EASIER TO BUILD

A Review and Call for Urgency in Child Welfare Services in New Brunswick

Défenseur des enfants et de la jeunesse du Nouveau-Brunswick
New Brunswick Child & Youth Advocate

Child and Youth Advocate (Office)

The Child and Youth Advocate has a mandate to:

- ensure that the rights and interests of children and youth are protected;
- ensure that the views of children and youth are heard and considered in appropriate forums where those views might not otherwise be advanced;
- ensure that children and youth have access to services and that complaints that children and youth might have about those services receive appropriate attention;
- provide information and advice to the government, government agencies and communities about the availability, effectiveness, responsiveness, and relevance of services to children and youth; and
- act as an advocate for the rights and interests of children and youth generally.

P.O. Box 6000	Toll Free:	1.888.465.1100
Fredericton, NB E3B 5H1	Local:	1.506.453.2789
www.cyanb.ca	Fax:	1.506.453.5599

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EXECUTIVE SUMMARY

The report, Easier to Build, provides a review of child welfare legislation and makes five main recommendations for improvement under a proposed new legislative framework. The investigation conducted in preparation for this report included a review of closed cases, existing policy, child protection practice standards, and responses to detailed data requests. Additionally, more than 200 children and youth who have been in care were interviewed to obtain their feedback on the child welfare system. Professionals who work within the system or in connected fields were also interviewed about the need for law reform in this area.

The first recommendation made by the Child and Youth Advocate is for a renewed rights-based approach to law reform and the enactment of a new *Children's Act* to replace the child welfare provisions of the *Family Services Act.* The *Family Services Act* currently upholds some basic rights and fundamental freedoms of children but does not meet all of the requirements of the *UN Convention on the Rights of the Child* (UNCRC). It is proposed that the UNCRC be incorporated by reference in the new *Children's Act*. Other countries have adopted methods of domestic enforcement of the UNCRC and these best practices could be reviewed as a model for New Brunswick.

The second recommendation addresses law reform, beginning with the consolidation of the relevant provisions of the *Family Services Act* in a new *Children's Act*. Child related provisions in other legislation should also be considered for inclusion in the *Children's Act*. Additionally, it is recommended that the *Children's Act* include amendments to the *Child, Youth and Senior Advocate Act* allowing the Child and Youth Advocate to have the authority to: seek enforcement of their recommendations in the Court of Queen's Bench where a child's rights have been violated and response to recommendations has been delayed or denied, offer Advisory Opinions and appear as an intervener where children's rights are at issue, and request the appointment of counsel for children.

The third recommendation is made in response to the consultation paper produced by the Department of Social Development. The Child and Youth Advocate promotes collaboration in the policy development process from MLAs, children and young people, and other stakeholders. However, the Child and Youth Advocate opposes the Department's suggestion that the criteria for child endangerment be reduced as these changes would fail to meet the country's obligations under the UNCRC.

The fourth recommendation is for the *Children's Act* to state that Integrated Service Delivery (ISD) is the mandated service delivery mechanism for all children and youth in New Brunswick. It calls for cabinet-level responsibility for coordinating services for children between departments. Although ISD is in place, there are operational problems which need to be resolved. The *Children's Act* should ensure that an ISD common plan is developed for every child with a child protection file, who has contact with the criminal justice system, or has complex health and learning needs as these children are most in need of integrated services.

The fifth recommendation is for the adoption of child-appropriate court procedures and advancement of child-friendly justice which promotes children's rights. This recommendation addresses the new cumulative 24-month period for permanent placement. It is suggested that placement and removal standards be clarified, requiring removal of children when necessary in the best interest of the child. This section also proposes that independent legal representation be available for children in child protection proceedings and that a specialized team of solicitors be situated within the Department of Social Development.

The implementation of the above recommendations will require training and education for involved professionals, as well as law reform, in order to successfully implement a child rights-based approach. Following the enactment of a *Children's Act* it is suggested that a mandatory review be completed every 5 years.

