenous rights and jurisdiction. The report then continues with an examination of how the Representative's functions are described and the core issue of how the Representative's scope of jurisdiction in relation to services to children, and to young adults, needs to be clarified and expanded so that the needs of the whole person can be fully considered and addressed. As for the more operationally related issues, these include matters related to: reviews and investigations, information-gathering and disclosure, monitoring the quality assurance processes of public bodies, communications with the Representative, and appointments and qualifications.

In total, the Representative makes 28 final recommendations, a consolidated list of which is presented below. Before proceeding with that list, however, there is need to discuss how, if endorsed, some of the key recommendations could and should, in the Representative's view, be prioritized and expedited.

Prioritizing and Expediting Recommended Mandate Changes

The Representative recognizes that 28 recommendations for amendments could, if all or most are endorsed, create an ambitious agenda for change that could take considerable time and resources to implement. The process for legislative change is complex and can be slow, as evidenced by the response to the 2017 Committee report which, as will be discussed in the body of our report, has resulted nearly five years later in only three recommendations being substantially or partially addressed by government.

The process of legislative change requires the Ministry of Attorney General, as the ministry responsible, to take the lead in assessing recommended changes, including legal and policy analysis, identifying resource implications, engaging in consultations with affected public bodies, and then processing for review and decision through relevant cross-ministry and Cabinet committees, followed by legislative drafting and prioritization and scheduling within a busy legislative agenda.

Obviously, some of the Representative's recommendations, insofar as they speak to the Office's core responsibilities, are more substantive than others, such as the recommendation to include special education (or inclusion) services within the Representative's mandate. Others, such as the recommendation to enable the Representative to share limited summary information of the results of RCY comprehensive reviews of critical injuries and deaths with birth or adoptive parents of a child, involve complex legal issues that need to be carefully examined. Yet others, such as the recommendation to establish a process of consultation with First Nations, Métis, Inuit and Urban Indigenous Peoples about means by which the Act can be strengthened to better reflect their experiences, needs and interests, will obviously require considerable consultation and time.

The number of recommendations and these differences in significance, complexity and consultation requirements all suggest that reform of the legislation may have to proceed in stages over time. An all-at-once approach could result in inordinate delay.

Avoiding delay is, in the Representative's view, paramount with respect to the recommendations to clarify and expand the Representative's mandate in relation to services to children and youth with special needs, and young adults in receipt of or eligible for CLBC services, or those formerly in care. As discussed in the body of the report, the Representative's current mandate in relation to services for children and youth with special needs is limited to services provided or funded by MCFD only, thereby excluding critical services provided to this highly vulnerable population by health authorities and school districts, such as special education (inclusion) services and Nursing Support Services. This does not accord with a "whole child" approach that should be at the forefront of services to, and advocacy for, children and youth, and their families.

Similarly, the Representative's advocacy mandate in relation to young adults is limited to those young people who are eligible for or in receipt of CLBC services and for young adults formerly in care, but in the latter regard is restricted only to the services available through Agreements with Adults (AYA) and the Provincial Tuition Waiver Program. Critical services such as mental health and addiction services for these vulnerable young adults are thereby excluded. Such a narrow remit hardly accords with a "whole person" approach nor, as discussed in the body of our report, with the Committee's recommendation from its 2017 review that the Representative's advocacy jurisdiction in relation to young adults should include: *"services and programs necessary to support them in their transition to adulthood."*

The Representative – and many others, including youth and families themselves – often lament about how government services are "siloed." Yet, paradoxically, the Representative's mandates in relation to services to children and youth with special needs, and to young adults, are similarly siloed – and unacceptably incomplete. This demands prompt action.

Fortunately, s.1 of the Act not only describes the designated services that fall within the ambit of the Representative's advocacy jurisdiction but also enables services to be prescribed by regulation. Changes to the scope of services through regulation can be a simpler process to expedite necessary changes on an interim basis, pending amendments to the Act itself. An example of this can be found with the changes flowing from the 2017 Committee's review and recommendations. Amendments to the *Representative for Children and Youth Regulation* (the Regulation) clarifying the Representative's mandate in relation to MCFD services for children and youth with special needs, as well as AYA and Tuition Waiver for young adults, were brought into force on July 3, 2019 – 17 months after the Committee filed its report and recommendations in February 2018. In contrast, amendments to the Act itself changing the definition of "young adult" were brought into force much later, on Feb. 28, 2022 – four years after the Committee filed its report.

The Representative therefore recommends that, as an interim step pending amendments to the Act itself, priority be given to expediting a broadening of its advocacy mandate by way of regulation, as described in Recommendations 11 and 13, specifically:[2]

- In relation to services to children and youth with special needs, by designating the following services:
  a) special (inclusive) education services funded by the Ministry of Education and Child Care; and
  b) Nursing Support Services and the assessment and diagnostic clinics for children with autism (BCAAN) and complex behavioural disorders (CDBC).[3]
- In relation to services to young adults, by designating mental health and addictions services provided or funded by the Ministry of Health or health authorities.

Consolidated List of Recommendations

Are the Representative's Functions Still Required?

1. Section 30 (1) of the Act be amended to remove the reference to determining whether the functions of the Representative are still required, and to simply state, like the governing statutes of the Information and Privacy Commissioner and the Human Rights Commissioner, that the Committee will undertake a comprehensive review of the Act every five years.
2. Section 30 (2) of the Act be repealed.

International Human Rights Instruments

3. Section 6 of the Act be amended to require the Representative to take into account the *United Nations Convention on the Rights of the Child (UNCRC)* in carrying out the Office's functions in relation to children and youth.
4. Section 6 of the Act also be amended to require the Representative to take into account the *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* in carrying out the Office's functions in relation to children, youth and young adults.
5. Section 6 of the Act be amended to expand the Representative's functions to include the education, promotion and monitoring of the rights of children, youth and young adults set out in the *UNCRC* and the *UNCRPD*.

[2] The Representative's mandate in relation to services to young adults is limited to individual advocacy. Although the Representative also recommends that the Act be amended to include a monitoring mandate for services to young adults, this could flow from amendments to the Act itself rather than this recommended interim measure.

[3] The body of the report discusses the inclusion of services provided by the Sunny Hill Health Centre and the Queen Alexandra Centre for Children's Health. These could be considered later, as necessary. The Representative's experience suggests that concerns do not principally arise about services at these hospitals *per se* but rather about the adequacy of community support services to support transition from hospital.

Implications of Evolving Indigenous Jurisdiction

6. Section 6 of the Act be amended to require the Representative to take into account the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* in carrying out the Office's functions under the Act.
7. A process of consultation with First Nations, Métis, Inuit and Urban Indigenous Peoples be established about means by which the Act can be strengthened to better reflect the experiences, needs and interests of First Nations, Métis, Inuit and Urban Indigenous Peoples.
8. Section 22 of the Act be amended to clearly enable the Representative to enter into agreements with Indigenous Governing Bodies, at their request, to assist them in developing their own internal capacity to perform one or more of the Representative's functions, or for the Representative to directly perform one or more of the functions under the Act.

Systemic Advocacy

9. Section 6 of the Act be amended to expressly include systemic advocacy as a primary function of the Representative, linking this function to the current monitoring mandate.

Jurisdiction Over Services to Vulnerable Children

10. For the purposes of individual advocacy and systemic advocacy (monitoring), describe the scope of services for children and youth generically, including:
    a) early childhood development services
    b) child welfare services
    c) mental health services for children and youth
    d) addiction services for children and youth
    e) services for children and youth with support (special) needs
    f) special education (inclusion) services for children and youth
    g) youth justice services
    h) services for youth in their transition to adulthood
    i) services for gender diverse youth; and

    give the authority and responsibility to the Representative to develop agreements with ministries and public bodies as to which particular services and programs are to be included and, in the event of disagreement, the authority to refer the matter to the Committee itself for resolution.[4]
11. As an interim step pending amendments to the Act itself, priority be given to expediting a broadening of RCY's advocacy mandate in relation to children and youth with special needs by way of regulation, specifically:
    a) special (inclusive) education services funded by the Ministry of Education and Child Care; and

[4] Note that child care services are omitted because they are services available to the general population of children rather than directed to children with extra support needs; supported child development services would fall under the rubric of services for children and youth with special needs.

b) Nursing Support Services and the assessment and diagnostic clinics for children with autism (BCAAN) and complex behavioural disorders (CDBC) funded by the Ministry of Health or health authorities.

Jurisdiction Over Services to Young Adults

12. Section 6 of the Act be amended so that the Representative may provide individual advocacy services to young adults in respect of services necessary to support their transition to adulthood, giving the authority and responsibility to the Representative to develop agreements with ministries and public bodies as to which particular services and programs are to be included and, in the event of disagreement, the authority to refer the matter to the Committee itself for resolution.
13. As an interim step pending amendments to the Act itself, priority be given to expediting a broadening of the Representative's advocacy mandate in relation to services to young adults by way of regulation, specifically by designating mental health and addictions services provided or funded by the Ministry of Health and health authorities.
14. In the interest of accessible language, recent amendments changing the wording of "young adult" to "included adult" be changed back to "young adult."
15. "Young adult" (or "included adult") be defined, at minimum, as adults under the age of 27 years who:
    a) are eligible for, or in receipt of, CLBC services or,
    b) were formerly in care as defined by proposed changes to the eligibility for a broadened suite of transitional support services (i.e., those who were under any form of order or agreement and who were in care for a cumulative period of two years between the ages of 12 and 19).
16. The Act be amended to give the Representative a systemic advocacy (monitoring) function in relation to services to young adults who were formerly in care and young adults in receipt of, or eligible for, CLBC services.

Reviews and Investigations

17. The definition of "critical injury" in s.1 of the Act be amended to clarify that "health" includes mental and emotional health.
18. Section 11 of the Act be amended to clarify that a critical injury or death that occurs in relation to a child who is eligible for a reviewable service – such as being on a waiting list for service – is subject to review and investigation.
19. Section 11 of the Act be amended to clarify that the Representative may make recommendations to a public body or director in an aggregate review report on deaths or critical injuries.
20. The Act be amended to provide that, where a critical injury has arisen while the injured person was a child, an investigation may include events and incidents that occurred at least one year after the child reached 19 years of age, where the Representative believes that such an investigation raises important public policy issues.

Information-Gathering and Disclosure

21. Amend s.10 of the Act so it enables the Representative to obtain information:
    a) directly from service providers, meaning an agency or person under a contract or agreement to provide designated or reviewable services for a public body, and
    b) from the Royal Canadian Mounted Police.
22. Amend the Act to give the Representative the discretion to disclose limited summary information of the results of the Representative's reviews of critical injuries and deaths to birth or adoptive parents of a child, regardless of whether that parent has or had guardianship, subject to enumerated criteria and to constraints on the subsequent disclosure or use of that information.
23. Amend the Act to enable the Representative to directly disclose the results of reviews to delegated Indigenous Child and Family Service Agencies.
24. Amend the Act to authorize the Representative to publicly report anonymized information about reviews of critical injuries and deaths, including the disposition of reviews and case summaries.

Monitoring Quality Assurance Processes

25. Section 6(1)(b) of the Act be amended to give clear authority to monitor, review, audit and conduct research in respect of quality assurance processes for all designated services.

Communication with the Representative

26. Section 26 of the Act be amended to provide that a child or youth, or a young adult in receipt of CLBC services, in a foster home, home share, staffed residential program, hospital, youth custody centre, facility, or other place where a designated service is provided:
    a) must be informed about the Representative's role in language suitable to the child, youth or young adult's level of understanding,
    b) if requested, the child, youth or young adult has a right to be assisted in immediately contacting the Representative, and
    c) the child, youth or young adult has a right to privacy in all communications with the Representative.

Appointments and Qualifications

27. Section 2 of the Act be amended to provide that the appointment of the Representative be for a single term of seven or eight years.
28. The qualifications of a Deputy Representative set out in the *Representative for Children and Youth Regulation* be clarified.

INTRODUCTION

Section 30 of the *RCY Act* mandates the Select Standing Committee on Children and Youth to carry out a comprehensive review of the Act every five years. The current review began in March 2022 with the Committee formulating a workplan. On April 22, 2022, the Committee heard briefings from the Representative, MCFD and the Ministry of Attorney General.

For that April meeting of the Committee, the Representative offered a comprehensive initial submission which set out the Office's initial recommendations for amendments to the *RCY Act* and identified some additional options for consideration by the Committee. It was hoped that this would be helpful to the Committee and others by serving as a platform for the identification of key issues and considerations.

The Committee invited British Columbians to provide written input on the legislation review between May 10 and July 27, 2022. Written submissions were received from 14 parties, including: Adoptive Families Association of BC, BC Association of Aboriginal Friendship Centres, BC Complex Kids Society, BCEdAccess Society, Community Living BC, Inclusion BC, Indigenous Child and Family Services Directors, Interior Health Authority, Native Courtworker and Counselling Association of BC, Office of the Human Rights Commissioner, Public Guardian and Trustee of British Columbia, Society for Children and Youth of BC, Union of BC Indian Chiefs, and Vancouver Island Health Authority.[5] As well, on Nov. 4, 2022, the Committee heard oral submissions from 12 of the 14 parties who made written submissions, and from the Representative.

The Representative also shared the Representative's initial submission with interested parties and independently met with several, including senior representatives from: the Ministry of Health, Ministry of Mental Health and Addictions, Ministry of Social Development and Poverty Reduction, Community Living BC, the Public Guardian and Trustee, Inclusion BC and the Society for Children and Youth.

Having considered the above-described information and engaging in internal discussions, the Representative has formulated the Office's final recommendations, which are set out in this final submission. In the interest of providing context and a full consideration of the issues, this submission includes a good deal of the background and discussion set out in the Representative's initial submission, with the addition of references to and discussion of the written and oral submissions made by other parties.

This submission expresses final positions on recommendations identified in the Representative's initial submission and explains the rationale for those final positions. Finally, some proposals for amendments were made by other parties that were not identified in the Representative's initial submission, and some concerns about some recommendations were expressed by some parties. This final submission also addresses the most salient of these helpful suggestions and the concerns raised.

[5] Written submissions are available at the Committee's website at https://www.leg.bc.ca/parliamentary-business/committees/42ndparliament-3rdsession-cay

BACKGROUND

It is best to situate this final submission by beginning with some background information which recounts a brief history of the antecedents to the *RCY Act*, the development of the Act itself and previous reviews and recommendations of the Committee as well as consequent amendments.

The creation of the Office of the Representative for Children and Youth, which has now been in place for 16 years, was preceded by 10 years of earlier attempts to establish external individual and systemic advocacy in relation to publicly funded services for children, youth and families.

The Legislative Assembly appointed B.C.'s first Children's Advocate in 1995.[6] The Child, Youth and Family Advocate (the Advocate) was an Independent Officer of the Legislature who was mandated to:

"• *ensure that the rights and interests of children, youth and their families relating to designated services are protected and advanced and that their views are heard and considered;*

- *ensure that children, youths and their families have access to fair, responsive and appropriate complaint and review processes at all stages in the provision of designated services,*
- *provide information and advice to government and communities about the availability, effectiveness, responsiveness and relevance of designated services; and*
- *promote and coordinate in communities the establishment of advocacy services for children, youths and their families."*[7]

Shortly after the creation of the Advocate's office, Judge Thomas Gove completed an inquiry into the death of Matthew Vaudreuil.[8] A key recommendation arising from the Gove Inquiry was the creation of a Children's Commissioner. Although the Children's Commissioner was not an Independent Officer of the Legislature but rather reported to the Attorney General, the mandate of this new and additional office, which was created by statute, provided for fairly detailed oversight of the activities of ministries and public bodies and, in summary, included responsibilities to:

- collect information about the deaths of all children (not just those in receipt of designated services) as well as about critical injuries sustained by children while receiving designated services, investigate those deaths and injuries, and make recommendation concerning them
- set standards to be applied by prescribed ministries or agencies of the government to help ensure that their internal review processes are responsive to complaints about decisions concerning the provision of designated services to children, and monitor whether ministries and agencies are meeting those standards
- review and resolve complaints about breaches of the rights of children in care, and decisions concerning the provision of designated services to children
- monitor whether the standards set by the director for plans of care are being met, identify plans that need to be reviewed by the director and conduct random audits of plans of care
- collect data about, and conduct or encourage research into, matters relevant to services for children; and
- provide public education and information designed to promote an understanding of, and to invite public comment on, the commission's work.[9]

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[6] *Child, Youth and Family Advocacy Act* (SBC 1996) Chapter 47.
[7] *Ibid*, section 2.
[8] *Report of the Gove Inquiry into Child Protection in British Columbia*, Victoria BC, Queen's Printer, 1995.
[9] *Children's Commission Act* (SBC 1997) Chapter 11, section 4.

Another key outcome of the Gove Inquiry was the creation of MCFD, which incorporated child, youth and family programs from the ministries of then-Social Services, Education, Health, Women's Equality and Attorney General.

The government's core services review, which began in 2001, led to a number of changes in public services. In 2002, the Children's Commissioner and the independent office of the Advocate were eliminated and replaced by a Child and Youth Officer who, like the Children's Commissioner, reported to government (the Attorney General) rather than the Legislature and whose primary function was:

> *"To provide support to children, youth and their families in obtaining relevant services and to provide independent observations and advice to government about the state of services provided or funded by government to children and youth . . ."* [10]

The Child and Youth Officer's advocacy mandate was very limited: while the office could provide information and advice to children, youth and their families, individual advocacy services could only be provided in *"extraordinary circumstances."* [11]

With the dissolution of the Children's Commission, the BC Coroners Service was given the responsibility for reviewing child deaths.

The *RCY Act* was enacted in May 2006 with bi-partisan support, immediately following the government's acceptance of the April 7, 2006 recommendations by the Honourable Ted Hughes, Q.C. in his *BC Children and Youth Review*, otherwise known as the *Hughes Review*.[12]

The *Hughes Review*, which was prompted by the deaths of two Indigenous children who were receiving child welfare services, recognized that despite the three attempts in the preceding 10 years to help children, youth and families navigate the child welfare system and hold that system more publicly accountable, public and professional confidence in the child welfare system was low.

Hughes' *RCY Act* recommendations flowed directly from his terms of reference, which instructed him to conduct an independent review of B.C.'s child protection system and to make recommendations regarding improved advocacy, child death reviews and monitoring of the ministry's performance.

The *RCY Act* was incrementally brought into force in three stages between November 2006 and June 1, 2007, at which time all the functions of the Office – individual advocacy, investigations and monitoring – were operational.

From the outset, the *RCY Act* included s.30, a provision requiring a standing committee of the Legislative Assembly – the Select Standing Committee on Children and Youth – to undertake a five-year review of the statute. Significantly, the statutory focus of the s.30 review was not general and routine, such as to assess the effectiveness of the legislation and make recommendations for change. Instead, the Committee's specific statutory task was:

> *"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*

[10] *Office for Children and Youth Act* (SBC 2002) Chapter 50, section 3.
[11] *Ibid*.
[12] Honourable Ted Hughes QC. B*C Children and Youth Review: An Independent Review of BC's Child Protection System*, Victoria, BC, April 7, 2006.

> *the coming into force of section 6, must undertake a comprehensive review of this Act or a review of portions of this Act."* (emphasis added)

That same task and criteria remain today, except that "young adults" was added in 2013, reflecting the newly expanded advocacy mandate to include young adults in receipt of specified services.[13,14]

This need for periodic review to determine whether the functions of the Representative are "still required" arose from Hughes' own uncertainty about whether the day may come when such external oversight – in particular, the monitoring function – may be unnecessary because the ministry's own performance measurement system, quality assurance programs and public reporting may be sufficient.[15]

There were three minor amendments to the Act before the first comprehensive review was undertaken:

- On June 21, 2007, a minor amendment to the Act consequential on the new *Public Inquiry Act*, S.B.C. 2007, c.9 was proclaimed into force by B.C. Reg. 226/2007. This amendment changed the way in which the Act described the Representative's power to compel evidence in an investigation.
- On Sept. 15, 2007, an amendment to the Act consequential on the new *Coroners Act*, S.B.C. 2007, c.15 was proclaimed into force by B.C. Reg. 298/2007. This amendment clarified the relationship between a Representative's critical injury or death investigation and the exercise of the Coroner's mandate.
- On May 29, 2008, an amendment to clarify the Representative's powers to disclose information by adding s.23 (4.1) came into force: *Miscellaneous Statutes Amendment Act (No. 2)*, 2008, S.B.C. 2008, c.42. This amendment came into force when that Act received Royal Assent on May 29, 2008.

The Select Standing Committee on Children and Youth conducted the first five-year review in 2011 and 2012. The Committee's review process included hearing from the Representative, the Deputy Minister of MCFD, and the Hon. Ted Hughes as well as receiving written submissions from key stakeholders and the public.

In May 2012, after hearing *"considerable support for the legislation and the work of the Representative,"* the Committee unanimously concluded that all the Representative's functions ought to be preserved, and made seven recommendations to improve the operation of the legislation:

> *"This report contains seven recommendations that are designed to enhance the functioning of the legislation while the Representative continues to provide valuable services for children and youth and their families. These include recommendations to expand and review parts of the Representative's mandate, improve provisions for appointing an acting Representative, facilitate information sharing between the Representative's office and public bodies, and strengthen reporting requirements. It is also recommended that the Act be amended to allow for future reviews of the legislation."* [16]

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[13] *Miscellaneous Statutes Amendment Act* (SBC 2013), Chapter 12, ss.30-37.

[14] In February 2022, "young adult" was re-described as "included adult" as a result of the *Miscellaneous Statutes Amendment Act (no.2)*, 2021. Despite this change, for ease of reference and understanding, "young adult" will continue to be used in this submission.

[15] *Supra*, note 12.

[16] Select Standing Committee on Children and Youth. *Review of the Representative for Children and Youth Act*. Victoria, B.C., May, 2012, p. iii.

Specifically, the seven recommendations were as follows:

"1. Allow for the appointment by the Lieutenant Governor in Council of an acting Representative if the Representative is suspended, the office is vacant or the Representative is temporarily absent because of illness or another reason, and the House is dissolved and the Select Standing Committee on Children and Youth is not constituted.

2. Allow the Representative to provide advocacy services to young adults between 19 and 24 years of age who are transitioning into the Community Living BC system and/or have received a reviewable service as defined under the Representative for Children and Youth Act within 15 months of their 19th birthday.

3. Require the Select Standing Committee on Children and Youth to complete a review of the Representative's monitoring functions described in section 6(1)(b) by April 1, 2015.

4. Authorize the Representative to investigate the critical injury or death of a child if a public body requests and provides written consent despite 13(1)(c).

5. Allow the Representative to disclose the results of an individual review with the public body or director responsible for the reviewable service.

6. Require the Representative to deliver the service plan to the Speaker before September 30 of each year.

7. Require the Select Standing Committee on Children and Youth to undertake a comprehensive review of this Act or a review of portions of this Act every 5 years, with the first 5-year period beginning on April 1, 2012."

As with the original Hughes recommendations, these recommendations were speedily addressed: in March 2013, all the recommendations were enacted by the Legislature.[17]

As can be seen below, the Committee recommended two discrete reviews of *RCY Act* functions, each of which was incorporated into the current version of s.30, enacted in 2013:[18]

> *"30 (1) To determine whether the functions of the representative described in section 6 are still required to ensure that the needs of children, and young adults as defined in that section, are met, the standing committee, before April 1, 2017, and at least once every 5 years after that, must undertake a comprehensive review of this Act or a review of portions of this Act.*
>
> *(2) In addition to the comprehensive review required under subsection (1), the standing committee must also complete, by April 1, 2015, an assessment of the effectiveness of section 6(1)(b) in ensuring that the needs of children are met."*

The Committee's report described the basis for the earlier review of s.6(1)(b), which relates to the Representative's monitoring mandate:

> *"The Ministry of Children and Family Development's formal submission to the Committee outlined steps underway to establish a credible system of performance measurement and quality assurance linked to public reporting. To implement the changes contemplated by the Hughes Review, it was proposed that a new provision be added to the Act allowing for the Representative's monitoring, review, and audit functions under section 6(1)(b) to be concluded in two years (excluding the research function), subject to a decision by the Committee and sustained and credible action by the Ministry."*[19]

[17] *Supra*, note 13.

[18] With the exception of the recent change of wording from "young adults" to "included adults." For ease of reference, *"young adults"* will continue to be used in this submission.

[19] *Supra*, note 16.

In 2015, the Committee undertook its review of the s.6(1)(b) monitoring function and filed a one-page report. The review was informed by a joint letter from the Representative and the MCFD Deputy Minister which:

> *"… described their shared view that the Representative's monitoring functions, including reviewing, auditing and research, remain a required and important aspect of oversight and public accountability of the performance and outcomes of the Ministry of Children and Family Development."* [20]

The Committee concluded:

> *"In accordance with the views of the Representative and the Ministry, the Committee recommends that, in order to ensure the needs of children are effectively met, section 6(1)(b) of the Representative for Children and Youth Act not be amended at this time. The Committee further notes that there will be an opportunity to review this section during the next statutory review of the Act, which is required to be undertaken by the Committee before April 1, 2017, pursuant to section 30(1) of the Act."* [21]

The second full five-year review commenced in 2017. The Committee received 16 written submissions from organizations and individuals, and received presentations from the first Representative, the succeeding Representative, the Deputy Attorney General and the Hon. Ted Hughes.

The Committee released its report in February 2018 and made nine recommendations, as follows:

> *"1. The Act's definition of designated services be amended to include services or programs provided or funded by government for children with special needs.*
>
> *2. A review of statutory officers' terms of employment be undertaken by the Legislative Assembly. The review should include appointment and remuneration, with a view to determining whether more standardized terms of employment would enhance independence, transparency and accountability. Such a review could include consideration of principles such as whether or not statutory officers' terms should be renewable.*
>
> *3. The Act be amended to allow the Representative for Children and Youth to support, assist, inform and advise young adults who have previously been in care with respect to services and programs necessary to support them in their transition to adulthood.*[22]
>
> *4. The Act be amended to ensure the Representative has authority to provide advocacy services with respect to programs and services for young adults with special needs that were formerly delivered under the Community Living Authority Act. Further, amendments to the Act should ensure that the Representative's existing mandate with respect to young adults with special needs is expanded in conjunction with the recommendations related to young adults who have previously been in care.*
>
> *5. Section 6(1)(b) of the Act be amended to authorize the Representative to monitor, review, audit and conduct research in respect of prescribed services and reviews by the director under the Child, Family and Community Service Act.*

[20] Select Standing Committee on Children and Youth. *Statutory Review of Section 6(1)(b) of the Representative for Children and Youth Act, First Report (SBC,2006, c.29)*, Victoria BC, March 26, 2015.

[21] *Ibid*.

[22] Select Standing Committee on Children and Youth. *Review of the Representative for Children and Youth Act*, Victoria BC, February 28, 2018.

6. *The Act be amended to a define a young adult as a person aged 19 years of age but under age 26, to align with the eligibility for agreements with adults under section 12.3 of the Child, Family and Community Service Act, and remove the requirement that a young adult is required to have received a reviewable service within the 15 months before the individual's 19th birthday.*
7. *The Act be amended to provide that, where the Representative is investigating a critical injury to a child, the investigation may include events and incidents that occurred after the child reached 19 years of age, where the Representative believes that such investigation raises important issues related to the conduct of a public body delivering a reviewable service.*
8. *Section 30 of the Act be amended to remove the reference to determining whether the functions of the Representative are still required, and to state that the Committee will undertake a comprehensive review, or review of portions of the Act, every five years to ensure the Act is functioning effectively to meet the needs of children and young adults.*
9. *The Act be amended to require that, in undertaking the functions under the Act, the Representative reflect the principles contained in the United Nations Convention on the Rights of the Child."*

In contrast to the speedy and fulsome responses to the original *Hughes Review* and to the first five-year statutory review in 2012, to date only three of these nine recommendations have been substantially (but not fully) addressed in the nearly five years since the Committee's recommendations were submitted in February 2018. Government responses to these three recommendations are described below.

Order-in Council 343/2019, which amended the *RCY Regulation* and which was brought into effect on July 3, 2019, substantially addressed the Committee's first recommendation to clarify the Representative's statutory mandate in relation to services for children and youth with special needs. However, because that regulation change was limited to prescribing services and programs funded by MCFD, some critically important services for children and youth with special needs that fall under the mandate of the Ministry of Health and health authorities still remain outside the Representative's statutory mandate. These excluded programs are Nursing Support Services, the assessment and diagnostic services for children and youth with special needs provided through the BC Autism Assessment (BCAAN) and the Complex Developmental Behavioural Conditions (CDBC) Networks, and services for children with special needs provided through Sunny Hill Health Centre and Queen Alexandra Centre for Children's Health.

That same 2019 Order-in-Council extended the Representative's advocacy mandate to include young adults who are eligible for an Agreement with Young Adults (AYA) under s.12.3 of the *Child, Family and Community Service Act (CFCS Act)* or the Provincial Tuition Waiver Program for former youth in care administered by the Ministry of Advanced Education, Skills and Training. While this was a step forward, it only partially addressed the Committee's Recommendation 3, which contemplated the Representative being given a mandate to advocate in relation to a much broader suite of support services for transitioning young adults which, in the Committee's view, should:

> *"… be carefully defined so that the Representative's mandate does not inadvertently exclude young adults who would benefit from support in accessing services they need for a successful transition into adulthood."* [23]

[23] *Ibid*, p. 10.

A broader suite of transitional services could include, for example, mental health and addiction services, and housing.

It is noted as well that the Committee recommended that this expanded advocacy mandate in relation to young adults include young people who had *"previously been in care"* (i.e., at any previous time) but, as will be discussed later, the expanded mandate that has actually been implemented is much narrower because AYA eligibility criteria is limited to only those who have "aged out" of care at 19.

The first part of the Committee's Recommendation 6 to change the definition of "young adult" to bring that (increased) age range into alignment with the definition of young adult in the *Child, Family and Community Service Regulation (CFCS Regulation)* was fully addressed by way of a miscellaneous statutes amendment in fall 2021, which was brought into force on Feb. 28, 2022.[24] The second part of that recommendation – involving removing the requirement that the young adult must have received a reviewable service in the previous 15 months – was not fully addressed but nonetheless made less stringent in the same amendments by the removal of the 15-month criteria and stating that the young adult must have received a reviewable service (at any previous time).

Given that nearly five years have passed since the Committee filed its report and that none of the recommendations have been fully addressed and only three partially addressed, the Representative will re-surface these outstanding issues, along with additional concerns.[25] Before doing so, it is necessary to discuss the central question set out in s.30 of the *RCY Act* which requires the Committee to again consider whether the Representative's functions described in s.6 – advocacy, investigations and monitoring – are still required.

[24] Bill-21 *Miscellaneous Statutes Amendment Act (No.2)* 2021. "Young adult" is re-described as "included adult"; the age range is increased to under age 27; and the included adult must have received a reviewable service at any previous time (not within 15 months of the 19th birthday) or be in receipt of or eligible for CLBC services. Brought into force by Order-in-Council 111/2022, February 28, 2022.

[25] The Committee's Recommendation 2 is discussed later in this report under the heading, Appointments and Qualifications.

DISCUSSION

The Representative's Functions Are Still Required – The Section 30 Test

This section explains why the Representative's oversight functions remain highly relevant and necessary. The individual and systemic needs of children and young adults in B.C. – as well as their families and communities – too often go unmet, and they can and do benefit from the work of the Representative.

The test for the Committee to assess, as set out in s.30 of the *RCY Act*, is clear:

> *"To determine whether the functions of the representative described in section 6 are still required to ensure that the needs of children, and included adults (young adults) are met …"* ("young adults" added for clarity)

There are two questions embedded in that test. First, are the needs of children and young adults being met? Second, are the functions of the Representative still required?

We readily acknowledge from the outset that, without doubt, there have been some substantive improvements in services to children and young adults in the past several years. A few examples include:

- a consistently declining number of children in care such that, as of March 31, 2022, there were 5,037 children in care, which is the lowest point in more than 20 years[26]
- improvements in educational outcomes for children in care[27]
- expanded eligibility and supports for Agreements with Young Adults (AYA) for young people who have aged out of care or Youth Agreements, with some improvements in uptake to that program as well as several recently announced program initiatives, in alignment with previous recommendations of the Representative, to provide substantively improved supports to former youth in care in the coming years[28,29]
- establishment of the Provincial Tuition Waiver Program to support the post-secondary education and training of former children in care
- substantive new investments in enhanced mental health and addictions services for children, youth and young adults, with some progress in implementation of these proposed new resources.

[26] Data is drawn from MCFD's Corporate Data Warehouse.

[27] See, Representative for Children and Youth. *A Parent's Duty: Government's Obligation to Youth Transitioning into Adulthood*. Victoria BC, 2020.

[28] *Ibid*.

[29] BC Budget 2022 enables: emergency measures introduced during the pandemic – including Temporary Housing Agreements, Temporary Support Agreements, and increased flexibility of the AYA program – will be made permanent. Beginning in 2022/23, there will be a new $600 a month rent supplement for youth leaving care. Youth Transitions navigators will be available to support youth as young as 14 to access the services in their transition to adulthood. The following year will see the expansion of the Agreements with Young Adults program to include counselling, medical benefits, increased life-skills training – and the introduction of an earning exemption. In 2024/25, young adults will receive a guaranteed income benefit from age 19 to 20 and a further 84 months of financial support if they are participating in approved programs. (Source: MCFD Intranet)

While some considerable progress has been made on a variety of fronts, it is nonetheless clear that glaring gaps, inadequacies and inequities in services to children, youth and young adults remain and that these concerns are current and continuing, not historical. While the overall number of children in care has declined, Indigenous children continue to be vastly over-represented: Indigenous children in B.C. are over 18 times more likely than non-Indigenous children to be in the care of the government.[30] The disturbing themes of the stories and experiences of many of these First Nations, Métis, Inuit and Urban Indigenous children and youth in care are reflected in the 2021 RCY report, *Skye's Legacy: A Focus on Belonging*.

Further, RCY investigation, monitoring and special reports over the past three years alone have documented in detail systemic shortcomings across different service systems, examples of which include:

- a report that documented in detail and called for an end to the inadequate and discriminatory funding of child welfare services to Indigenous children and families residing off-reserve[31]
- three reports on services for children and youth with special needs – known, in short, as *Alone and Afraid*, *Left Out* and *Excluded* – have exposed serious and wide-ranging service gaps and inequities, and have recommended systemic reform[32]
- despite the modest progress made in respect of AYAs, tuition waivers and educational outcomes for children in care, *A Parent's Duty; Government's Obligation to Youth Transitioning into Adulthood (2020)* documented in detail the distressingly poor outcomes of young adults who transition from care and how government as parent has failed to comprehensively address those needs, again recommending systemic reform[33]
- two reports on substance use services documented the very limited range, availability and accessibility of youth-specific and culturally appropriate substance use services for youth, again identifying the need for and recommending the development of a comprehensive system of services[34]
- on the mental health front, four reports have identified systemic issues and needs for service improvements in relation to youth who are detained in hospital under the *Mental Health Act*, for children and youth with mental health and complex needs who engage in non-suicidal self-injury, for children and youth with FASD, and for children in care.[35]

It is significant that several of these reports underscore how youth themselves have told the Representative that service systems have not worked well in addressing their needs.

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[30] Ministry of Children and Family Development, *2022/23 – 2024/25 Service Plan*. Victoria BC, February 2022.

[31] See, *At a Crossroads: The roadmap from fiscal discrimination to equity in Indigenous child welfare* (2022).

[32] The three reports include: *Alone and Afraid: Lessons learned from the ordeal of a child with special needs and his family* (2018); *Left Out: Children and youth with special needs in the pandemic* (2020); and *Excluded: Increased Understanding, Support and Inclusion for Children with FASD and their Families* (2021).

[33] The systemic reforms recommended in relation to transitioning young adults appear, to a substantial degree, to have been supported in BC Budget 2022. See, note 29.

[34] The two reports are: *Youth Substance Use Services in B.C. – An Update* (2019) and *Time to Listen: Youth Voices on Substance Use* (2018).

[35] The four reports are: *Detained: Rights of children and youth under the Mental Health Act* (2021); *A Way to Cope: Exploring non-suicidal self-injury in B.C. youth* (2020); *Excluded: Increased Understanding, Support and Inclusion for Children with FASD and their Families* (2021); and *A Parent's Responsibility: Government's obligation to improve the mental health outcomes of children in care* (2022).

Going beyond RCY's public reports and calls for systemic reform on a variety of service fronts, the day-to-day work of RCY underlines, in very sobering terms, that the needs of too many children, youth and young adults are not being met. In the past five full fiscal years alone – between 2017/18 and 2021/22 – RCY has opened a total of 7,437 advocacy cases where issues have arisen with the provision of services to children and young adults.[36] These calls are made by children, youth, young adults, families, social workers and service providers, and each one represents an individual and/or family crisis within the system, often from a person who does not know where else to turn to navigate B.C.'s complex, daunting and, in many cases, under-resourced child-serving systems.

In the same five-year period, there were 7,890 reports of deaths (528) and critical injuries (7,362) reviewed by RCY and determined to be "in-mandate," (i.e., satisfying the criteria for death or critical injury). Moreover, the annual number of in-mandate reports of deaths and critical injuries more than doubled (168%) in that time period and is projected to substantively increase again during 2022/23. These increases are likely primarily related to better reporting by MCFD but also likely reflect an overall increase in critical injuries attributable to such factors as the opioid crisis and toxic drug supply (e.g., loss of loved ones, overdoses), impacts of the pandemic on mental health resulting in more mental health-related incidents (e.g., suicide attempts, self-injury), increased sexual exploitation and violence, and gang-related activities. Notably, these data regarding deaths and critical injuries exclude a large swath of reporting from health authorities in relation to mental health and addictions services for children and youth because health authorities are now just at the very beginning stages of reporting such incidents to the Representative. Moreover, the data only capture reports of deaths and critical injuries that were determined to be in-mandate and therefore exclude many serious but nonetheless non-mandate reportable circumstances, such as runaways, being missing, less serious harm that does not meet the threshold of a critical injury, harm to others, and so on.