A MESSAGE FROM THE CHILD & YOUTH ADVOCATE

"It is easier to build strong children than to fix broken men".

– Frederick Douglass (attributed)

The attribution of that quote is sometimes debated, but its wisdom is clear. When a child is struggling, there is no moral, ethical or economic case to waste time. Children do not just deserve our guidance, they deserve a sense of urgency.

It is easy in government to wait. We can always tell ourselves that another study, another budget cycle, another discussion is necessary. Children do not age at the speed of study. The five-year old who struggles to read becomes a nine-year old who hates school very quickly. The infant born into a house where violence is the norm quickly becomes a child who accepts violence as normal. The six-year-old bouncing from foster home to foster home quickly becomes a twelve-year old who has learned not to expect care or help from adults. When a child is struggling, the time for action is now.

This part of our review of child welfare services in New Brunswick looks at this most urgent of charges. We have tried to put Douglass' words into actions that will build strong children rather than dawdle and delay until they become broken adults. We are asking all decisionmakers to live the urgency that building strong children demands.

In this report we have made suggestions for a system that matches the promise of children's rights with concrete action. We describe a system where planning and collaboration happen automatically, not as part of some specialized process. We call for law reform that captures the urgency of helping children in our laws and processes.

Most of all, we ask for the creativity and imagination of everyone in a position to help a child when they struggle. There will always be other demands on our time, our budgets, and our attention. Yet there is no task that should call us more urgently. If we shrink from the task of building strong children, we will find the task of fixing broken adults to be impossible.

Kelly A. Lamrock, Q.C.

Child & Youth Advocate for New Brunswick

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INTRODUCTION

"Human beings are fashioned, not born"

Erasmus, 1529

What we experience in childhood will mark our entire life experience in indelible ways. Erasmus' aphorism is proven ever more true each day, with the advances of neuroscience[1]. In New Brunswick, as in many other parts of the world, conversations in child welfare circles are now taken up with trauma-informed care. Dr. Bruce Perry, author of *The Boy who was Raised as a Dog*, and other psychiatrists and neuroscientists working with traumatized children, have been able to show through brain imagery the lasting impacts of child trauma, but also the saving influence that relational supports can offer children[2].

At least two rules flow from this observation: a) we have to stop child abuse; and b) when child abuse occurs, we have to offer meaningful relational supports to help children recover from the abuse. This report is all about making the necessary law reforms to better put those two rules into effect in our Province. We believe that a new legislative commitment to child rights enforcement is the best way forward to ensure that our history will no longer repeat itself, and that in New Brunswick we can stop putting family or parents' interests ahead of children.

Three years ago, in February 2019, we released *Behind Closed Doors*[3], a report calling for urgent reforms to better address cases of chronic neglect in early childhood. This was the story of a New Brunswick household with five children raised in conditions of chronic neglect that prompted an urgent call for law reform. Within a year, the Minister of Social Development had initiated a broad consultation and called for a new dedicated child welfare law which is now being prepared for introduction and study in the Legislative Assembly. At the press conference where the Advocate's report was released, the Minister was asked why it is that New Brunswick was one of the only provinces in Canada without a stand-alone child protection act. The fact is that New Brunswick was among the first jurisdictions in the world to legislate in the area of child protection and we have a long legislative history in this area. In 1999, the Department of Health and Community Services, on the initiative of Richard Quigg, then Director of Child Protection for the Province, commissioned Carolyn Howlett to carry out a study resulting in a

[1] Wordsworth expressed it more enigmatically as "the child is the father of the man", but both authors fundamentally capture the age old observation that our experiences in childhood will fashion us into the adults we become and that our humanity is forged through education: Erasmus, Desiderius, *De Pueris Instituendis*, The Collected Works of Erasmus, Toronto, University of Toronto Press, 1974, 26:304.