These large numbers reflect real children and young adults who have had adverse experiences while receiving services and are another testament to the long-standing fact that the needs of the most vulnerable children, youth and young adults in the province are not being met.

Since the needs of many children, youth and young adults continue to go unmet, the next question is: Are the functions of the Representative still required? In the Representative's view, the answer is clearly a resounding yes. As outlined in the many recent public reports identified above, as well as the continuing high demand for individual advocacy services, it is apparent that the need for systemic reforms to a range of services is still required and is not near to being realized. The need for the Representative to continue to discharge her oversight functions is underscored by the significant and growing number of critical injury and death reports. Keeping all these functions in mind, the question is: Without the Representative's work, would the ministries and public bodies involved have identified needs for systemic reforms with the same degree of rigor, candor and force, and with the same credibility that derives from independent, arms-length monitoring, review and investigation? The answer, we believe, is that the clarity and objectivity of the Representative's independent work remains critically important.

As already acknowledged, there are examples of appreciable progress in several service areas in recent years. It bears mention that these are all areas that have been championed by this Office, and that will continue to be championed. Obviously, full credit for these and other advances should not go to this Office, but the Representative is confident in the belief there would not have been nearly as much

[36] Note that these are the number of cases, not the total number of children, youth and young adults served. Since some cases involve sibling groups, the total numbers of individuals is greater.

progress without the work of RCY's investigation and monitoring teams, and the systemic advocacy this Office brings to bear. What the then-Representative stated in his 2017 submission to the Committee remains equally true today:

> *"To remove or limit one or more of the Representative's functions, this Committee should have before it real and substantial evidence that gives the Committee the confidence to inform the public that the child-serving systems under its mandate are on such a firm, long-term structural footing that the Representative's independent functions in a particular area are no longer necessary."* [37]

In the Representative's view, there is no "real and substantial evidence" to justify such a conclusion.

It should be noted that none of the 14 submissions to the Committee for the current review suggested that any of the Representative's functions should be discontinued. Indeed, as will be detailed later, most submissions expressly recommended not just continuance of the current functions but an expansion of functions and/or scope of jurisdiction over services to children, youth and young adults.

Is Section 30 Still Required?

The s.30(1) requirement that the Committee undertake a comprehensive review every five years to determine whether the functions of the Representative are "still required" was established from the outset of the Act in 2006, while the s.30(2) requirement to review the effectiveness of the s.6(1)(b) – or monitoring – function flowed from the 2012 review. The 2015 review concluded that the monitoring, review, audit and research functions under the latter section remained necessary. That review did not recommend any change to s.30.

The Committee's 2017 review, by contrast, concluded that ongoing reviews that are based on determining whether the Representative's functions are still required are no longer necessary. Instead, the Committee unanimously recommended that the five-year reviews should focus on reviews of the *RCY Act* itself, not on whether the Representative's functions are still required. The Committee would have had in mind the submission by UNICEF Canada, which aptly described s.30 as having the *"potential to serve as a sunset provision for some of the Representative's powers."* [38] The Committee also would have considered the BC Association of Social Workers' submission that the Act *"needs to be clear regarding permanence"* of the Office.[39] In making its recommendation, the Committee noted the submission of First Call that s.30 should be replaced with a mandate to *"periodically review the Act in its entirety to assess how well it is supporting the work that needs to be done to promote and protect the rights of BC's children and youth."* [40] No submissions to the Committee's 2017 statutory review suggested that one of more of the functions of the Representative are no longer required. Indeed, most external submissions recommended expansion of the Representative's mandate. This is the context in which the Committee:

> *"… concluded that statutory reviews conducted every five years remain an important responsibility for the Committee, and help ensure that the Act responds to evolving issues in services for children and youth."* [41]

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[37] Representative for Children and Youth. *Review of the Representative for Children and Youth Act*. Victoria BC, submitted to the Select Standing Committee on Children and Youth, November 2017.

[38] UNICEF Canada. *The Legislated Functions of the Representative Can't Be Phased Out: The Rights and Interests of British Columbia Children and Youth Depend On It*. Brief submitted by UNICEF Canada to the Select Standing Committee on Children and Youth as part of the Five-Year Review of the *Representative for Children and Youth Act*, February 9, 2017, p. 5.

[39] 2017 Special Committee Report, p. 16.

[40] *Ibid*.

[41] *Ibid*.

Consistent with this, the 2017 Committee review recommended that s.30 be amended:

> ***"to remove the reference to determining whether the functions of the Representative are still required", with the five-year reviews focusing on the* RCY Act *itself.*** (emphasis added)

No other Canadian child and youth advocacy office is subject to this kind of review. The legislation for five jurisdictions requires periodic reviews of, for example, the effectiveness of the statute, but none ask whether one or more of the functions of the child and youth advocacy offices should continue. The remaining Canadian jurisdictions have no statutory review provisions at all.

None of B.C.'s eight other Independent Officers of the Legislature is subject to this kind of review. Only two of them – the Information and Privacy Commissioner and the Human Rights Commissioner – have prescribed statutory review provisions, both of which require reviews by a special committee of the Legislature, not the need for the officers' functions to exist.[42]

In the nearly five years since the 2017 statutory review report was published, government has failed to act on the Committee's recommendation to stop reviewing to determine whether the Representative's functions are still required. The Representative urges this Committee to make the same recommendation to government in the clearest terms. The statistics summarized above are a stark reminder that, despite progress in some areas, the critical needs of far too many children, youth and young adults remain unmet. The history of RCY's engagement over the past 16 years with services to children, youth and young adults further illustrates the chronic and undoubtedly ongoing challenges in meeting those needs. It would be naïve to think that independent, arm's-length advocacy and oversight is not needed now and will not be required in the foreseeable future.

The need for the Representative's functions has been clear for years, it remains clear, and it will continue to remain so. The time has come for all the current Representative's functions to be recognized as an important and enduring feature of publicly funded services to children, youth, young adults, and their families in B.C.

None of the parties participating in the current legislative review has questioned whether the Representative's Office should continue to exist or whether any of its specific functions should continue. They all either assumed the Office would continue, expressly recommended continuation of the Office or recommended an expanded mandate, while two submissions – from the Society for Children and Youth of BC and the BcEdAccess Society – expressly recommended removal of s.30. As the submission from the Society for Children and Youth of BC, an organization that has provided legal and rights assistance to thousands of children, noted: RCY plays a *"vital, necessary and distinct role"* in helping to meet the needs of young people, yet a statutory review that requires a determination as to whether RCY's functions are

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[42] See, s.80 of the *Freedom of Information and Protection of Privacy Act* (RSBC 1996) c.340 and s.50.1 of the *Human Rights Code* (RSBC 1996) c.210. The review of the Information and Privacy Commissioner's legislation is every six years, while the Human Rights Commissioner is every five years. As an example, s.50.1 of the *Human Rights Code* reads:

(1) At least once every 5 years, a special committee of the Legislative Assembly must begin a comprehensive review of sections 47.01 to 47.24 of this Code and must submit a report respecting those sections to the Legislative Assembly within one year after the date of the appointment of the special committee.

(2) A report submitted under subsection (1) of this section may include any recommended amendments to sections 47.01 to 47.24.

(3) For the purposes of subsection (1), the first 5-year period begins on the date that this section comes into force.

still required *"threatens the stability and permanence of the Office and its ongoing role in championing child and youth rights."*[43]

The Representative fully agrees with the Committee recommendation from the 2017 review that s.30 be amended to provide for a general periodic review of the *RCY Act*, which is useful since issues relating to the effective functioning of the Act will likely continue to emerge over time.

Further, s.30(2) is now unnecessary and should be repealed, since the 2015 Committee completed the contemplated assessment of the effectiveness of s.6(1)(b) by the stipulated time.

In relation to the current requirements for periodic review of the *RCY Act,* the Representative recommends:

- **Section 30(1) of the Act be amended to remove the reference to determining whether the functions of the Representative are still required, and to simply state, like the governing statutes of the Information and Privacy Commissioner and the Human Rights Commissioner, that the Committee will undertake a comprehensive review of the Act every five years.**
- **Section 30(2) of the Act be repealed.**

Situating the Representative's Functions in the International Human Rights Context

Instead of considering whether the current functions of the Representative are still required, in the Representative's view, the questions should be: How can the mandate and functions of the Representative be clarified and improved, and what next steps should be taken in the evolution of the role of the Office?

Addressing those questions should begin by looking at the international context.

United Nations Human Rights Conventions

The *UNCRC* sets out the civic, political, legal, social welfare, educational, health and cultural rights of children. The *UNCRC* was ratified by Canada in 1991 and has been ratified by every member of the U.N., except the United States.

Having ratified the Convention, Canada has an obligation to ensure that its legislation, policies, programs and services affecting children comply with it. Article 4 states:

> *"States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."*

The responsibility to implement this obligation is shared by the provinces and territories, since most areas of responsibility for matters affecting children are under provincial and territorial jurisdiction. Reflecting these jurisdictional responsibilities, the governing statutes of comparable child and youth advocacy offices in Manitoba, Prince Edward Island, Yukon and Nunavut all make reference to the *UNCRC*.

Although it is the most universally accepted human rights instrument in the world, and although statutes in several other Canadian jurisdictions have referenced it, the *UNCRC* is not expressly referenced in any

[43] *Supra*, note 5.

legislation pertaining to children in B.C.[44] In the 2017 statutory review, the Representative, along with other parties such as UNICEF Canada and First Call, recommended that the *RCY Act* be amended to reference the *UNCRC*. In response, the Committee recommended:

> *"The Act be amended to require that, in undertaking the functions under the Act, the Representative reflect the principles contained in the United Nations Convention on the Rights of the Child."*

Nearly five years later, this recommendation has not been actioned by government. Unlike the other 2017 statutory review recommendations, however, this majority recommendation was not unanimously supported by all members of the Committee and clearly prompted debate:

> *"Committee Members did not come to a unanimous recommendation on the issue of whether the UN Convention should be referenced in the Act. Some Members wanted to more fully explore the legal implications before coming to a decision on the issue, particularly given the breadth of the subject matters in the UN Convention. Some Members observed that the UN Convention already informs how the Office of the Representative for Children and Youth approaches its work, and a reference to the UN Convention in the Act may be unnecessary. Additional objections included the possibility of overemphasizing international human rights agreements relative to the goal of child protection.*
>
> *"Other Members noted that several similar Acts in other provinces and territories reference the UN Convention as an interpretive guide for the work of their independent child and youth representatives. Some Members argued that international standards for human rights are compatible with, and reinforce, the goal of an effective child welfare system. Given that the UN Convention is the most-ratified of all international conventions, some Members considered it to represent an international consensus that is worth reflecting in the legislation."* [45]

Regarding concerns about legal implications, Canadian courts have held that the *UNCRC* does not have the force and effect of domestic law unless it is directly incorporated by reference into a domestic statute; however, the values reflected in international treaties or conventions such as the *UNCRC* may help inform the contextual approach to statutory interpretation and judicial review.[46] The Representative accepts the opinion that simply referencing the *UNCRC* in RCY's governing statute would not accord any greater legal powers or authority than is currently set out in the *RCY Act*.

The Representative routinely references the *UNCRC* as a guiding framework in carrying out the Office's functions, including in preparing public reports, and will continue to do so. This is consistent with guidance from the Supreme Court of Canada on how international conventions can help inform statutory interpretation. While it is acknowledged that the Court's guidance clarifies that it is not legally necessary to include reference to the *UNCRC* in the *RCY Act*, the Representative believes it is important to do so because this would visibly and affirmatively reflect the province's commitment to the values, principles and aspirations set out for children in the *UNCRC*.

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[44] Examples are: the federal government's *Youth Criminal Justice Act and An Act respecting First Nations, Inuit and Metis children, youth and families*; child welfare legislation in Yukon, N.W.T. and Nunavut; and child and youth advocate legislation in Manitoba, P.E.I., Yukon and Nunavut.

[45] *Supra*, note 22, p. 18.

[46] *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817. More recently, see *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, and *Li v. British Columbia*, 2021 BCCA 256.

How would this be done? A straightforward approach would be to amend the *RCY Act* to say that the Representative must consider the *UNCRC* in carrying out the Office's functions. This would affirm the Representative's existing commitment to doing so and make that commitment permanent for future Representatives. This is the approach that the 2017 Special Committee recommended (i.e., that the *RCY Act "be amended to require that, in undertaking the functions under the Act, the Representative reflect the principles contained in the United Nations Convention on the Rights of the Child."*)[47]

Several submissions to the Committee supported incorporating reference to the *UNCRC*, including those from the Office of the Human Rights Commissioner, Society for Children and Youth, BC Complex Kids Society, CLBC and the BCEdAccess Society. None of the other submissions expressed concerns about this proposal.

Turning to another United Nations human rights instrument, the *UNCRC*, of course, does not apply to young adults. The *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)*, which was adopted by the United Nations General Assembly in 2006 and ratified by Canada in 2010, sets out fundamental principles (e.g., inclusion, autonomy, etc.) and rights that, like the *UNCRC* for children, guide the work of the Representative in relation to advocacy services to young adults who are eligible for CLBC services. Although the Representative is administratively guided by the *UNCRPD*, it would be desirable for the Representative to, as with the *UNCRC*, be statutorily required to take the *UNCRPD* into account in carrying out functions in relation to young adults who are eligible for CLBC services.

CLBC's written submission expressed no concerns about incorporating reference to the *UNCRPD* in relation to young adults into the Act, while the Office of the Human Rights Commissioner expressly supported the proposal. None of the other submissions expressed concerns about the proposal.

The Representative initially thought that, if there is to be a statutory requirement to consider the *UNCRC* in relation to children, it might be unnecessary to also include a statutory requirement to consider the *UNCRPD*. However, submissions from and discussions with Inclusion BC, BC Complex Kids Society and BCEdAccess Society, all of which supported application to children and youth as well as young adults, have caused the Representative to think otherwise.[48] As well, express reference to the *UNCRPD* that is limited to young adults only, with no mention of children, may inadvertently create the inference that the *UNCRPD* should not be considered in relation to children, even administratively. That is an outcome that must be avoided.

In relation to United Nations human rights conventions, the Representative recommends:

- **Section 6 of the Act be amended to require the Representative to take into account the *United Nations Convention on the Rights of the Child (UNCRC)* in carrying out the Office's functions in relation to children and youth.**
- **Section 6 of the Act also be amended to require the Representative to take into account the *United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)* in carrying out the Office's functions in relation to children, youth and young adults.**

[47] *Supra*, note 22, Recommendation 9.
[48] *Supra*, note 5.

A related step proposed by some in the 2017 statutory review would be to broaden the Representative's functions to include a responsibility to take a more affirmative and proactive role in the education, promotion and monitoring of the rights of children set out in the *UNCRC*.[49] In this regard, the United Nations Committee on the Rights of the Child has pressed for the establishment of independent bodies with responsibility for promoting and protecting children's rights.[50] As well, Article 42 of the *UNCRC* provides:

> *"States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."*

This proposed expansion of function was supported in the current review by the Society for Children and Youth of BC, BC EdAccess Society and Complex Kids Society as well as, importantly, the Human Rights Commissioner, who wrote:

> *"More broadly, realizing our international obligations requires that we build a new culture of human rights in British Columbia. While my Office works to develop and deliver public information and education about human rights, change at the societal level requires many actors working together in partnership. I would welcome an explicit role for the Representative in promoting education and awareness of the rights of children and youth set out in the United Nations Convention on the Rights of the Child."*[51]

In keeping with the earlier recommendation that the Act be amended to require the Representative to take into account both the *UNCRC* and the *UNCRPD* in carrying out her functions in relation to children, youth and young adults, it follows that the proposed additional function of education, promotion and monitoring apply to both the *UNCRC* and the *UNCRPD*.

The Representative recognizes that taking on an affirmative role in the education, promotion and monitoring of the rights of children, youth and young adults as set out in the *UNCRC* and *UNCRPD* could represent an appreciable addition to the Representative's functions, which could have resource implications for the Office. Moreover, such an enhancement to her role could, due to the broad remit of the *UNCRC*, imply that the Representative's jurisdiction also be broadened to include all publicly funded services to *all* children instead of, as is now the case, being principally limited to a narrower population of designated and reviewable services to vulnerable children, youth and young adults. This is a matter that will be discussed later.

The Representative recommends:

- **Section 6 of the Act be amended to expand the Representative's functions to include the education, promotion and monitoring of the rights of children, youth and young adults set out in the *UNCRC* and the *UNCRPD*.**

[49] For example, by UNICEF Canada and First Call.

[50] United Nations Committee on the Rights of the Child. General Comment No.2. Thirty Second Session, January 2003, p. 2.

[51] "Youth" is defined in s.1 of the *RCY Act* as a person who is 16 years of age or older but under the age of 19 years of age, while "child' is defined as a person under 19 years of age. Whenever "children and youth" is used in this submission, it means persons under 19 years of age.

The United Nations Declaration on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* of 2007 – which sets out individual and collective rights of Indigenous Peoples to cultural and ceremonial expression, identity, language, employment, health, education and other matters – was ratified by Canada in 2016.[52]

In 2019, B.C. enacted the *Declaration on the Rights of Indigenous Peoples Act (DRIPA)*. Section 2 states *DRIPA*'s purposes, which are: *"to affirm the application of the Declaration to the laws of British Columbia"; "to contribute to the implementation of the Declaration";* and *"to support the affirmation of, and develop relationships with, Indigenous governing bodies."* Section 4 requires the provincial government to *"prepare and implement an action plan to achieve the objectives of the Declaration."* Section 3 of *DRIPA* states that:

> *"In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."*

The Representative's view at this time is that *DRIPA* would not appear to require amendments to the *RCY Act* to achieve consistency between them because, on the face of it, the functions of the Representative do not appear to be directly in conflict with, nor inconsistent with, the provisions of the Declaration. The Representative nonetheless acknowledges that the determination of whether amendments are needed to ensure consistency must be made by government in consultation and cooperation with Indigenous Peoples.

While *UNDRIP* speaks to a broad range of individual and collective rights applicable to children and adults alike, several provisions address children and families, specifically Articles 7, 14, 17 and 21. As well, Article 22 states:

> *"Particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration."*

The written submission by the Indigenous Child and Family Services Directors, who are responsible for more than half of the Indigenous children in care in the province, recommends that the Representative's role should include oversight of B.C.'s implementation of *DRIPA*, including the *DRIPA* Action Plan as it pertains to children. That plan, which was released in March 2022, details a number of specific actions to be undertaken in relation to children, youth and families.[53] These actions include services in relation to children in care, mental health, substance use and harm reduction, and public education. The Representative already has an appreciable degree of s.6 monitoring (systemic advocacy) or s.20 (special report) authority to review some of these services within her existing jurisdiction (e.g., child welfare or mental health and addictions services). However, if the Committee were inclined to endorse this recommendation, the Representative notes that statutory clarification would nonetheless be helpful. This is, however, a matter that requires much broader consultation with all Indigenous rights and title holders, as required by *DRIPA* itself.