[2] Perry, B., The Boy who Was Raised as a Dog Basic Books, 3rd ed., 2017 444 pp.; Ungar, M. *Resilience, Trauma, Context & Culture* Trauma, Violence and Abuse 14(3) 2013, pp. 255-266. https://michaelungar.com/files/15contributions/5._Resilience%2C_Trauma%2C_Context%2C_and_Culture.pdf

[3] Cartwright, W. *Behind Closed Doors: A Story of Neglect*, 2019, Fredericton, Child, Youth and Seniors' Advocate Office, 40 pp.

comprehensive historical review entitled *The Story of Child Welfare in New Brunswick*[4]. Those engaged in the task of law reform today should begin by reading that history.

We can learn from this study that the current *Family Services Act* drew its inspiration from significant reports Commissioned by the Hatfield government in the mid-1970s, including one by Lorne MacGuigan, former MLA for Saint-John Centre. MacGuigan's report called for a rights-based approach to child protection, on the premise that all child welfare decisions had to consider that the effect of the decision on the child was of prime importance. The report set out a list of universal rights that should be afforded every child. The report concluded that the rights of the child should be given the first priority. While the family unit must be "revered, nurtured and protected", "the best interests of the child must be the primary concern, and the preservation of the family unit must be secondary."[5] This was in 1975. Gordon Fairweather, former Attorney-General for New Brunswick under Premier Hugh John Flemming, would soon be named Chief Commissioner of Canada's newly established Human Rights Commission. In 1979, the United Nations declared the *International Year of the Child* and began work on a new Convention for children's rights. But the universal human rights treaty enshrining the very principles that MacGuigan had called for was still ten years away. Later reports from the Department of Social Services and its Interdepartmental Committee on Children's Services proposed thoroughgoing law reform unifying all services to children in a single legislative framework. The *Family Services Act* brought all the disparate child welfare services laws within one legislative framework and recognized that the family was the fundamental unit of society and that the child's place was within a family - not a group home, not an orphanage or special care home, but a family[6].

We also see in this study of child welfare that much of the history of child protection in New Brunswick revolves around the tension between keeping children safe and keeping families intact. Legislators have intervened time and again to defend children and propose new ways of keeping them safe, but Courts have typically been loath to remove children from their parents and often find ways of sending them back, even over the protestations of child protection professionals. In this report, the Child and Youth Advocate urges the Province to take decisive and conclusive legislative measures to enforce the child's right to be free from all forms of violence, to have a nurturing and supporting family environment and to have those globally guaranteed rights directly enforceable before our courts. We also formulate recommendations for the Courts and the family practice bar to consider in finding ways to make judicial processes

[4] Howlett, C., *The Story of Child Welfare in New Brunswick*, NB Department of Health and Community Services, March 2002, 276 pp
[5] Howlett, C., supra at pp. 54-55.
[6] ibid. pp 65-71

in our Province more accessible, more attentive, more expeditious and more responsive to children.

Context and Methodology

The Child and Youth Advocate gave notice of a systemic review of Child Welfare Services in New Brunswick as a follow-up to *More Care, Less Court*. Many prior reports of the Advocate's office had dealt with important elements of child protection services. *Broken Promises*, *Connecting the Dots*, *The Protection of Vulnerable Newborns,* and *Hand-in-Hand* all had a significant child-protection focus, but the focus was usually in relation to a certain aspect of child protection and child-in-care services, whether chronic neglect in early childhood, infanticide, Indigenous child welfare, or the intersection of child welfare with other child and youth services. None of these reports undertook a full review of the legal framework or of the child welfare system as a whole. Having completed a similar comprehensive review of the child justice system with our *More Care, Less Court* report, we knew that child welfare needed the same kind of thorough going review.

The three main drivers of this reform included: 1) calls from the Youth in Care network for more follow-through on their advice and lived experience particularly in relation to psychotropic drug use and youth experience in group home care; 2) meetings with domestic legal aid lawyers and Family Crown lawyers who both spoke to the bottlenecks, delays and miscarriages of justice in family court processes, specifically in relation to child protection proceedings; and 3) the work of our own office in co-leading the five year Strategy for the Prevention of Harm to Children and Youth in New Brunswick, as well as alerts from our own individual case advocates in relation to complaints arriving to our office where child protection social workers themselves admitted to the failings of the system in keeping children safe from harm.

The investigation proceeded under the direction of Gavin Kotze, Director of Systemic Advocacy within our Child and Youth Advocate Unit and Christian Whalen, Deputy Advocate, on the basis of important documentary disclosure and review of closed case files, of existing policy instruments, of child protection practice standards, of responses to-detailed data requests, and meetings with all stakeholders. Our staff began interviewing children and youth who are in care or who had aged out of care, and these interviews continued on to include more than 200 children and youth. We met with them in group home settings, in foster care, in hospital settings, in specialized care settings and in the youth detention and secure custody centre, in order to collect their feedback in relation to child welfare services. We also met, over the course of two years, with professionals at head office and in various regions responsible for Child Protection Services, Child in Care Services, and other child welfare programs including Youth Engagement Services and Adoption Services. We met with officials in the Attorney General's Family Crown office, Family Law Services of legal aid, education and early childhood,

public health, mental health, primary care, policing and youth criminal justice, and with Integrated Service Delivery Child and Youth team members and management, to collect their feedback in relation to the need for law reform in this sector. In the spring of 2019, the Advocate also met with the former Chief Justice of Queen's Bench and senior judges of the Family Division to gather their advice. Additionally, research associates on our staff carried out jurisdictional scans of Canadian and global best practices in the field of child welfare and contributed to our literature review in preparation for this report.

This report is one of two reports which follow up on *Behind Closed Doors* and offer more comprehensive recommendations to inform the development of a new approach to child protection and child welfare, under a new legislative mandate. This report, *Easier to Build,* focuses upon the need for a new legislative framework for child welfare as well as reform of Family Court processes involving children. This report is about setting down the foundations for child rights implementation in New Brunswick and developing child friendly justice systems. The companion report, *Through Their Eyes*, takes a more detailed approach to the law, regulations and practice standards and focuses upon the experience of children's lives in care - whether in kinship, foster care, group home care or specialized treatment centres, and also considers permanency planning, adoption services and post-guardianship care.

Easier to Build is divided into five main parts. A first part will consider the case for domestic incorporation of the *UN Convention on the Rights of the Child* (hereinafter, "the Convention") into New Brunswick law through the process of child welfare reform. A second part will consider the overall scheme of the Act and offer recommendations on the enforcement mechanisms for child rights and how to keep all services to children unified in a new legislative scheme and connected with services to families. A third part of the report will take a deeper dive into some of the detailed provisions of a new legislative framework, as proposed in government's consultation paper and its ongoing jurisdictional scan and legislative review. The report will touch on some of the Advocate's main submissions in response to the consultation paper, but additional submissions in response to the consultation will be found in Appendix 1 to this report. A fourth part will explore ways in which Integrated Service Delivery, and one child-one file public service interventions for children, can be better supported through legislation. Finally, the last part of the report will look at Family Court processes and consider how these can be improved through legislation and rules of court to ensure better access to justice for New Brunswick children in ways that support their best interests and provide child friendly justice.

Each of these five parts of the report will be introduced by one or more vignettes of children's stories identified through our investigation which underpin the need for reform. The children's names have been changed and some of the facts borrowed from other cases to help anonymize

the information, but all of these vignettes are representative of trauma experienced by children both within formal systems of care and leading to their placement into care. Throughout the report we have also sought to give voice to the youth that we met and interviewed. These vignettes into children's lives and their accounts of their lived experience are often challenging and disturbing. We share them in this report to underscore the urgent need for reform - the need to do better by finally taking children's rights seriously and putting in place strong measures to deter and prevent all forms of harm to children.