The *RCY Act* was borne out the *Hughes Review*, which was prompted by the deaths of two Indigenous children who were receiving child welfare services. Colonization, residential schools, the "Sixties Scoop"

[52] This was followed by the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* in 2021.

[53] Note also that the United Nations has provided detailed commentary on how the *UNCRC* should be applied to Indigenous children. See, United Nations Committee on the Rights of the Child. *General Comment No.11: Indigenous children and their rights under the Convention*. Geneva, February 12, 2009.

of Indigenous children into the child welfare system, and the continuing racism and discrimination evidenced by the recent federal human rights rulings and settlements, have left a tragic legacy of an astounding degree of over-involvement of the child welfare system in the lives of Indigenous children and families. As noted earlier, an Indigenous child in B.C. is over 18 times more likely than a non-Indigenous child to be in government care.[54] Given this context – and while acknowledging that it may not be legally necessary – it is, in the Representative's view, morally necessary that the Representative be required to take into account *UNDRIP* when carrying out her functions under the Act. It is noted that the 2022 written submission from the Union of BC Indian Chiefs recommends that the Act be amended to require the Representative to implement *UNDRIP* when carrying out her functions, while the submissions by the Office of the Human Rights Commissioner, BCEd Access and CLBC all supported including reference to *UNDRIP* in the *RCY Act*.

Given the context noted above, the *RCY Act* seems dated and inadequate to the task of reflecting the history, experiences, needs and interests of Indigenous children and families, and young adults. As such, the *RCY Act* is, at the least, inconsistent with the spirit and intent of the Declaration. Indeed, "aboriginal" – an outdated term itself – is only referenced twice in the Act. Section 7(2) provides that, before appointing a Deputy Representative, there must be consideration of *"the person's understanding of or involvement in the lives of aboriginal children and families in British Columbia."* If such qualifications are to be expressed in statute, it seems inadequate to limit them to just the Deputy Representative role. As well, s.19(1) provides that the Representative's annual report must address *"the representative's work with aboriginal children and their families."*

Otherwise, there is no preamble or statement of principle in the Act that addresses the history of colonialism and racism, and the unique circumstances and needs of Indigenous peoples. Indigenous peoples are not defined in the Act. While the Representative has functions directly related to families, "family" is not defined in the Act, nor the broader conception of family in an Indigenous context. The central importance of culture, tradition and language to Indigenous Peoples is not mentioned. There is no requirement for notice to First Nations or the Métis Nation when the Representative becomes actively involved in a child's life. There is no requirement for investigation cultural liaisons or cultural navigators. There are no provisions which enable appropriate data sharing with First Nations and the Métis Nation.

It is true that these and other relevant issues can be – and indeed currently are – addressed administratively by the Representative, but given the legacy of colonialism, the consequent frequency of involvement, emerging self-governance (see below), and the unique circumstances and needs of Indigenous peoples, there is no doubt that the Act could be strengthened in this regard.[55]

The inadequacies of the Act in reflecting the current and evolving landscape of Indigenous rights and jurisdiction are underscored by the 2022 written submission from the Union of BC Indian Chiefs (UBCIC), which makes 25 recommendations in relation to a variety of matters, including: review

[54] *Supra,* note 30.

[55] Examples of administrative actions include: in keeping with Hughes' recommendation, there is a dedicated Deputy Representative who is Indigenous, postings for all positions include a preference for Indigenous candidates (and sometimes Indigenous-only candidates) as well as a requirement for understanding of the history and circumstances of Indigenous Peoples; there is extensive staff training in cultural humility and safety; there is a full time RCY Knowledge Keeper and developing roster of Matriarchs and Elders; there are dedicated positions for Indigenous community liaison and monitoring; Indigenous research methodologies are in the course of being incorporated; and there are protocol agreements with the First Nations Leadership Council and the Métis Nation.

of the Act in conjunction with First Nations; the Representative implementing *UNDRIP* in carrying out her functions; incorporating requirements for consultation with First Nations in relation to several specified decisions; clarifying the Representative's role and functions in relation to Indigenous Governing Bodies that have resumed jurisdiction over child, youth and family services and with Delegated Aboriginal Agencies; endorsing the inclusion of the function of systemic advocacy in the Act; clarifying the definition of critical injury; the need for several new provisions regarding engagement, consultation with and notice to First Nations; defining several Indigenous-related terms in the Act; matters related to the need for consultation and engagement with First Nations in the appointment of staff as well as specifying a required level of First Nations representation amongst staff; provisions for the appointment of an Indigenous advisory team; distinctions-based and disaggregated data collection and reporting; and access to information. The UBCIC submission also recommends the appointment of a separate and independent Indigenous advocate accountable to First Nations governments, either in the Representative's Office or outside of it.

These wide-ranging recommendations by the UBCIC underscore the need for fulsome consultations with all Indigenous rights and title holders in the review and reform of the *RCY Act*.

In relation to the *United Nations Declaration on the Rights of Indigenous Peoples,* the Representative recommends:

- **Section 6 of the Act be amended to require the Representative to take into account the *United Nations Declaration on the Rights of Indigenous Peoples* in carrying out the Office's functions under the Act.**
- **A process of consultation with First Nations, Métis, Inuit and Urban Indigenous Peoples be established about means by which the Act can be strengthened to better reflect the experiences, needs and interests of First Nations, Métis, Inuit, and Urban Indigenous Peoples.**

Implications of Evolving Indigenous Jurisdiction

In 2019, the federal government enacted, *An Act respecting First Nations, Inuit and Métis children and families*, which is intended as a contribution to the implementation of *UNDRIP*. The legislation, which came into force in January 2020, establishes national principles and minimum standards that must be met by all service providers. The Act affirms the right of Indigenous Peoples to self-government, which includes jurisdiction over child and family services and sets out processes by which Indigenous Governing Bodies may establish and administer their own laws in relation to child and family services, subject to the principles and minimum standards set out in the Act.[56,57]

[56] "Child and family services" is defined in s.1 as *"services to support children and families, including prevention services, early intervention services and child protection services."*

[57] An "Indigenous Governing Body" is defined in s.1 as *"a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982."*

The federal Act will be complemented by a number of amendments to the provincial *CFCS Act* and *Adoption Act* set out in Bill-38, *Indigenous Self-Government in Child and Family Services Act*, which was introduced in October 2022 and received Royal Assent on Nov. 24, 2022 and will remove barriers in provincial legislation to the effective exercise of Indigenous jurisdiction, and which recognizes, affirms and supports that jurisdiction.[58]

Several Nations, or Indigenous Governing Bodies, in B.C. are in the process of designing their own laws and systems of services to support the exercise of jurisdiction over child and family services. Undoubtedly, more will do so in the coming years. Critically, once an Indigenous Governing Body establishes full jurisdiction, the Representative, being a creature of provincial legislation, will no longer have jurisdiction over those services. These changes will obviously have significant impact on the Representative's work in the years to come, which the Representative will closely monitor. Given this, it is an area that will be appropriate for the ensuing five-year statutory review in 2027.

In the interim, however, the question has been raised about how Indigenous Governing Bodies that have asserted jurisdiction might, should they choose to do so, implement the equivalent functions of the Representative (i.e., individual advocacy, systemic reviews, and/or investigations). Of course, internal organizational mechanisms may be developed by Indigenous Governing Bodies on their own. Another option, however, could be for an Indigenous Governing Body to engage the Representative to directly carry out one or more of those functions and/or to assist them in developing their own internal capacity. Inquiries have already been made by some Nations that are establishing their Indigenous Governing Bodies about the possibility of such ongoing relationships with the Representative. Given this, there should be a provision in the *RCY Act* to enable the Representative to enter into agreements with Indigenous Governing Bodies to support them in developing the internal capacity to carry out one or more of the functions of the Representative or for those bodies to engage the Representative to directly carry out one or more of the Office's functions. In this regard, while s.22 now enables the Representative to *"enter into agreements for the purpose of exercising the powers and performing the functions and duties"* under the Act, we suggest that, for clarity, s.22 should be amended to expressly permit the Representative to enter into agreements with Indigenous Governing Bodies under which the Office of the Representative may exercise its powers, duties and functions as a service to them.

Should such agreements arise, and should they involve the Representative directly carrying out one of the Office's functions, questions could be raised about the Representative's authority under the *RCY Act*, in particular to compel the production of information and to keep that information confidential. In this regard, the production of information is a matter that can be built into agreements as necessary, while the current provisions in the Act strictly protecting the confidentiality of information would equally apply to any work the Representative carries out by way of an agreement established under the Act.

In recommending this, the Representative does not presume that one or more Indigenous Governing Bodies will turn to the Representative for services, but the option should at least be available should they choose to do so.

[58] Most but not all sections were brought into force by Order in Council 637/2022.

In relation to the assertion of jurisdiction over child and family services by First Nations, Métis and Inuit peoples, the Representative recommends:

Section 22 of the Act be amended to clearly enable the Representative to enter into agreements with Indigenous Governing Bodies, at their request, to assist them in developing their own internal capacity to perform one or more of the Representative's functions, or for the Representative to directly perform one or more of the functions under the Act.

Clarifying the Functions of the Representative: Systemic Advocacy

The question about whether the functions of the Representative would still be required was initially prompted by Hughes himself, who wrote, before the legislation was enacted, in relation to the Representative's monitoring mandate:

> *"This may not be a permanent aspect of its mandate. As discussed below, it is unusual to have an external body overseeing the functioning of a government ministry. This is essential at this time, to restore public confidence in the child welfare system, but it may not always be necessary."* (p. 30)[59]

When the *RCY Act* was enacted, however, the Representative's monitoring mandate did not solely concern child welfare nor the functioning of a single ministry (MCFD). The monitoring mandate is described in s.6(1)(b) *RCY Act* as:

> *"… 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."*

"Designated services" are defined in s.1 as including:

> "*(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 during their transition to adulthood;*
>
> *(f) additional services or programs that are prescribed under section 29 (2)(a)."*

[59] *Supra*, note 12.

Section 6(1)(b) therefore focusses the Representative's monitoring, review, audit and research functions on the provision of designated services by one or more public bodies. These services were and continue to be administered not just by MCFD but also several other ministries and public bodies, including: the Ministry of Health and health authorities (and, since 2017, the Ministry of Mental Health and Addictions); CLBC; the Ministry of Social Development and Poverty Reduction; and the Ministry of Education due to the transfer of child care services to that ministry in 2022. Clearly, the monitoring mandate is not, and never has been, limited to just child welfare services, nor to just MCFD.

This broader scope of the Representative's monitoring mandate is evidenced in practice by the major reports mentioned earlier that were carried out in the past three years, some of which were carried out under the monitoring mandate and called for systemic reform of service systems – in particular, mental health services for children and youth (including hospital services administered by health authorities), addictions services for youth (administered by health authorities), and transitional support services for young people who have left care (administered by Social Development and Poverty Reduction, Attorney General, health authorities, CLBC, and Advanced Education and Skills Development, in addition to MCFD). Each of these recent reports, and earlier monitoring reports on topics such as social worker staffing and educational services for children in care, called for broad systemic changes, in keeping with the monitoring mandate's expressed purpose of *"making recommendations to improve the effectiveness and responsiveness of that service,"* (i.e, systemic reform).[60] Put another way, the statutory mandate to "monitor, review, audit and conduct research" are means by which systemic advocacy is informed. Similarly, the subjects of the Representative's investigation and aggregate review reports are selected precisely because they are emblematic of the identified need for systemic reforms.

Hughes himself recognized that systemic advocacy would be an important role for the Representative; he defined systemic advocacy as:

> *"… working toward positive change in policies, practice and service delivery in child welfare."* [61]

Yet, although systemic advocacy is a primary purpose of the Office that is implicit in the *RCY Act* and explicit in practice, the Act is oddly silent about this central function. An amendment in this regard would clarify and affirm that the Representative's functions are not just case-specific, but are also oriented to achieving systemic improvements to better serve all children and youth, and their families and communities.

In relation to systemic advocacy, the Representative recommends:

- **Section 6 of the Act be amended to expressly include systemic advocacy as a primary function of the Representative, linking this function to the current monitoring mandate.**

[60] See, Representative for Children and Youth. *The Thin Front Line: MCFD staffing crunch leaves social workers over-burdened, B.C. children under-protected* (2015) and *Room for Improvement: Toward better education outcomes for children in care* (2017).

[61] *Supra*, note 12.

Clarifying Who and What Services for Children and Youth Should Be Included

The jurisdiction of RCY is rooted in the *Hughes Review*, in particular arising from serious concerns about children involved in the child welfare system, who are a sub-population of children and youth who have need for extra support services from government (i.e., young people who, otherwise put, are vulnerable children). Yet RCY's jurisdiction, of course, extends well beyond child welfare to include additional children and youth with extra support needs. The investigation and review function includes *"reviewable services,"* which are defined in s.1 as:

> *"(a) services or programs under the Child, Family and Community Service Act and the Youth Justice Act;*
>
> *(b) mental health services for children; (b.1) addiction services for children;*
>
> *(c) additional designated services that are prescribed under section 29 (2)(b)"*

For the purposes of the Representative's advocacy and monitoring mandates in relation to children, *"designated services"* are defined in s.1 as including a broader range of services, which in turn expands the range of eligible children:

> *"(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 during their transition to adulthood;*
>
> *(f) additional services or programs that are prescribed under section 29 (2)(a)."*

Additional reviewable and designated services or programs prescribed under s.29(2)(a) by the *RCY Regulation* in relation to children include: services or programs under the *Youth Criminal Justice Act* (Canada) and the child in home of a relative (CIHR) program under s.6 of the *Employment and Assistance Regulation*.[62] Further, the *RCY Regulation* prescribes services and programs for children with special needs provided or funded by the ministry or minister responsible for the *CFCS Act* (i.e., MCFD) as "designated services" for the purposes of the Representative's advocacy and monitoring functions.

As can be seen, the definitions of designated and reviewable services are principally targeted to children and youth with extra support needs, but not entirely so. The inclusion of child care services can be seen to be inconsistent with the principal focus of the legislation on vulnerable children and youth. While some components of child care services, such as Supported Child Development programs for children with special needs or the use of child care as a protective measure in child protection circumstances, are obviously directed to vulnerable children, the vast majority of child care services embrace the general child population. This begs the question about whether the mandate of the Representative should be

[62] Note that s.6 of the *Employment and Assistance Regulation* was repealed in 2010 but the *Representative for Children and Youth Act Regulation* has not been amended to reflect this change. Admissions to the CIHR program were terminated in 2010, resulting in a progressively declining caseload which was only 477 on Dec. 21, 2020. Once all of the ("grandfathered") children originally on the 2010 caseload reach the age of majority (or their circumstances change earlier so that they are no longer eligible), the caseload will entirely disappear.

broadened such that it becomes a "full service" Office with a broad mandate that includes, in effect, all publicly funded services for all children, as was suggested in some submissions in the 2017 review and some in the current review.[63]

Such an approach would align the Representative's mandate in relation to children with the broad jurisdiction that the Ombudsperson and the Human Rights Commissioner have over all publicly funded services in B.C. It is also an approach that is employed in some other jurisdictions in Canada and internationally, such as in New Zealand, England and several European countries. In Canada, the equivalent child and youth advocate offices in Saskatchewan, New Brunswick, Newfoundland and Yukon have jurisdiction over all publicly funded services for all children. Furthermore, such an approach would intersect with the potential re-framing of the role of the Representative that was discussed earlier (i.e., to include the education, promotion and monitoring of children's human rights). These rights apply, of course, to all children and go beyond, including not only the rights set out in domestic legislation (such as the *CFCS Act*) and extend to the *UNCRC* and *UNDRIP*. In that regard, the United Nations Committee on the Rights of the Child has pressed for the establishment of independent bodies with responsibility for promoting and protecting children's rights:

> *"It is the view of the Committee that every State needs an independent human rights institution with responsibility for promoting and protecting children's rights. The Committee's principal concern is that the institution, whatever its form, should be able, independently and effectively, to monitor, promote and protect children's rights."*[64]

Obviously, there could be appreciable resource implications for the Representative's Office if a decision is made to substantially broaden its scope to include all publicly funded services to all children, together with including the education, promotion and monitoring of children's human rights as a central purpose of the Office.

Although most of the written submissions to this review were silent on this option, expanding the Representative's jurisdiction to include all publicly funded services to all children was expressly recommended by the BCEdAccess Society and Inclusion BC. While that confidence is appreciated, the Representative believes that it is premature to be taking such a large step at this time. Aside from the resource implications, it can be argued that, as we will detail later, the Representative has never been accorded a complete mandate over the full range of services to vulnerable children nor for all the most vulnerable children and youth. For example, critical educational and health services for children with special needs are not included in the Representative's current mandate nor are services to gender diverse children. Moreover, decisions have been made in recent years to expand the Representative's mandate, not more widely across a broader range of children and youth, but rather to include vulnerable young adults, specifically CLBC-eligible young adults and those formerly in care. Yet, as we will detail later, the Representative's service mandate for these vulnerable young adults is very narrow and incomplete, excluding critical supports such as mental health and addictions services. Accordingly, in the Representative's view the priority at this time should be to expand and complete the Representative's jurisdiction so that the Office's core mission of supporting the most vulnerable and marginalized children, youth and young adults in the province can be fully realized. This is not to suggest that a much broader remit should be ruled out altogether but rather that it should be considered a future step in the evolution of the Office, after a full mandate in relation to vulnerable children, youth and young adults is fully implemented.

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[63] From, for example, UNICEF Canada and First Call.

[64] United Nations Committee on the Rights of the Child. *General Comment No.2.* Thirty second Session, January 2003, p. 2.

Assuming a decision is made to retain services to vulnerable children, youth and young adults as the primary focus and purpose of the Office, changes are nonetheless required to clarify the Representative's mandate in relation to children and youth. As can be seen above, designated and reviewable services are described in the Act in a variety of different and, quite frankly, muddled ways:

- generically (e.g., *"mental health services for children"*)
- generically but limiting that generic description by specifying the ministry responsible (e.g., services for children and youth with special needs but only those provided or funded by the ministry responsible for the *CFCS Act*)
- generically but very broadly and unclearly (e.g., *"services for youth during their transition to adulthood,"* which begs questions about which "youth," what services, what transition means, and transition from what?)
- by specifying services or programs that are provided or funded under specified legislation (e.g., the *Adoption Act*, *Youth Justice Act*, etc.)
- by a combination of a generic description together with identification of the legislative authority (e.g., both "child care" generically and then specifying both the *Child Care BC Act* and the *Child Care Subsidy Act*)
- by specifying a program name (e.g., the Child in the Home of a Relative program).

The different ways that designated and reviewable services are described in the Act is problematic because it leads to a lack of clarity about the scope of services that are within the Representative's mandate and leads to the exclusion of relevant and important services for vulnerable children.

Services to children and youth with special needs is an example in point.[65] These services, unlike some other services such as mental health and addiction services for children, are not described generically.

When the Act was passed in 2006, the responsibility for many (but certainly not all) services to children and youth with special needs was shared between MCFD and CLBC. This explains the reference in the definition of *"designated services"* to services or programs under the *CFCS Act* (e.g., special needs agreements) and the *Community Living Authority Act*, which incorporated those special needs services under the Representative's individual advocacy and monitoring mandates. Nonetheless, several key services for children and youth with special needs that were then administered by MCFD were not mandated under the *CFCS Act* – such as Medical Benefits, Nursing Support Services and Provincial Deaf and Hard of Hearing Services. This called into question the Representative's jurisdiction over those particular services. Further, the special needs services that had been administered by CLBC were transferred to MCFD in 2008, creating more uncertainty about the Representative's legal mandate over these services. These uncertainties were resolved, in part, by way of an amendment to the *RCY Regulation* in July 2019, clarifying the Representative's jurisdiction by prescribing services and programs for children and youth with special needs administered by the minister responsible for the *CFCS Act* (i.e., MCFD).

[65] MCFD now describes children and youth with special needs as "children and youth with support needs". Other descriptions include *"children with disabilities"* or, instead of describing the children, *"disability services for children"*. The Representative continues to use the term "children and youth with special needs" because it is used in the *RCY Regulation*, is well understood in the community and service sectors, and has been used in previous reviews and reports by the Committee.

The amendment to the *RCY Regulation* did not, however, fully address the relevant recommendation arising from the Committee's 2017 statutory review, which stated:

> *"The Act's definition of designated services be amended to include services or programs provided or* ***funded by government*** *for children with special needs."* (emphasis added)

Many key services for children and youth with special needs are, to this day, omitted from the Representative's jurisdiction. In 2013, Nursing Support Services were transferred from MCFD to the Ministry of Health and the Provincial Health Services Authority, thereby removing those services from the Office's jurisdiction. Throughout the entire life of the Act, key services for children and youth with special needs administered by the Ministry of Health and health authorities have been omitted from the Representative's individual advocacy and monitoring (or systemic advocacy) jurisdiction, including assessment and diagnostic clinics for children with autism (BCAAN) and complex developmental behavioural disorders (CDBC), and specialized services such as those found at the Sunny Hill Health Centre and Queen Alexandra Centre for Children's Health. As well, special education (inclusion) services funded through the Ministry of Education and administered by school districts or independent schools are omitted, not just in relation to children and youth with special needs but all vulnerable children, which is a matter discussed in more detail below.

As this discussion illustrates, the responsibility for programs and services sometimes can shift between ministries or public bodies and even between statutory legislative authorities, leading to gaps and uncertainties. The needs of children and youth with extra support needs cannot and should not be described and limited by the silos of ministry mandates and legislation. This concern was reflected in the 2017 statutory review report, in which the Committee commented:

> *"Committee Members identified an opportunity to simplify the Act's existing approach to defining services that are within the Representative's mandate. As part of the statutory review, the Committee noted two specific issues where program delivery changes led to inadvertent "gaps" in the Representative's authority to provide advocacy services. A simplified approach to defining services under the Representative's mandate might help reduce the possibility of inadvertent gaps in authority in the future."* (p. 6)

The Representative concurs. In the Representative's view, a better approach would be to describe all of the services that are to be included in relation to vulnerable children and youth in a clear, generic manner – as is currently the case, for example, with *"mental health services for children"* or *"addiction services for children"* – and then give legislative authority and responsibility to the Representative to negotiate formal agreements with ministries and public bodies as to which specific programs and services are in scope. To illustrate with our example of children and youth with special needs, it is notable the Committee's 2017 statutory review recommended a generic description: *"services and programs provided or funded by government for children with special needs"*. If these services were simply and generically described in the Act, as recommended, the Representative could then follow up with MCFD, the Ministry of Health and the Ministry of Education and Child Care to identify the particular services that should be in scope.[66]

It is recognized that such an approach runs some risk of uncertainty and, potentially, disagreement between the Representative and ministries about what services should or should not be included. For

[66] Note that while the responsibility for child care services is being transferred from MCFD to the Ministry of Education in 2022, the responsibility for Supported Child Development services for children with special needs will remain with MCFD. Nonetheless, the Ministry of Education would need to be engaged in relation to children with special needs if there is agreement to include special education services as a designated service.

example, *"mental health services for children,"* on the face of it, unequivocally includes programs such as Child and Youth Mental Health Services administered by MCFD and dedicated Adolescent Psychiatric Units (APUs) administered by health authorities. But does it also include a brief one-time visit to a hospital emergency room? Or a visit to a family physician, funded under the Medical Services Plan, who prescribes an anti-depressant? (The Representative thinks not, to both). Or, a 17-year-old who is admitted to an adult psychiatric unit due to the unavailability of a specialized adolescent unit? (The Representative thinks yes.) These are matters that can be discussed and decided administratively. If there is a disagreement about, depending on perspective, perceived "over-reach" by the Representative or "bureaucratic resistance" by ministries, these disagreements could be resolved by way of referral to the Committee itself for decision.

Some might argue that giving the authority to the Committee to decide such matters somehow intrudes upon authority that should properly be exercised by the executive branch of government. But that would not be the case because the executive branch of government would still decide which amendments should be brought forward to the Legislative Assembly, thus preserving the executive government's control respecting the Representative's scope of jurisdiction. Moreover, Parliamentary Committees do make some important decisions, including unanimously recommending the appointment of the Representative (s.2), suspending the Representative (s.4), appointing an acting Representative (s.4) and the decision to refer a critical injury or death of a child to the Representative for investigation, while the Select Standing Committee on Finance and Government Services decides the Representative's budget. Further, decisions by the Committee in this respect would almost certainly be made far more expeditiously than the protracted processes of statutory amendment or changes in regulation. Finally, and importantly, such an approach would provide for a public, transparent and non-partisan process of decision-making regarding the Representative's crucially important role.

Turning to a broader issue about scope of services, if the principal purpose and focus of the Representative's mandate is and should be to help better support and improve outcomes for children and youth with extra support needs, it seems anomalous that a universal publicly funded service that, next to the family, is so central to child development is omitted from her jurisdiction (i.e., educational services).[67] The Representative has produced several public reports that have documented the need for systemic reforms to public education services for sub-populations of children with extra support needs, in particular, children in care, children and youth with special needs, and youth justice.[68,69] No doubt, the same could be found for children and youth involved in the mental health and addictions systems who are also often concurrently involved in multiple systems of services. Further, the impacts of the pandemic have left no doubt about the importance of schools to the well-being of children, and their families, especially for children with special needs.[70] Yet, the Representative has not been given – and children and families have not been able to benefit from – a mandate to provide individual advocacy for children in receipt of or eligible for "special education" (or "inclusion") services, nor a direct monitoring (systemic

[67] Note that this does not just refer to public schools; independent schools are also, in part, publicly funded.

[68] See: *Health and Well-Being of Children in Care in B.C.: Educational Experience and Outcomes (2007)*; *Room for Improvement: Toward better educational outcomes for children in care (2017)*; *A Parent's Duty: Government's Obligation to Youth Transitioning into Adulthood (2020)*, and *Kids, Crime and Care, Health and Well Being of Children in Care: Youth Justice Experiences and Outcomes (2009)*.

[69] See: *Alone and Afraid: Lessons learned from the ordeal of a child with special needs and his family (2018)*; *Left Out: Children and youth with special needs in the pandemic (2020)*; and *Excluded: Increased Understanding, Support and Inclusion for Children with FASD and their Families (2021)*.

[70] See, *Left Out: Children and youth with special needs in the pandemic* (2020).

advocacy) mandate over those same special educational services. A "whole child" approach demands the inclusion of these crucially important services. If a decision is made to include special education services within the Representative's purview, it is safe to say that this could have an appreciable resource impact on the operations of the Office.

This need for a whole child approach, in particular in relation to services to children and youth with special needs, was echoed in compelling submissions to this review by the BCEdAccess Society, Inclusion BC, BC Complex Kids Society and CLBC.

Another emerging area of prospective jurisdiction that, in the Representative's view, should be included is services to gender diverse (transgender and non-binary) children and youth. This is a small but high-needs population of children and youth who the Representative frequently encounters in critical injury and death reports and in advocacy cases but only, due to jurisdictional limitations, to the extent that some of these children and youth are involved with reviewable or designated services. This population experiences stigma, discrimination, marginalization, violence and trauma that lead to distressingly higher rates of, for example, mental health issues such as suicide attempts and ideation, and substance use. The Representative has commissioned a research review by the University of British Columbia's Stigma and Resilience Among Vulnerable Youth Centre (SARAVYC) that will be available in the coming months but the Office's experiences to date with this high-needs population is sufficient for us to recommend direct and broader inclusion within the RCY's statutory mandate.

In its submission to the 2022 statutory review, the B.C Complex Kids Society, noting how the parents of children with complex needs are often *"struggling immensely"* and how those families have been left out of the government's Poverty Reduction Strategy, recommended that the Representative be accorded monitoring jurisdiction over that strategy.[71] This echoes the submission to the 2017 statutory review by the then-Representative who recommended that the Office be given a monitoring mandate over government's poverty reduction strategy in relation to children and young adults.[72]

The current Representative routinely observes how the health and well-being of children and families, and young adults, can be deeply affected and compromised by poverty, and therefore endorses and welcomes efforts that will lead to systemic improvements, including potentially a statutory mandate. Whether this actually requires the Representative to have a direct statutory mandate over government's poverty reduction strategy, however, is debatable. In the Representative's view, RCY has an existing mandate relating to government's efforts to reduce poverty and in fact has already exercised that authority in the 2020 report, *A Parent's Duty: Government's Obligation to Youth Transitioning into Adulthood*. That report clearly identified the poor outcomes for young adults formerly in care, including in particular poverty and homelessness, and made recommendations to address these – recommendations that were subsequently endorsed in BC Budget 2022. The Representative's statutory authority exercised in that report arose from s.20 of the *RCY Act*, which enables the Representative to make a "special report" with recommendations to the Legislative Assembly if the Representative "considers it necessary to do so," the caveat being that the special report must be directly connected to the Representative's statutory functions (i.e., individual advocacy, monitoring or investigation, or reviews).[73] In this regard, as noted above, the

[71] See, *Poverty Reduction Strategy Act* (SBC) chapter 40.

[72] *Review of the Representative for Children and Youth Act: Submission by the Office of the Representative for Children and Youth,* Nov. 2017.

[73] See, *British Columbia (Representative for Children and Youth) v. British Columbia (Attorney General)* 2019 J.No 2108 BCSC 1888.

Representative routinely observes the deleterious impacts of poverty on children and families, and young adults, in the context of individual advocacy cases and reviews of critical injuries and deaths across a variety of populations, including Indigenous families, the families of children and youth with special needs, those involved in the child welfare system, and young adults formerly in care. As such, there are existing substantive grounds and legal authority for the Representative to carry out special reports related to poverty affecting these populations. That said, a direct statutory mandate would have the advantages of providing clarity about mandate, create expectations, and provide a foundation for the Representative to ask for the necessary resources to support further research and reports.

The discussion above relates to "designated" services for children and youth and the Representative's individual advocacy and monitoring (systemic advocacy) mandates. Otherwise, the Representative is satisfied that the current narrower jurisdiction in relation to "reviewable services" for the purpose of reviews and investigations of critical injuries and deaths – limited to child welfare, youth justice, mental health and addiction services – is sufficient, for now.[74] In this regard, it is noted that even 16 years after the implementation of the statutory duty to report critical injuries and deaths to the Representative that is set out in s.11, health authorities are only now in the beginning stages of reporting these serious circumstances in relation to mental health and addictions services for children and youth that are provided or funded by the health authorities. It would be prudent to await fulsome reporting by the health authorities under the current mandate before considering next steps, if any, in this regard.

For the purposes of individual advocacy and systemic advocacy (monitoring), the Representative recommends that the scope of services for children and youth be described generically, including:

a) early childhood development services

b) child welfare services

c) mental health services for children and youth

d) addiction services for children and youth

e) services for children and youth with special needs

f) special education (or inclusion) services for children and youth

g) youth justice services

h) services for youth in their transition to adulthood

i) services for gender diverse youth; and

give authority and responsibility to the Representative to develop agreements with ministries and public bodies as to which particular services and programs are to be included and, in the event of disagreement, the authority to refer the matter to the Committee itself for resolution.

[74] Under the *RCY Regulation*, reviewable services also include children who are in receipt of funding under the Child in the Home of a Relative program. The Representative does not, however, receive reports of critical injuries and deaths about this population of children because, being financial agreements, there are no (case management) means for MCFD to monitor and report the same.

As an interim step pending amendments to the Act itself, priority be given to expediting a broadening of the Representative's advocacy mandate in relation to children and youth with special needs by way of regulation, specifically:

a) special (inclusive) education services funded by the Ministry of Education and Child Care; and

b) Nursing Support Services and the assessment and diagnostic clinics for children with autism (BCAAN) and complex behavioural disorders (CDBC) funded by the Ministry of Health or health authorities.

For clarity, special education services are included in above-noted list of services as these services are directed to children with extra support needs, whereas child care is intentionally omitted because these are generally available services that are not specifically targeted to vulnerable children.[75] An exception in relation to child care services is Supported Child Development services, the responsibility for which will remain with MCFD and which can be captured under the rubric of services for children and youth with special needs.

Services for Young Adults

From the outset, the definition of "designated services" for the purposes of the Representative's individual advocacy and monitoring mandates included "services for youth and young adults during their transition to adulthood." While "youth" is defined in the Act, "young adult" was not defined in the original iteration of the Act. Moreover, the overly general description of "transition to adulthood" created uncertainties about transition of who, from what, and how?

The Representative's mandate in relation to services to young adults was subsequently clarified, to a limited extent, in three stages.

In 2013, the Act was amended, defining "young adult" in s.6(2) as a person who is:

> *"a) 19 years of age or older but is under 24 years of age, and*
>
> *b) received a reviewable service within 15 months before the person's 19th birthday."*[76]

At that time, the age of under 24 years aligned with the eligibility of young adults for AYA set out under the *CFCS Regulation*, but that same regulation was later (2016) amended and increased to be under the age of 27 years, thereby creating a discrepancy.

The 2013 amendments to the *RCY Act* also added sub-section 6(a.1) to the Act, thereby according the Representative individual advocacy (but not monitoring) jurisdiction over young adults under 24-years-old but this new jurisdiction was limited by virtue of s.4.1 of the *RCY Regulation* to CLBC services only.

[75] The issue of the Representative's jurisdiction over special education is not new. It is noted that for the 2012 statutory review the Representative requested jurisdiction over educational services but limited only to children in care, while in the 2017 statutory review the Representative requested monitoring (but not individual advocacy) jurisdiction over special education.

[76] *Supra*, note 13.

The Committee's 2017 statutory review recommended three key changes in respect of the Representative's individual advocacy mandate for young adults:

> *"The Act be amended to allow the Representative for Children and Youth to support, assist, inform and advise young adults who have previously been in care with respect to services and programs necessary to support them in their transition to adulthood.*
>
> *"The Act be amended to ensure the Representative has authority to provide advocacy services with respect to programs and services for young adults with special needs that were formerly delivered under the Community Living Authority Act. Further, amendments to the Act should ensure that the Representative's existing mandate with respect to young adults with special needs is expanded in conjunction with the recommendations related to young adults who have previously been in care.*
>
> *"The Act be amended to a define a young adult as a person aged 19 years of age but under age 26, to align with the eligibility for agreements with adults under section 12.3 of the Child, Family and Community Service Act, and remove the requirement that a young adult is required to have received a reviewable service within the 15 months before the individual's 19th birthday."*[77]

An amendment to s.4.1 of the *RCY Regulation* in July 2019 partially addressed the first of the Committee's recommendations above by according the Representative individual advocacy jurisdiction for young adults who are eligible for an AYA under s.12.3 of the *CFCS Act* and those eligible for the Provincial Tuition Waiver Program, currently administered by the Ministry of Advanced Education and Skills Development.

Amendments to the *RCY Act* that were passed in October 2021 addressed the third of the Committee's recommendations by re-describing young adults as *"included adults,"* and increasing the age range from under 24 to under 27 years of age (to align with AYA eligibility). The amendments also removed the requirement for a young adult to have received a reviewable service within 15 months of the person's 19th birthday, substituting the stipulation that the included adult must have received a reviewable service at any previous time or be in receipt of or eligible for CLBC services.[78] These amendments were brought into force on Feb. 28, 2022.[79] (For ease of reference, "included adults" will continue to be described in this submission as "young adults".)

In summary, the Representative now has individual advocacy jurisdiction in relation to young adults under the age of 27 years who were formerly youth in care and eligible for an AYA or Tuition Waiver, or those eligible for or in receipt of CLBC services. The scope of the Representative's individual advocacy mandate, however, is statutorily limited to those specifically identified program services (i.e., AYA, Tuition Waiver and CLBC services). Such a narrow scope does not nearly satisfy the Committee's unanimous 2017 recommendation that the Representative be accorded the authority to advocate:

> *"… with respect to services and programs* ***necessary*** *to support them in their transition to adulthood."* (emphasis added)

[77] The reference to "under age 26" was obviously in error as AYA eligibility is actually under age 27.
[78] *Miscellaneous Statutes Amendment Act* (no.2), 2021.
[79] Order-in-Council 111/2022.

In this regard, the Committee also stated that:

> *"… the categories of services should be carefully defined so that the Representative's mandate does not inadvertently exclude young adults who would benefit from support in accessing services they need for a successful transition into adulthood."* [80]

As with children, if the goal of individual advocacy is to improve services to and outcomes for young adults with extra support needs, then a "whole person" approach demands that, at the least, the core services "necessary" to support them in their transition to adulthood be able to be addressed. These could include, for example, services such as mental health and addiction services, housing supports and financial supports or, in the case of CLBC young adults who have concurrent significant medical needs, specialized health services and supports.

The Representative has now had several years of experience with advocacy for young adults involved in the CLBC service system and can state that there have been many case examples where advocates have not been able to address the services necessary to support them in their transition to adulthood. The case of Jason is just one example in point (see text box).

JASON'S STORY

Jason is a CLBC-eligible young person who was hospitalized for lengthy periods three times between the ages of 18 and 21. His first hospitalization in an adult psychiatric ward took place while he was still 18 and eligible for MCFD services, but he remained in hospital without supports for months. He was discharged by the hospital to his parents' care without supports. It did not last. His discharge from his second mental health hospitalization, when he had become an adult, did involve some planned post-discharge services, but they were not provided in a timely or effective way. Again, transition to the community was unsuccessful. At the current time, at the age of nearly 21, he remains in hospital for the third time. There has been an effort to coordinate services between CLBC and the health authority, however, the RCY Advocate does not have jurisdiction to advocate for timely and appropriate support services from the health authority.