A draft of this report was provided to the Department of Social Development in February 2020. The report would have been released much sooner had the COVID-19 pandemic not been declared. The pandemic has occasioned significant new and unprecedented challenges in child protection and child welfare services. Departmental Officials, as well as Court Officials are to be commended for their ability to maintain essential services in these trying times occasioned by the global public health crisis. We are also encouraged that notwithstanding the priority focus on COVID response and the vaccination program now underway, government is moving forward with its process of law reform in this sector. The added pressures upon services and court processes over the past year has only further underscored the need for reform. As an Advocate's Office we partnered with the Université de Moncton and other Advocate's Offices in Canada and abroad to convene in late September a global conference on the protection of children's rights in times of pandemic. For the many reasons outlined in our reports but also as a measure of pandemic response, this report is being released now in an effort to persuade Government to take an important step forward in implementing and enforcing child rights in our province, and to mobilize public support in favour of this reform.

PART I – A Child Rights Based Approach to Law Reform

In these times of global pandemic, it is easy to imagine a mother's anxiety at protecting her child from a devastating illness. That's why in Jeffrey's village, in southern New Brunswick, the entire community came together to support his parents when he was taken ill at eight years old with a life-threatening disease. Jeffrey was a bright active spright who loved to play hockey. One night after practice Jeffrey started to come down with a cold and have the chills. His parents bundled him up in bed and got him to rest. But in the night, he complained of the cold again. In the morning his mother was concerned enough about her son's complaints, and his loss of feeling in his cold toes that had started to turn blue, that she took him to the nearest hospital, an hour away. In hospital Jeffrey's condition continued to deteriorate and acting on their preliminary diagnosis Jeffrey was airlifted with his mother that same day to the IWK in Halifax; his father followed by car, as quickly as possible. Unfortunately, despite all of the best medical care available, health professionals were not able to stop the rapid spread of the ravaging disease. After months of treatment and two relapses, Jeffrey had lost most of all four of his limbs in emergency surgeries aimed at saving his life. Today he has to adapt to his new life. His life has been radically changed, many opportunities and possibilities have vanished, there are so many new things to learn, and tasks once mastered that have to be learned again.

Many children might experience an overwhelming sense of loss when disease changes their life and outlook so abruptly. We felt that way when we read through Jeffrey's file, but then we met Jeffrey. He hasn't lost his spark. He seems a very happy child, he loves to laugh and enjoys a good joke, he knows what makes him happy and he is still very much his mother's pride and joy.

His parents, like most parents faced with the devastating illness or disability of a child, struggled mightily to keep up with his needs. Eventually, the strain on their relationship was too much and his parents split up. His Dad still helps out where he can but Jeffrey now lives alone with Mom, as his main support. At school he has someone to help him move around the school, help him with him personal care and help him eat, along with helping him through his educational programming. At home it's pretty much all on Mom. One of the school support workers has been a long-time friend of Mom's and is helping out as much as she can, but the School District reassigned her to a new job an hour away and she can't help out as much anymore. Mom experienced this as a huge set-back; not only did she lose the person of trust and confidence that she relied upon at school to know that her son would be okay, but she also lost that person's occasional support, physically and mentally, at home after hours.

The collective agreement between government and the union representing educational assistants lets anyone with more seniority bump another less senior member out of their position when there are job shifts. A special provision of the collective agreement allows

workers who are in delicate relationships to be exempted from the seniority "bumping" rules.[7] *Our investigation has found out however that there are no "delicate relationships" in New Brunswick schools. The employer and the union seem to agree that this is a good thing. We do not. We think that collusion by adults to defeat the human rights of vulnerable children is a bad thing. We urge government to take a broader view of its responsibilities in terms of keeping children safe from harm and ensure that labour-employment practices of the kind that we have come across in the educational sector are carefully re-evaluated to ensure that child services put the rights of children ahead of the comfort of adults.*

In a child rights-based approach to child protection, it wouldn't matter that Jeffrey's need for protection stems from his illness, he would receive all the wraparound supports that he needs. In New Brunswick today however, child protection mainly only gets involved when a child is in danger from some form of neglect or intentional harm within their parental home. We see so many children suffer harm in schools and community, and so many good families simply overwhelmed by their child's very great needs. Yes, parents have the primary responsibility for the upbringing and development of their child, and yes, they should always have their child's best interests as their basic concern. But nowhere is it written that parents need shoulder this burden alone. Poverty, disability, and discrimination can harm children as much as abuse and neglect and may often trigger or compound such abuse or neglect. We need solutions and interventions that look holistically to the needs of every child in the context of their entire family situation.

Article 18 of the Convention on the Rights of the Child makes it clear that governments must "render appropriate assistance to parents… in the performance of their child-rearing responsibilities". There is a reason why Article 18 and Article 19, which guarantees the child's right to be protected from all forms of violence and harm, are placed next to one another in the Convention, and so close as well to Article 23 which guarantees every disabled child the right to "enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community." The nexus between these three rights is very strong. As it is with Articles 26 and 27 which guarantee children basic social welfare and an adequate standard of living. Government needs a legal framework and a coordinated approach to make sure that all of these rights work together so that disabled children in every circumstance enjoy the equal protection and benefit of the law.

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[7] Agreement between Treasury Board and The Canadian Union of Public Employees Local 2745, Expiring February 28th, 2023, Article 13.09 Delicate Relationships.

Jenny was the oldest of two girls. She had a normal childhood and was a bright student but started to misbehave when her parents divorced. She started missing a lot of school in grade eight and began experimenting with many new drugs. She had a reputation as someone who would try anything to get a high and was proud of it. Eventually, her behavior became so unruly that her mother was afraid to keep her at home. She one day took a knife from the kitchen drawer and threatened her mother with it. In grade ten she dropped out of school altogether and was placed into care as her parents could not look after her anymore. After several placements in group homes and foster homes failed to keep her safe, or improve her addictions, she ended up living on the street in a bad part of town. She was taken twice to hospital for drug overdoses and very nearly died. She spent six months at Portage for drug rehabilitation but fell back into her habits almost immediately following her release. Her parents were distraught and did not know what to do. Her father wanted her charged with the assault on her mother, because he would rather see her safe in jail than on the streets. We were asked to intervene on her behalf by the Crown prosecutor, who was ready to proceed with charges, but felt there ought to be a better way of keeping her safe.

At the time of our intervention Jenny was on the street and had been missing from her foster parent placement for three weeks. Eventually the police found her, arrested her and the court sent her to Restigouche for a 30-day evaluation. In hospital, as at Portage before, she was a model patient. There she agreed to try another stint at Portage and if it did not help her overcome her addictions she agreed to a placement in a place of safety made for her in her community that could be converted into a locked facility if her behaviours and addictions escalated and threatened further harm.

New Brunswick's Family Services Act has for many years had a provision, in section 57, to allow for the placement of a child in a place of safety in the community which is a community placement resource different from a group home or a foster home or special care home and which may have different levels of security for youth at risk of harming themselves, including locked quarters as you might find in a level 4 care home. The problem is that the Department has never opened any such homes and currently doesn't have any community resources that would qualify as a section 57 place of safety. We recommended that one be established for Jenny and that at least four more be established around the province. The Department accepted our recommendation and promised to develop them, but now over three years later, there are still none available and government is consulting publicly on whether these sorts of facilities are a good idea.