CLBC's submission supported an expansion of the RCY's individual advocacy jurisdiction to include mental health and addictions services for CLBC young adult clients, but expressed concerns about the potential inclusion of housing in the RCY services mandate, asserting that the possible scope of what is "housing" could be overly broad and that it lacks clarity, potentially leading to an area such as housing for medically complex individuals, and could have significant implications.[81] Clarity in this and other matters related to jurisdiction over services could, however, be achieved by adopting the same approach to defining service jurisdiction that was discussed earlier in relation to services to children and youth (i.e., defining the services generically, and then giving authority to the Representative to negotiate agreements with public bodies as to what services are included and, in the event of disagreement, refer the matter to the Committee for resolution). Accordingly, if services were, in keeping with the 2017 Committee recommendation, simply described in the Act as those *"necessary to support transition into adulthood"* the Representative could engage with, for example, BC Housing, CLBC and the Ministry of Health to develop agreements as to which housing-related services and programs are in scope. This would not only provide for clarity and transparency

[80] *Supra*, note 22.
[81] *Supra*, note 5.

but obviously also significant opportunity for input by CLBC, which endorsed this approach to defining service jurisdiction, and other public bodies into the decision-making process.

Turning to young adults who were formerly in care, the poor outcomes and the broad range of needs of this highly vulnerable young adult population have been documented in detail by the Representative in her 2020 report, *A Parent's Duty: Government's Obligation to Youth Transitioning into Adulthood*. This report made a compelling case for systemic reform to fully address the broad swath of needs of this highly vulnerable population, including income support, education and training, mental health and addiction services, mentoring and housing. This report noted:

> *"Research – including hard science on brain development – along with the experiences of parents and youth everywhere underlines that the journey to self-sufficiency takes time and much support, well into a person's twenties. We need systems of support for youth in care that look much more like the diverse, long-lasting and highly individual supports that a parent provides as their own children grow into adulthood."* (p. 4)

As well, the 2020 report, *From Marginalized to Magnified: Youth Homelessness Solutions From Those With Lived Expertise*, featured the voices of young adults with lived expertise and their needs for a broad suite of support services, describing the current lack of support services as a *"highway to homelessness."*

Government has clearly acknowledged and responded to the needs of young adults who were formerly in care through welcome new initiatives arising from BC Budget 2022, which include a new financial supplement, a no-limit earnings exemption, financial assistance with the costs of housing, the support of dedicated transition workers, enhanced life-skills and mental health programs, better medical benefits, and making permanent former emergency measures that allow young people to stay in their placements past their 19th birthday.[82] Yet, despite these well-documented needs, which have obviously been recognized by government, the Representative's individual advocacy jurisdiction in relation to these young people is misaligned by being limited to just AYAs and Tuition Waivers.

It should be noted as well that AYA eligibility does not, as the Committee recommended in 2017, currently include young adults who have been "previously in care," which would include a person who has been previously in care at any time and for any period of time. Currently, AYA eligibility is limited by s.8.3 of the *CFCS Regulation* to young people who were in continuing custody, on a Youth Agreement, or in the guardianship of a Director of adoption or of a Director under s.51 of the *Infants Act* when they "aged out" at 19. This excludes other young people in care, such as those who were on voluntary care agreements, special needs agreements, or in temporary care.[83] It also excludes young people who may have previously spent substantive periods of time in care or under an agreement but who may not have been in care when they turned 19. Examples are a young person with significant mental health or addiction or special needs issues, who dropped out of or was terminated from a Youth Agreement before the age of 19, or a youth who spent many years in care but was adopted before the age of 19.

[82] https://engage.gov.bc.ca/youthtransitions/background/
[83] *Ibid.*

It is noted that government has not only proposed a broadened suite of support services for young adults who were formerly in care but also broadened eligibility, specifically:

> *"Expanding program eligibility to all youth transitioning out of government care, regardless of the type of care agreement, if they had 24 months of cumulative time in care between ages 12-19 or achieved legal permanency within this time."* [84]

This is significant step forward. For example, including all youth transitioning out of care, regardless of the type of care agreement, makes young people who were on voluntary care agreements or special needs agreements eligible for services. As well, the proposed 24-month criterion makes those who have had some substantive and relatively recent experience in care eligible even if they were not still in care or under an agreement upon reaching their 19th birthday. It is very concerning, however, that some young people with recent and serious issues such as mental health or substance use concerns will remain ineligible for supports (e.g., a young person who dropped out of or was terminated from a Youth Agreement or a voluntary care agreement after 18 months and before the age of 19). Significantly, these broadened eligibility criteria will also still exclude young people with extensive time in care and ongoing traumatic experiences, such as a young person who spent many years in care, enduring significant trauma over those many years, and then was adopted at age 12.

Given the above, the fundamental issue in relation to the Representative's individual advocacy jurisdiction for young adults who were formerly in care is whether that jurisdiction should, in keeping with the 2017 Committee recommendation, include every young adult who has "previously been in care" (i.e., without limitation) or whether it should be defined more narrowly, in alignment with the proposed eligibility for an expanded suite of transitional support services (i.e., all young people who have transitioned out of care, regardless of the type of care agreement, subject to the limitation of a cumulative total of 24 months in care between the ages of 12- and 19-years-old).

This is a challenging issue. The option of including all young adults who were formerly in care was supported by the Adoptive Families Association of BC and Inclusion BC in their submissions, while CLBC supported alignment with the criteria for young people who are eligible for the proposed new suite of services. Including every young person who has spent any amount of time in care at any previous time would involve a much larger number of eligible persons and, for some, might be considered to be over-inclusive (e.g., a child who was in care for only a few weeks at a very young age, and was returned to the parents with no subsequent involvement). Nonetheless, the Adoptive Families Association of BC forcefully argues that the narrower criteria create eligibility gaps in RCY advocacy jurisdiction for young people who, for example, have spent a shorter period of time in care yet still face many of the challenges and disadvantages associated with time in care. The Representative fully agrees with these concerns about eligibility gaps but notes that they are first and foremost gaps in eligibility for **program** services. The Representative will continue to advocate at a systemic level for these program eligibility gaps to be further narrowed, and hopefully closed altogether but, until those gaps are closed, the Representative will be unable to effectively carry out individual advocacy for services for which the young adult is statutorily or administratively ineligible. Accordingly, the Representative agrees that the individual advocacy jurisdiction should be aligned with the eligibility criteria for the proposed expanded suite of transitional services for young adults who were formerly in care, but the Representative will continue to advocate for broader systemic reform to close program eligibility gaps.

[84] Government of British Columbia News Release, "$633 million to help prevent and reduce homelessness". March 17, 2022.

Turning to another matter, the Representative's individual advocacy and monitoring (or systemic advocacy) functions for children and youth go hand in hand (i.e., under s.6, the Representative has jurisdiction to provide individual advocacy services for children in receipt of or eligible for the wide range of designated services, and also to monitor, review, audit and conduct research in relation to the very same range of services). The connection between the two is obvious: individual advocacy facilitates improvements to services to individual children and their families, while the forward-looking function of systemic advocacy promotes improvements to those same systems that serve all eligible children and families. Moreover, examining and analyzing issues that collectively emerge from advocacy for individual children and families serves to inform the identification of systemic issues that require attention and improvement.

For services to young adults, however, the Representative's jurisdiction is limited to individual advocacy – there is no systemic advocacy (monitoring) function. Moreover, there is also no jurisdiction over reviews and investigations of critical injuries and deaths of young adults and the Representative is unable to make a s.20 "special report" to the Legislative Assembly because both of those functions are limited to children and youth under the age of 19. What this means in practical terms is that, if there is an ongoing pattern of significant problems with service delivery to young adults that emerges as a result of individual advocacy involvement, the Representative is unable to inquire further and conduct research and cannot file a public report with recommendations for systemic improvements. This issue was addressed in the 2017 statutory review, wherein the Committee recommended:

> *"Section 6(1)(b) of the Act be amended to authorize the Representative to monitor, review, audit and conduct research in respect of prescribed services …"* [85]

"Prescribed services" refers to services that are prescribed by regulation, specifically services to young adults, including CLBC services, Agreements with Young Adults, and tuition waivers. The Committee said this about the issue:

> *"With regard to the proposed additions and clarifications to the scope of the Representative's authority under section 6(1)(b), Committee Members agreed that it would be a modest change to clarify that prescribed services may be subject to the Representative's monitoring authority under section 6(1)(b)."* (p. 13)

Despite the view that giving the Representative monitoring (systemic advocacy) jurisdiction over young adult services would represent only a modest change, government has not actioned the Committee's recommendation in the nearly five years since it was made. As such, the Representative has, in effect, an incomplete advocacy role in relation to these important services for vulnerable young adults. This unfortunate gap is also inconsistent with government's very clear acknowledgement of the significant needs of young adults who were formerly in care by, as discussed earlier, the newly announced significant improvements in services that are promised to be implemented in the coming months and years. Yet, the Representative will not have the authority to monitor the implementation of these welcome improvements and help ensure they best serve young people.

[85] This recommendation concludes with the words: *"… and reviews by the director under the* Child, Family and Community Service Act*."* This second part of the recommendation will be discussed later.

CLBC's submission raised concerns about the proposal to accord the Representative a systemic advocacy function over services to young adults, writing:

> *"CLBC has concerns about the RCY having a systemic advocacy function in relation to young adults who are eligible for or receiving CLBC services. Systems-level advocacy duplicates the work of the Advocate for Service Quality (ASQ) who, in addition to supporting individuals and their families with their complaints or concerns, reviews cases and processes, tracks data and raises awareness about systemic issues, and makes recommendations to decision makers, including the Minister. This duplication is unnecessary, a poor use of resources, and expands the RCY's role far beyond its original intent of supporting children and youth."*

Every public body delivering services has established internal quality assurance processes, with varying degrees of scope and intensity. In counterpoint to the concerns raised by CLBC, and potentially other public bodies delivering services to young adults, giving the Representative systemic advocacy jurisdiction over a service does not necessarily mean that, in practice, the jurisdiction will be exercised routinely or without deference to the internal organizational processes of public bodies. For example, RCY does not conduct random audits of program services and does not have the capacity to do so. Rather, systemic advocacy initiatives only arise when the Representative accumulates substantial evidence of ongoing and serious concerns (e.g., a recurring pattern of similar concerns arising from a number of individual advocacy cases). Even then, the Representative will only commence a systemic review and issue a public report after concerns have been raised administratively with the public body and that body is unable or unwilling to take the necessary remedial action, or the matter is so serious it demands public attention.

Having worked for many years with the Advocate for Service Quality in relation to individual advocacy cases, the Representative acknowledges that CLBC has a robust system of quality assurance processes. It should be noted, however, that the ASQ is not, like the Representative, an arm's length and Independent Office that reports to the Legislative Assembly and can issue public reports with formal recommendations that are tracked and assessed. Moreover, while CLBC has a robust system of internal quality assurance processes, the same cannot be said for all public bodies delivering services to young adults.

In relation to the jurisdiction respecting young adults, the Representative recommends:

- **The Act be amended to enable the Representative to provide individual advocacy services to young adults in respect of services necessary to support their transition to adulthood, giving the authority and responsibility to the Representative to develop agreements with ministries and public bodies as to which particular services and programs are to be included and, in the event of disagreement, the authority to refer the matter to the Committee itself for resolution.**
- **As an interim step pending amendments to the Act itself, priority be given to expediting a broadening of its advocacy mandate in relation to services to young adults by way of regulation, specifically by designating mental health and addictions services provided or funded by the Ministry of Health and health authorities.**
- **In the interest of accessible language, recent amendments changing the wording of "young adult" to "included adult" be changed back to "young adult".**

- **"Young adult" (or "included adult") be defined, at minimum, as adults under the age of 27 years who:**
  - **a) are eligible for or in receipt of Community Living BC services or,**
  - **b) were formerly in care as defined by proposed changes to the eligibility for a broadened suite of transitional support services (i.e., those who were under any form of order or agreement and who were in care for a cumulative period of two years between the ages of 12 and 19).**
- **The Act be amended to give the Representative a systemic advocacy (monitoring) function in relation to services to young adults who were formerly in care and young adults in receipt of or eligible for CLBC services.**

Reviews and Investigations

One of the Representative's key functions is, under Part 4 of the *RCY Act* – to review, investigate and report publicly on critical injuries and deaths. This provides desirable transparency and accountability respecting services provided to vulnerable children, which can and does lead to improvements in services generally. Put another way, the Representative's investigative and reporting functions can identify errors or gaps but can also point out where things are being done well. However, as discussed below, the significant public interest goal in this function is materially hampered by unnecessary scope limitations and imprecise language.

Before fleshing out these concerns an overview of how Part 4 works is necessary.

Section 1 of the *RCY Act* defines *"critical injury"* as well as the *"reviewable services"* that are subject to such reviews and investigations, while sections 11 to 16 set out the criteria, jurisdiction and process for reviews and investigations.

The Representative may only review and investigate in respect of a *"critical injury"* or death of a child. A *"critical injury"* is defined as an injury to a child that may *"result in the child's death"* or *"cause serious or long-term impairment of the child's health."* Section 1 defines *"reviewable services"* as:

> *"(a) services or programs under the Child, Family and Community Service Act and the Youth Justice Act;*
>
> *(b) mental health services for children;*
>
> *(b.1) addiction services for children;*
>
> *(c) additional designated services that are prescribed under section 29(2)(b)."* [86]

The legislation imposes a very clear, positive reporting duty on all public bodies responsible for a reviewable service to provide information to the Representative when the public body becomes aware of a critical injury or death of child who was receiving, or whose family was receiving, a reviewable service at the time of or in the previous year.[87] After receiving such a report, the Representative may conduct a review for the purpose of determining whether to investigate or to identify and analyze recurring

[86] *Supra*, note 74.
[87] Section 11.

circumstances or trends (the latter activities are commonly known as "aggregate" reviews and reports).[88,89] If, after completion of a review, the Representative decides not to conduct an investigation, the results of the review may be disclosed to the public body responsible for the reviewable services.[90]

After completing a review, the Representative may investigate a critical injury or death where the Representative determines that a reviewable service, or the policies and practices of a public body or director under the *CFCS Act* may have contributed to the critical injury or death, and the critical injury or death:

"• *was or may have been due to one of the grounds for child protection set out in section 13 of Child Family and Community Service Act,*

• *occurred, in the opinion of the Representative, in unusual or suspicious circumstances, or*

• *was or may have been self-inflicted or inflicted by another person."* [91]

The Representative's authority to investigate is, however, subordinated to other processes. The Representative is prohibited from investigating until:

"• *if applicable, the completion of a criminal investigation and criminal court proceedings,*

• *in the case of a death, the earlier of the date on which a coroner meets certain requirements under the Coroners Act and one year after the death; and*

• *where a public body or director responsible for a reviewable service has procedures in place for investigation of critical injuries and deaths, the earliest of the date of completion of the investigation by the public body or director, or one year after the date of the critical injury or death, or the date the public body or director provides the Representative with written consent to investigate."* [92]

Section 16 sets out requirements for the Representative's review and investigation reports. As mentioned earlier, under s.16, the Representative is authorized to aggregate and analyze information received from reviews and investigations and produce a report of that information. These reports must not contain information in individually identifiable form. Where the Representative has investigated the critical injury or death of a child, the Representative must make a report about it.

Both types of report – aggregate and individual – must be provided to the Committee and to the public body or the director responsible for the provision of a reviewable service. For individual investigations, the report must contain the Representative's reasons for undertaking the investigation and may include recommendations to the public body or director responsible for the provision of a reviewable service that

[88] Although the Representative "may" review a report of a critical injury or death, and therefore has the discretion not to do so, the practice is to at least conduct an "initial review" – or summary review – of every in-mandate report of a critical injury or death.

[89] For a recent example of an aggregate report, see, *A Way to Cope: Exploring Non-Suicidal Self-Injury in B.C. Youth*, September 2020.

[90] Administratively, the Representative conducts two types of reviews: all in-mandate reports are subject to an initial (or summary) review, a small number of which are selected for comprehensive reviews. A comprehensive review involves an in-depth file review. In practice, a matter only proceeds to investigation after a comprehensive review is completed and which indicates an investigation is merited. Most comprehensive reviews do not proceed to investigation, although the findings of comprehensive reviews are shared with the public body or bodies responsible for services (but, as discussed later, not the public, parents or significant others).

[91] Section 12, which also enables the Committee to refer a critical injury or death to the Representative for investigation.

[92] Section 13.

is a subject of the report. The report may also make recommendations to any other public body, director or person that the Representative considers appropriate. The Representative may disclose personal information in a public report of an individual investigation if specified public interest grounds are satisfied.[93]

With this overview in mind, the Representative urges the Committee to consider the following concerns.

First, in order for the Representative to properly discharge the Office's statutory functions to review and investigate critical injuries and deaths, the Representative must be informed by the responsible public body that the critical injury or death occurred in the first place. That is why s.11 creates a clear, positive legal duty for public bodies responsible for reviewable services to report these events to the Representative. Compliance by public bodies with this legal duty has not, however, been without issue.

The lack of compliance by MCFD with the legal duty to report prompted a Representative's special report in 2010.[94] This concern was eventually satisfactorily resolved in 2015 by MCFD developing and implementing a reporting policy and process that has resulted in, as noted earlier, a vast increase in reports since then. While the Representative, through the individual case review of reported injuries and deaths, still routinely finds previous critical injuries that have not been reported by MCFD, to its credit, that ministry has dedicated considerable effort to improving reporting.

This issue has, however, re-emerged more recently in relation to efforts to have health authorities begin to comply with their unambiguous legal duty to report critical injuries and deaths associated with the delivery of mental health and addictions services to children. Health authorities have raised questions over the years about what constitutes a "critical injury". A prominent area of discussion has been what is meant by the term "health" in the s.1 definition: *"an injury to a child that may … cause serious or long-term impairment of the child's health"*.

It is well-established both legally and in practical terms that a person's "health" is about much more than physical health. It clearly includes mental and emotional health.[95] Given the public policy goals of the legislation, it is inconceivable that the Legislature intended to exclude mental health from the term "health" in the *RCY Act.* Indeed, the legislation itself underscores that the Legislature intended no such thing, since the definitions of *"designated services"* and *"reviewable services"* include *"mental health services for children"*.

This issue is compounded, for some, by the use of the word "injury," which in common discourse connotes physical injury. "Serious harm" may be more clearly understood words.

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[93] As discussed below, there is an apparent gap in the Representative's reporting function that should be filled – where the Representative conducts an aggregate review, not individual investigation, it appears that the aggregate review report cannot include recommendations to the responsible public body or director.

[94] *Special report: Reporting of the Critical Injuries and Deaths to the Representative for Children and Youth*, 2010 Section 20 *RCY Act* enables the Representative to make a *"special report"* to the Legislative Assembly *"if the representative considers it necessary to do so."*

[95] The common-sense observation that "health" goes beyond "physical" health is amply supported by, for example, sources such as the World Health Organization, whose website underscores that: "health" is *"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"*. As another example, court decisions have for well more than a century made it clear that damages for "personal injury" go beyond physical harm because "injury" can be psychological, mental or emotional.

Accordingly, matters that do not involve physical injury but nonetheless seriously impact a child's emotional and psychological well-being are clearly encompassed within the meaning of "critical injury". These include incidents such as sexual touching or sexual interference, the death of a parent or loved one, and witnessing traumatic events. It is also important to note that "critical injury" is defined as an injury that "may" cause serious or "long-term" impairment of a child's (mental or emotional) health. In this regard, it is also well established that the impacts on children (and adults) of disturbing and traumatic events may not be immediately apparent and often do not fully materialize until well after the trauma has occurred, causing long-term impairment. These are settled issues that should not be questioned or prompt debate, but nonetheless are too often questioned.

Despite the clear scope of what "health" means, the definition of critical injury in s.1 of the Act should be amended to explicitly state that "health" includes mental and emotional health. It is noted that while the vast majority of submissions were silent on this issue, clarifying the definition of "health" was supported by the Union of BC Indian Chiefs.

While consideration could also be given to substituting "serious harm" for "critical injury" in the *RCY Act*, the Representative is of the view that that should be unnecessary as long as the definition of health is clarified as described above.

A second issue concerns s.11, which sets the boundaries for what are reviewable services by requiring that the child or the child's family "was receiving" a reviewable service at the time of, or in the year previous to, the death or critical injury. This could be interpreted as ruling out circumstances where a child applied for or was referred to a reviewable service but was placed on a waiting list (i.e., cases where the child was not yet "receiving" services at the time of the death or critical injury). This is especially important in the context of mental health and addiction services, both of which are reviewable services and both of which, unfortunately, are under-resourced and commonly have wait lists.

Simply put, there should be no doubt that the Representative has jurisdiction to review and investigate cases such as where a child commits suicide while awaiting mental health clinical services or a youth overdoses while awaiting placement in a detox or addictions treatment program. This change would properly align the Representative's review and investigation jurisdiction with the Representative's advocacy mandate, which includes, as stated in s.6(1)(a), advocating on behalf of a child *"receiving or eligible to receive"* a designated service. The same standard should apply to critical injuries and deaths.[96]

[96] Questions could be raised about how a public body would be able to report a death or critical injury to the Representative if the child was not actually in receipt of services at the time. In some circumstances, the public body may become aware (e.g., on follow up with a no-show for an appointment or placement). Otherwise, these matters can come to the Representative's attention through a coroner, from parents or significant others, or the media. The same issue arises in relation to a public body reporting a critical injury or death of a child who is no longer in receipt of services but had received services in the previous year. The public body is only required to report when the public body "becomes aware" of the critical injury or death.

The third issue relates to clarifying the Representative's authority to make recommendations to public bodies when the Representative conducts an aggregated analysis and report on reviews or investigations of deaths or critical injuries. As noted earlier, s.16(1) authorizes the Representative to aggregate and analyze information received from reviews and investigations and produce a public report. Related to this, the authority to conduct aggregate reviews is set out in s.11(3)(b), which states that the Representative may conduct a review:

> *" … to identify and analyze recurring circumstances or trends*
>
> *(i) to improve the effectiveness and responsiveness of a reviewable service, or*
>
> *(ii) to inform improvements to broader public policy initiatives."*

Sections 16(3) and (4) authorize the Representative to, in an investigation report about a critical injury or death of a child, make recommendations to the public body or director responsible for a reviewable service that is a subject of the report. By contrast, however, the s.16 authority to prepare an aggregate report of reviews and investigations does not unambiguously, expressly enable the Representative to make recommendations.

Since the purpose of an aggregate review is to improve the effectiveness and responsiveness of reviewable services, or to inform improvements to broader public policy initiatives, the authority for the Representative to make recommendations to public bodies appears to be implicit and, standing alone, would likely not be at issue. Some uncertainly arises, however, because aggregate reports do not stand alone and in every other context the Representative is given explicit authority to make recommendations:

- s.6(10(b) expressly provides that the Representative may *"monitor, review, audit and conduct research … for the purpose of making recommendations …"*
- s.16(4)(a) states that an investigation report may *"contain recommendations"* to public bodies, a director or person that the Representative considers appropriate
- s.20 provides that the Representative may make a special report to the Legislative Assembly, which may *"contain … recommendations"* for a public body or director.

In the face of these explicit references to making recommendations in every other situation, the silence about recommendations in reports on aggregate reviews and investigations creates some uncertainty that should be clarified. To avoid doubt, and to more clearly support the *RCY Act*'s public policy goals, s.16(4) should be amended to explicitly authorize the Representative to make recommendations in either type of aggregate report.

Another important issue relates to a matter that was addressed by the Committee in the 2017 statutory review and resulted in this recommendation:

> *"The Act be amended to provide that, where the Representative is investigating a critical injury to a child, the investigation may include events and incidents that occurred after the child reached 19 years of age, where the Representative believes that such investigation raises important issues related to the conduct of a public body delivering a reviewable service."*

This Committee recommendation was prompted by the then-Representative's request and it has not been actioned by government in the nearly five years since it was made. In discussing this issue, the Committee stated:

> *"The Ministry of Attorney General's written submission asked whether the Act should be clarified such that events that occurred after a person's 19th birthday are not within in the Representative's investigation and reporting scope. The Representative did not agree with the Ministry's suggestion, and recommended that the Act should instead be amended to establish that when the Representative has commenced an investigation into a critical injury of a child, the Representative has authority to include events (such as further critical injuries, or death) that occur after the person who is subject of the investigation has turned 19.*
>
> *"Committee Members concluded that Office of the Representative for Children and Youth's proposal would not expand the Office's scope to investigate critical injuries and deaths of young adults in a broad way. Instead, the intent is to allow the Representative discretion to include events that the Representative feels are relevant to a critical injury investigation as long as the initial investigation began while the person was under the age of 19."* (p. 15)

Setting aside the fact that this recommendation has languished inside government, upon reflection, it would have been too narrow in any case. This is because the recommendation would only permit an investigation to *"include events and incidents that occurred after the child reached 19 years of age"* where the Representative has already been investigating a critical injury to or death of a child before that person turned 19. The chances that the Representative will have already commenced an investigation into a critical injury before a death or another critical injury subsequently occurs are very slim, especially considering the statutorily required time delay in s.13, described earlier, must be satisfied.

In the Representative's view, the central issue is that, when there have been critical injuries before the age of 19 – such that jurisdiction is established – an investigation should be able to examine all matters and incidents that are reasonably connected to the critical injuries, even if some of those incidents, including death, happened after the young person attained the age of majority. Simply put, the Representative should have the authority to fully investigate all matters in a case where, for example, a young person experienced several overdoses while under the age of 19 and then died of an overdose six months after their 19th birthday. For the Representative to have to truncate such an investigation at age 19, and not be able to tell the whole story, dishonours that child, and the child's family, and compromises the central purposes of an investigation set out in s.11 (i.e., to improve the effectiveness and responsiveness of reviewable services or to inform improvements to broader public policy initiatives).

Alysha's story (see textbox), which has been anonymized with some details changed or omitted to make it non-identifiable, is an example of a tragic case that clearly warranted investigation but was unable to proceed to investigation due to these age-related jurisdictional constraints.

ALYSHA'S STORY

Alysha's was a First Nations girl who came from a family with a history of intergenerational trauma and child protection involvement. She was removed from her family and community at birth and later adopted by a non-Indigenous family who unfortunately did not support her in maintaining connections with her First Nation through her formative years, although she did positively re-connect with her First Nation later in adolescence.

Alysha began to show early symptoms of mental health problems and poor adjustment to school and family in her pre-adolescent years. These problems escalated through her teen years with self-harm and suicide attempts, disordered eating, polysubstance use, school dropout, and behavioural issues such that her adoptive family was not able to support her. She was diagnosed with FASD and accompanying cognitive impairments, depression and anxiety, and substance use disorder.

She experienced several critical injuries throughout her adolescence, including self-injury and suicide attempts, overdoses, and a serious illness that may have caused brain damage.

In later adolescence, florid psychotic symptoms emerged, resulting in her being involuntary detained under the *Mental Health Act*. She was placed under an Interim Custody Order under the *CFCS Act*. She was initially detained in an adolescent psychiatric unit but, after reaching 19 years of age, was transferred to an adult psychiatric hospital. In the several months that she was in both the adolescent and adult hospitals, she was frequently restrained and placed in seclusion, including for consecutive periods involving several weeks.

Securing an appropriate placement on discharge from hospital proved to be elusive. An assessment found that she was not eligible for CLBC services. She was not eligible for an AYA under the *CFCS Act* because she was not in continuing care or on a Youth Agreement when she turned 19. Supportive housing options were unavailable. Although she was considered highly vulnerable, she was discharged to a shelter. She died from toxic drug poisoning, five months after turning 19-years-old and shortly after being discharged from hospital.

Although Alysha was in receipt of more than one reviewable service, had experienced a number of critical injuries and her challenges of mental health, substance use and housing continued from adolescence into her first year as an adult, the Representative was unable to investigate this story through to her death due to the age jurisdiction limitations set out in the RCY Act. This is a story that otherwise would have been investigated due to the opportunities for learning about systemic and structural barriers to quality services for young people with complex needs.

The Representative accepts that, if investigations could explore subsequent matters that occur in early adult years, there must be reasonable limitations on this proposed jurisdiction. We note, as an example, that the Alberta Child and Youth Advocate has jurisdiction to review the deaths of all persons who previously received intervention services within two years before the age of majority and those who die within two years after attaining the age of majority.[97] Acknowledging Alberta's two-year window, the Representative believes that a period of one year after the age of majority would be appropriate (noting that this would

[97] See s.9.1(2) of Alberta's *Child and Youth Advocate Act,* noting that this is, in fact, a mandatory duty to review and publicly report.

complement the fact that under s.11 of the *RCY Act* critical injuries and deaths that occur within the previous year of receipt of reviewable services are within jurisdiction for potential investigation).

Finally, in its submission, the Public Guardian and Trustee (PGT), which acts as the property guardian for approximately 4,500 children in care, made two recommendations for amendments to the *RCY Act*, both of which relate to investigations. First, it was recommended that s.16(4) of the Act be amended *"to require the Representative to respect the wishes of a child or youth who objects to the disclosure of their personal information in a report where the Representative is unable to anonymize the personal information sufficiently to satisfy the concerns of the child or youth"*.[98] This issue emerged from the 2016 RCY investigation report, *Approach with Caution: Why the Story of One Vulnerable B.C. Youth Can't be Told*. In that situation, the subject youth, who had experienced significant critical injuries, objected to publication of the investigation report because the details of the youth's personal circumstances could not, in the youth's view, be sufficiently anonymized to protect the youth's then-precarious emotional state. Therefore, a decision was made to produce an anonymized and far less detailed investigation report and to provide the Provincial Director of Child Welfare with an embargoed copy of the full report, to inform changes to public policy.

The PGT also recommended that s.12(4) of the Act be amended to expressly require that the Representative *"notify the PGT of an investigation undertaken by the Representative concerning the critical injury of a child or youth for whom the PGT serves as property guardian"*. [99]

The Representative supports enshrining the voice of children and youth into law whenever appropriate. It is important to note, however, that the current Representative has implemented a policy that full public investigation reports relating to a living, as opposed to deceased, child or youth who has experienced a critical injury will not be undertaken by the Office precisely because, even with a well-anonymized report, the young person will likely be identifiable to immediate and extended family, friends, or the young person's community circle. As well, even in circumstances where a living youth, for example, consents to publication of an investigation of a critical injury, that decision may be regretted years later (i.e., consent at the time is not necessarily a guarantee against emotional harm arising at a later time). As well, if a consent provision were embedded in the legislation, it would raise the issue of a young person's capacity to provide informed consent, which is not insurmountable but is clearly a complicating consideration.

That said, the Representative recognizes that a future Representative may have a different view and not adhere to the current policy of not carrying out full, publicly reported investigations of critical injuries to living children and youth. The Representative has discussed these recommendations with the PGT and, regardless of whether amendments are recommended by the Committee, will initiate a protocol agreement that provides for notification to that Office of investigations and for independent consultations with the PGT's office about hearing the voice of the child or youth in cases where the PGT is property guardian.

[98] *Supra*, note 5.
[99] *Ibid*.

In relation to reviews and investigations, the Representative recommends:

- **The definition of critical injury in s.1 of the Act be amended to underscore that "health" as used in the Act includes mental and emotional health. Further, consideration be given to replacing "critical injury" with "serious harm".**
- **Section 11 of the Act be amended to clarify that a critical injury or death that occurs in relation to a child who is eligible for a reviewable service – such as being on a waiting list for service – is subject to review and investigation.**
- **Section 11 of the Act be amended to clarify that the Representative may make recommendations to a public body or director in an aggregate review report on deaths or critical injuries.**
- **The Act be amended to provide that, where a critical injury has arisen while the injured person was a child, an investigation may include events and incidents that occurred at least one year after the child reached 19 years of age, where the Representative believes that such an investigation raises important public policy issues.**

Information-Gathering and Disclosure

There are several matters related to information-gathering and disclosure, most of which are also connected to reviews and investigations, that require the Committee's attention.

To enable the Representative to carry out the Office's unique functions, the Act accords the Representative extraordinary powers to gather information. These powers are in turn balanced by extraordinary limitations on the disclosure of that information. These provisions are complicated, and their essential elements are summarized in brief below.

With respect to information-gathering, under s.10, the Representative has the right to *"any information"* that is in the custody or control of a public body (other than an Officer of the Legislature) or a director that is necessary to enable her to carry out functions or duties under the Act. This is a wide-ranging authority that includes not just access to case file records but also, for example, medical records, police records and even Cabinet records.[100] The only exceptions are records involving solicitor-client privilege and records relating to a committee of a hospital charged with studying, investigating or evaluating medical or hospital practice.[101]

As well, s.11 requires a public body responsible for the provision of a reviewable service that becomes aware of a critical injury or death of a child who was receiving, or whose family was receiving, the reviewable service at the time of, or in the previous year, to provide information respecting that event to the Representative. Further, when the Representative carries out an investigation under s.12, s.14 empowers the Representative to make enforceable orders for attendance to answer questions on oath or affirmation and for the production of records.

[100] *Representative for Children and Youth v. British Columbia*, 2010 BCSC 697.
[101] Section 51 *Evidence Act* (RSBC 1996) c.124.

With respect to information disclosure, the Representative and the Office's staff are required under s.23 to take an oath of confidentiality and must maintain confidentiality in all matters in relation to the performance of functions or duties under the Act. As well, ss.23(5) provides that the Representative and the Office's staff cannot be compelled to give evidence in a court or in proceedings of a judicial nature except for the purposes of enforcement of the *RCY Act* itself or to give evidence with respect to a trial of a person for perjury.[102]

The Representative may, however, disclose information, including personal information, on very limited grounds (i.e., only if, in the opinion of the Representative):

"*a) the disclosure is necessary to confirm the representative is performing, has performed or intends to perform one or more of her functions in respect of an individual, and*

b) the public interest in the disclosure outweighs the privacy interests of any individual whose personal information is disclosed."

As examples, these narrow criteria enable the Representative to disclose to relevant staff of a public body that the Representative is engaged in advocacy or an investigation in relation to an identified child, or to publicly state that an investigation will be undertaken. As per ss.16(5)(b), these same criteria apply to the disclosure of personal information in relation to a public report of an investigation into a critical injury or death.

The issues related to information-gathering and disclosure are discussed below.

With respect to information-gathering, s.10 gives the Representative the right to *"any information"* that is in the *"custody or control"* of a public body (other than an officer of the Legislature) or a director that is necessary to enable the Representative to carry out the functions or duties set out in the *RCY Act*. This includes the reviews and investigation function as well as the individual advocacy and systemic advocacy (monitoring) functions. Despite the clear legal right to information, significant obstacles to information-gathering can arise when program services are principally delivered by way of contracts with non-governmental agencies. This is typically the case with, for example, child welfare services and addiction services, while other service streams such as mental health and youth justice rely at least to some extent on contracted services. When agencies are involved in service delivery the public body (such as MCFD) may have summary case management-related information available but information such as the day-to-day details of program offerings and participation, staff notes about behaviour, and so on are held by the service provider. While the terms of a contract with a service provider may state that information held by the agency with respect to program services and client information belongs to the public body and therefore is in its *"custody or control,"* the practical reality is that even then the public body does not have that information at hand. Accordingly, the Representative cannot gather the information directly from the agency but rather must take the convoluted route of asking the public body to ask the agency for information, which either creates additional work for the public body, delay or even resistance, and this can have a considerable chilling effect on information-gathering in the first place.

[102] It is also important to note that, as an officer of the Legislature, ss.3(3)(f) of the *Freedom of Information and Protection of Privacy Act (FOIPPA)* exempts from the provisions of FOIPPA records created by or for, or that are in the Representative's custody or control, that relate to her functions under the *RCY Act*. (Administrative records such as financial or staffing records are, however, subject to that Act.) Put simply, this means that information and records relating to the Representative's advocacy, monitoring (systemic advocacy) or investigations functions cannot be disclosed or obtained by others under *FOIPPA*.

Similar and even more concerning issues arise in relation to program review research under the Representative's monitoring mandate. For example, while a public body may have high-level summary information available about the type of services that are contracted and the amount spent, even basic information, such as the number of and demographic characteristics of clients served, to what degree and for how long they were served, is far too often not gathered by the public body but is held by agencies, again frustrating the information-gathering process.

It would be far simpler and more efficient for both the Representative and for public bodies for the Representative to have the authority under s.10 to obtain information directly from a "service provider" (i.e., a person retained under a contract to provide designated or reviewable services for a public body).[103]

Obstacles to information-gathering have also arisen with respect to investigations that require information from police services. This is not an issue when a municipal police force is involved as those forces are governed by provincial legislation, but obstacles have arisen when the RCMP are involved because that force is governed by federal legislation. It would be helpful if there could be clarification in the *RCY Act* about access to RCMP information. The Representative acknowledges that this may raise constitutional questions but, in this regard, notes that s.3(a) the *RCY Regulation* references federal legislation (i.e., the *Youth Criminal Justice Act*).

Turning to information disclosure, when a report of a critical injury or death is received, the Representative conducts a review under s.11(3) for the purposes of determining whether to conduct an investigation or to carry out an aggregate review of recurring circumstances or trends (e.g., sexual assaults, non-suicidal self-injury). Administratively, the first step is to determine whether the reported circumstances meet the threshold test under the Act *vis-a-vis* reviewable services and the definition of critical injury under s.1. If so, an initial case review is conducted and summarized, which may lead to one of several different decisions:

- internal referral for consideration in a future aggregate review
- internal referral for a much more in-depth "comprehensive review" in cases that may be a candidate for a full investigation and public report, or which otherwise appear to identify significant practice or public policy concerns
- external referral to the originating ministry or public body in cases where there are identified practice concerns that require follow up with that individual case by that body
- internal referral to an RCY Advocate for follow up in cases where there are identified significant concerns
- no further action, although every case is included in summary statistical analyses of trends and patterns.

The information the Representative receives and reviews is obviously deeply personal and saddening, sometimes tragically so, especially for the parents, other family members and caregivers to the seriously injured or deceased child.

[103] As an example, P.E.I.'s *Child and Youth Advocate Act* requires "community organizations" to disclose information to the Advocate, with community organization being defined in s.1 as *"a community organization or other body that delivers a reviewable service for children, youth and their families pursuant to a contract or agreement with Government"*.

The Representative carries out a fairly small number of full investigations – typically around two per year – because they are very intensive and require a lengthy period and significant staff resources to complete. In those investigations, others involved in the case, including parents, are obviously aware of the action taken by the Representative and of the outcome (i.e., through the investigation process and the public report, which includes recommendations to improve public policies or practices).

Due to the strict limits on confidentiality and disclosure set out in the Act, all other cases of reviews of critical injuries or deaths – almost all the RCY's cases, in other words – are carried out in complete confidence, with the Representative being unable to disclose to parents (or others) the findings or actions taken. These constraints arise from ss.11(4) which states:

> *"If, after completion of a review under subsection (3), the representative decides not to conduct an investigation under section 12, the representative may disclose the results of the review to the* ***public body, or the director****, responsible for the provision of the service that is the subject of the review."* (emphasis added).

This means that the results of a review may be disclosed only to the public body or director responsible, with all others, including parents and close family members, being left in the dark about the results of the review.

We readily acknowledge that this limitation is in keeping with the general purpose of the Act to promote improvements in public policy or practice. However, the inability to disclose any information at all, even generally or in summary, to parents, especially in cases where the child has died, is simply wrong. Imagine a circumstance where your teenage daughter who was caught in the thrall of addiction and well beyond your (or any parent's) capacity to care for, is placed into care and a group home, and then suddenly dies of an overdose. The coroner has decided that there will not be an inquest, as is most often the case. As a parent, you know your daughter's death will, if not fully investigated, at least be reviewed by the Representative. Yet, when you ask the Representative for information, the Representative is legally unable to disclose any information and must tell you that.

The Representative has encountered several cases such as this. These circumstances also can be aggravated in cases where, for example, the child is, or was, in continuing care and the birth or adoptive parent is no longer the legal guardian of the deceased child, leaving the parent legally ineligible to request information directly from the ministry or public body. This occurs even in cases where the birth or adoptive parent, although no longer the legal guardian, has maintained an ongoing and loving relationship with the child. Even then, they are by law completely denied any access to information from any public body.

The Representative appreciates that this is a complex and very challenging issue where there are competing considerations that need to be balanced. The Representative has and needs extraordinary powers to gather information to effectively carry out the Office's statutory functions. There are severe limitations on disclosure precisely because of those extraordinary powers, so the Representative does not become an inadvertent conduit for the disclosure, or discovery, of information that cannot be legally obtained through other means. As well, the Representative's mandate ultimately is to promote improvements to public policy and practice, not to find fault or wrong-doing.

The Representative would not support having a power to disclose to parents the detailed case records gathered for the purpose of a review, or the detailed reports of reviews that are disclosed to public bodies. The Representative does, however, believe that it could be beneficial to have discretion to disclose summary written or oral information to parents about the key findings and decisions made in a review.

It is acknowledged that it may be frustrating for parents to be given only summary information, but that is better than no information at all.

It is also recognized that the disclosure of even summary information may open the door to further action by the parent, which perhaps could be mitigated by a prohibition against subsequent disclosure or use of that information in any fashion, including in legal proceedings. The existing s.23(5), which prevents the Representative and RCY staff from giving evidence in court proceedings, could possibly be adapted for this purpose.[104]

Another important issue relates to what information may be disclosed to Indigenous Child and Family Service agencies (ICFSAs, formerly known as Delegated Aboriginal Agencies), which are delegated legal authority under the *CFCS Act* by the Provincial Director. Some 67.5 per cent of children in care are Indigenous, about 53 per cent of whom are served by ICFSAs.[105] As noted above, s.11(4) only permits the Representative to disclose the results of reviews to the "public body" or "director". However, ICFSAs are not public bodies and are not directors, but rather are delegates of the director. This means that even when an ICFSA is directly responsible for the conduct of a case that has been comprehensively reviewed, the Representative cannot directly disclose the results of that review to the ICFSA. The results must go to the director. This unnecessary constraint can be easily remedied by modifying s.11(4) so that it reads: *"director or delegate of the director"*.

As already noted, the vast majority of reviews by RCY are conducted in confidence, with the only public reporting being limited to a very small number of public investigation reports, anonymized aggregate reports, and summary statistics (produced, for example, for the Office's annual report). The obvious concern is that the findings and lessons learned from these substantial numbers of confidential reviews are not shared, which is inconsistent with the goals of transparency and accountability. It also means the public bodies and others cannot benefit from the lessons learned by others, which does not promote improvements in services for children, youth or young adults. It is the Representative's view that, in the interest of transparency and accountability, the Representative should be given clear authority to produce publicly available anonymized information about reviews including, where appropriate, the disposition of those reviews and case summaries. In the latter regard, it is noted that MCFD commendably posts anonymized case summaries of director case reviews, albeit brief, on its public website, and the Representative's ability to also do so would be in the public interest.

In relation to information-gathering and disclosure, the Representative recommends that the Act be amended to:

- **Give the Representative the discretion to disclose limited summary information of the results of the Representative's reviews of critical injuries and deaths to birth or adoptive parents of a child, regardless of whether that parent has or had guardianship, subject to enumerated criteria and to constraints on the subsequent disclosure or use of that information.**
- **Enable the Representative to directly disclose the results of reviews to delegated Indigenous Child and Family Services Agencies.**
- **Authorize the Representative to publicly report anonymized information about reviews of critical injuries and deaths, including the disposition of reviews and case summaries.**

[104] Other statutes have similar prohibitions. For example, s.51 of the *Evidence Act* prohibits the use in civil proceedings and other legal proceedings of information or documents related to certain hospital quality assurance processes.
[105] Data is as of Dec. 31, 2021. Source is MCFD Corporate Data Warehouse.

Monitoring Quality Assurance Processes

Ministries and public bodies responsible for the delivery of designated programs for children and families are expected to, and do, have in place a variety of processes and mechanisms to monitor, assess and identify strengths and weaknesses in service delivery, and thereby promote quality improvements. Such quality assurance processes and mechanisms come in a wide variety of forms: formal complaint processes, program evaluations, individual case reviews, policy and standards audits, investigations, establishing and monitoring performance measures, routine and targeted data collection and analysis, and so on.

Section 6(1)(b) of the *RCY Act* describes the Representative's monitoring (systemic advocacy) function *"… to monitor, review, audit and conduct research on the provision of a designated service…"*. A "designated service" is described in s.1 as an enumerated list of *"services or programs"*.

Questions have been raised about whether the *RCY Act* gives the Representative the authority to monitor quality assurance processes, in particular in relation to monitoring the director's (quality assurance) reviews under s.93.2 of the *CFCS Act*. In its 2017 report, the Committee stated that the Ministry of Attorney General:

> *"… also suggested that the Representative does not have authority to review a director's review conducted under the Child, Family and Community Service Act because a director's review is not a service or program for children and their families as set out in the Representative for Children and Youth Act's definition of "designated services."* (p. 13)

The then-Representative disagreed with this interpretation, as does the current Representative. It is noted that s.93.2 of the *CFCS Act* states *"… a director may conduct a review on any matter relating to the provision of a service,"* which s.6(1)(b) of the *RCY Act* mirrors in stating that the Representative may *"… monitor, review, audit and conduct research on the provision of a designated service"*. It is common sense, and consistent with the Legislature's policy intent, to view quality assurance processes as just as integral to the "provision" of a service as other fundamental components of service delivery, such as budget capacity, human resource practices, program policies and procedures, infrastructure supports, information systems, training programs, and so on.

The Committee responded to the Ministry of Attorney General's argument by recommending an amendment to confirm the Representative's perspective:

> *"Section 6(1)(b) of the Act be amended to authorize the Representative to monitor, review, audit and conduct research in respect of … reviews by the director under the Child, Family and Community Service Act."*

Government has not acted on this recommendation in the nearly five years since it was made and it should be dealt with now.

Moreover, although the previous Committee's recommendation related to director's reviews under s.93.2 of the *CFCS Act*, there is no sound public policy reason why the Representative's authority in this regard should be limited to just *CFCS Act* child welfare services, given the scope of the Representative's jurisdiction. There is a very strong case that it should be broadened so that it encompasses quality assurance processes for *all* designated services.

To be clear, the Representative has no interest in, for example, reviewing individual director case reviews or addressing individual complaints. Rather, the Representative should have unambiguous authority to systemically examine the strengths and weaknesses of quality assurance processes that are in put in place by public bodies, and to suggest improvements to those processes. The explicit purpose of the Representative's monitoring mandate is to *"… make recommendations to improve the effectiveness and responsiveness"* of designated services. Quality assurance processes are not immune to weaknesses or insufficient budgetary supports, yet, paradoxically given the statutory mandate, the Representative is, in the view of some, not allowed to contribute to enhancing the effectiveness and responsiveness of services by reviewing and commenting on public bodies' quality assurance processes intended to improve services.

Two of the submissions commented on the proposal to give the Representative clear authority to monitor the quality assurance processes of public bodies, with Inclusion BC supporting the proposal and CLBC expressing concerns. CLBC's concerns about monitoring quality assurance processes are the same as its above concerns about systemic advocacy oversight of CLBC services to young adults. Again, CLBC says it has a robust system of quality assurance processes and the Representative's role in this regard would be duplicative of its internal Advocate for Service Quality. The Representative's response to this is the same as set out on page 45 in the discussion of a proposed systemic advocacy function for young adults.

In relation to the authority to monitor, review, audit and conduct research, the Representative recommends:

- **Section 6(1)(b) *RCY Act* be amended to give clear authority to monitor, review, audit and conduct research in respect of quality assurance processes for all designated services.**

Children and Youth Communicating with the Representative

Section 26 of the *RCY Act* provides that if a child or youth in a foster home, group home, facility or other place in which a designated service is provided asks to communicate with the Representative, the person in charge must immediately forward the request to the Representative and, if the child or youth writes a letter to the Representative, the person in charge must forward the letter unopened to the Representative. The purpose of these provisions is to ensure that a child or youth is free to communicate with the Representative to, for example, seek advocacy assistance, without interference and in privacy. These provisions also recognize that children and youth who are placed in residential arrangements away from family and natural advocates can be in particularly vulnerable circumstances.

Submissions to the 2017 legislation review from First Call and the BCGEU included recommendations that the Act be amended to require care providers and those responsible for facilities to inform children and youth, in language suitable to their understanding, of the role of the Representative, the means to contact the Representative, and to be able to do so privately, and without delay.

In response the Committee said:

> *"The Committee considered section 70 of the Child, Family and Community Service Act, which provides that children in care have the right to privacy during discussions with individuals including a lawyer, Member of the Legislative Assembly or Member of Parliament, the Ombudsperson, and the Representative or an employee of the Representative's office, and states that they have a right to be informed about and assisted in contacting the Representative or the Ombudsperson. Members were concerned by an example from one Member's community where a child in care reported having information about the Office of the Representative for Children and Youth removed from the child's possession.*
>
> *"The Committee agreed that it is essential for children and youth to be aware of their rights, including the right to contact the Representative.*
>
> *"In discussing how children and youth might have their right to assistance from the Representative promoted and protected, Committee Members determined that the Act should not duplicate section 70 of the Child, Family and Community Service Act. However, the Committee urges that children's rights under section 70 must be meaningfully upheld. Committee Members emphasize that social workers and care providers are responsible for meeting the needs of children and youth in care in a way that respects their rights, which includes making children and youth aware of their right to independent advocacy from the Representative."* (p. 16)

In short, the Committee did not support the recommended amendment, principally on the grounds that it is apparently unnecessary, as it would duplicate the provisions of the *CFCS Act*.

Section 70(1) of the *CFCS Act* sets out the rights of children in care, including the right *"to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the Representative for Children and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament"* and *"to be informed about and to be assisted in contacting the representative under the Representative for Children and Youth Act, or the Ombudsperson"*.

Section 26 of the *RCY Act* and s.70 of the *CFCS Act*, in the Representative's view, remain inadequate to the task of ensuring that children and youth in all residential placement circumstances associated with designated services are made aware of and afforded immediate and private access to the Representative.

First, and most importantly, the s.70 rights only apply to children and youth in care, yet the Representative's advocacy jurisdiction extends to a much broader range of designated services that provide other types of residential and facility services. These include: mental health detention in hospital under the *Mental Health Act*; addictions residential withdrawal management, treatment and supportive recovery programs; youth justice custody centres and full-time attendance programs; and youth shelters. The s.70 rights do not apply in these many commonly encountered situations.

Moreover, even in residential circumstances where s.70 rights apply, those rights do not require those responsible to explain the role of the Representative to the child or youth in language suitable to their understanding, and to immediacy in facilitating contact with the Representative. As for s.26 of the *RCY Act*, its nearly anachronistic reference to unopened letters not only ignores the more common means by which children and youth communicate (e.g., social media, chat and text), it does not adequately capture the principle of privacy in all forms of communication.

Further, young adults with special needs who are in CLBC residential placements are similarly situated as children and youth in residential care, and similarly vulnerable. Given this, it is the Representative's view that these requirements should be extended to young adults in receipt of CLBC services who are in residential placements such a home share or group home.

In its written submission to the current Committee review, the BC Association of Aboriginal Friendship Centres (the Association) recommended two amendments to the *RCY Act* that were prompted by the concerning findings of a special 2021 report about youth custody centres by the BC Ombudsperson.[106] That report documented the repeated use of prolonged periods of "separate confinement" (or seclusion) in youth custody centres in response to youth at risk of self-injury or suicide, with seclusion being experienced almost exclusively by female youth and mostly by Indigenous and racialized female youth, none of whom made formal complaints.[107] Citing one of the Representative's reports on self-injury amongst youth which indicated that self-harm can be construed as a form of communication, the Association recommended that s.26 be amended to include self-harm as a form of communication that requires the Representative to be notified.[108] The Association also recommended that relevant legislation, including the *RCY Act*, be amended to give the Representative a right of access to youth custody centres.

The Representative shares the Association's, and Ombudsperson's, deep concerns about the repeated and prolonged use of separate confinement in youth custody centres, which will hopefully be remedied by effective responses to the recommendations of the Ombudsperson's report. It is noted, however, that s.4 of *Youth Custody Regulation*[109] accords "privileged persons", which includes the Representative (s.1), a right of access to youth custody centres, while s.6 accords the right to privacy of communications by mail, telephone or other electronic means with the Representative. Additionally, it is noted that serious or repeated self-injury, as well as suicide ideation and attempts, fall within the ambit of "critical injury"

[106] B.C. Office of the Ombudsperson, *Alone: The Prolonged and Repeated Isolation of Youth in Custody*. Victoria, B.C., 2021.
[107] *Ibid.*
[108] B.C Representative for Children and Youth, *A Way to Cope: Exploring non-suicidal self-injury in B.C. youth.* Victoria, B.C. 2020.
[109] B.C. Reg.11/2017, April 1, 2017.

and are expected to be reported to the Representative. Moreover, in keeping with a recommendation by the Ombudsperson, MCFD has agreed in principle to report the use of separate confinement as a critical injury to the Representative. The implementation of this recommendation has been hampered by, in the Representative's view, unfounded impediments arising from the federal *Youth Criminal Justice Act*, although those impediments are expected to be resolved in due course.

In relation to providing information to children and youth about the Representative and facilitating contact by them, the Representative recommends:

> **Section 26 of the Act be amended to provide that a child or youth, or a young adult in receipt of CLBC services, in a foster home, home share, staffed residential program, hospital, youth custody centre, facility, or other place where a designated service is provided:**
>
> - **must be informed about the Representative's role in language suitable to the child or youth's level of understanding,**
> - **if requested, the child or youth has a right to be assisted in immediately contacting the Representative,**
> - **the child or youth has a right to privacy in all communications with the Representative.**

Appointments and Qualifications

In keeping with the recommendation of the *Hughes Review,* s.2 of the Act provides that the Representative is to be appointed for a five-year term, which can be renewed for a second five-year term, for a maximum total of 10 years. In the Office's submission to the 2017 statutory review, the then-Representative observed that there were differences between the terms of appointment and pension benefits of the Representative *vis-a-vis* other officers of the Legislature, and recommended:

> *"… the Committee give consideration to amending the Representative's current renewable five-year term of office so that it becomes a single non-renewable term – such as eight years – and that the pension benefits of the Representative be harmonized with those of some other Officers of the Legislature. Should these changes be enacted, they should not be brought into force until the expiration of the term of office of the current Representative."*[110]

While that recommendation was limited to only the Representative's governing statute, the Committee took the matter further by addressing the terms of employment of all statutory officers, recommending:

> *"A review of statutory officers' terms of employment be undertaken by the Legislative Assembly. The review should include appointment and remuneration, with a view to determining whether more standardized terms of employment would enhance independence, transparency and accountability. Such a review could include consideration of principles such as whether or not statutory officers' terms should be renewable."*[111]

[110] *Supra*, note 22.
[111] *Ibid.*

This recommendation has not been actioned in the nearly five years since the Committee issued its report. That is perhaps not surprising because, while the recommendation may have considerable merit, including a review of the terms of all statutory officers adds considerable complexity to seeking resolution of the issue. In the Representative's view, this remains an issue and having now had more than four years' experience in the role, the Representative fully agrees with the former Representative's rationale:

> *"In the Representative's view, a single, somewhat lengthier term – such as eight years – is the preferable approach for the Representative's term of office; a single term better ensures that the office holder, knowing his or her term of office cannot be renewed, will fully maintain the independence and vigilance required of the office holder."* [112]

The Representative is of the view that there is a greater likelihood of this matter being successfully addressed if the recommendation is limited to the Representative's governing statute.

Another matter that was discussed in the Committee's 2017 report related to the qualifications of a Deputy Representative. Section 7 of the *RCY Act* authorizes the Representative to appoint one or more Deputy Representatives. The Ministry of Attorney General's 2017 submission identified an issue with the qualifications of a Deputy Representative, which are listed in the regulation under the *RCY Act*. Section 2(b) of the Representative for Children and Youth Regulation requires a Deputy Representative to have experience in:

> "*(i) working with children,*
>
> *(ii) respecting the provision of one or more designated services, as defined in the Act, or experience, in British Columbia or another jurisdiction, that is substantially similar to this type of experience,*
>
> *(iii) investigating the critical injuries of children or the deaths of children,* ***or***
>
> *(iv) in financial or business administration."* (emphasis added)

A plain reading suggests it may be possible to have a Deputy Representative with experience only in financial or business administration (i.e., experience in only one of the four types of experience listed, which obviously would not be desirable). The then-Representative agreed with the proposal to clarify these qualifications, as does the current Representative. The Committee stated that it supported clarifying these qualifications but did not make an express recommendation to do so because regulations were beyond the scope of the Committee's mandate. This matter has not yet been addressed by Cabinet.

In relation to appointment and qualifications, the Representative recommends:

- **Section 2 of the Act be amended to provide that the appointment of the Representative be for a single term of seven or eight years.**
- **The qualifications of a Deputy Representative set out in the *Representative for Children and Youth Regulation* be clarified.**

[112] *Supra*, note 72.

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