We acknowledge that there is a legitimate debate over the right model of these resources. However, doing nothing for three years cannot be the response to having a difficult policy choice to make. The law provides for such interventions, but government has not followed its own law

nor made any similar resources available in appropriate cases. Children do not age at the speed of government study. Three years is enough time for a teenager in crisis to become an adult failed by government. The result is that when children are at very great risk of harm in community, but do not pose a mental health risk to themselves or others, nor run significantly afoul of the law, there is no adequate means of keeping them safe, and often they are hospitalized or charged as a stop-gap measure. We think children deserve better and that they and their families should have real remedies available to them to enforce the basic rights of every child and to ensure best interest solutions that balance all of their rights appropriately when a child's liberty interests clash with their very right to survival and maximum development. In long term care for seniors and other vulnerable adults, the province requires nursing homes and special care homes to keep a number of beds available around the province for emergency use. Why can we not require the same of group home operators and foster homes. Why do our most vulnerable children not have the benefit of the same supports we offer to seniors and adults in our communities? A new approach to child protection in New Brunswick premised upon enforcement of the fundamental human rights of every child is the right solution.

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These vignettes show that many children in care, or children who require Social Development supports have dedicated, loving families, but their behaviours or challenges are simply too much for one parent, or even two, to shoulder alone. Child Rights based approaches require us to take into account the needs of the whole child in the context of family, community and the broader social structure. This is the structural, holistic shift in service delivery that vulnerable children in New Brunswick need.

The fundamental reform of the *Family Services Act* provides our Province with a unique opportunity to dramatically improve the lives of every child in the province and not just children in need of protective care. Already New Brunswick is a leading Canadian jurisdiction in terms of child rights enforcement, in terms of service integration for children, in terms of inclusive education programming and increasingly also in terms of its supports for kinship care and its investments in early childhood. Our *Family Services Act,* while very progressive for its time, was proclaimed two years prior to the *Constitution Act, 1982* and its Canadian *Charter of Rights and Freedoms,* nine years before the United Nations adopted the *Convention on the Rights of the Child*, and thirty years before the development in this province of Integrated Service Delivery. There are many ways in which services to children can be improved through law reform. The most important and foundational change required however is to enshrine in a

new *Children's Act*, all of the rights of the child proclaimed under the Convention that Canada ratified thirty years ago.

The reasons for this foundational rights approach are pressing and manifold. In this first Part of the report we can summarize the case for child rights based reform as follows: 1) the Rule of Law and our constitutional order require it; 2) leading economies and leading jurisdictions in terms of child welfare are already well along this path; 3) prior efforts at reform in this direction have been unsuccessful and the violations of child rights in New Brunswick continue to demand such reform; and 4) only this principled approach will sufficiently underpin our efforts toward service integration and place us on a path for continued leadership and social and economic progress, by placing children's welfare first among our priorities, as a Province.

Respect for the Rule of Law

The work of the European Commission for Democracy through Law (the Venice Commission), although a regional instrument of the Council of Europe, is a helpful reference in defining the criteria for the Rule of Law. The Commission's checklist identifies the benchmarks of Rule of Law as Legality, Legal Certainty, Prevention of Abuse of Powers, Equality before the Law and Non-Discrimination and Access to Justice. Within the criterion of Legality, the Venice Commission lists eight principles, the third of which is the relationship between international law and domestic law. This principle provides that Rule of Law exists where a State's "domestic legal system ensures that the State abide by its binding obligations under international law". Compliance "with human rights law, including binding decisions of international courts" and "clear rules on the implementation of these obligations into domestic law" are explicitly incorporated into the standard. In its commentary on the benchmarks the Venice Commission notes that:

> 47 The principle of *pacta sunt servanda* (agreements must be kept) is the way in which international law expresses the principle of legality. It does not deal with the way in which international customary or conventional law is implemented in the internal legal order, but a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" or to respect customary international law.
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> 48. The Principle of the Rule of Law does not impose a choice between monism or dualism, but *pacta sunt servanda* applies regardless of the national approach to the relationship between international law and internal law. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to

supremacy of law (II.A.2). This does not mean however, that it should always have supremacy over the Constitution or ordinary legislation.[8]

The Venice Commission's benchmarks are premised upon the UN Rule of Law Indicators and the definition of Rule of law set out in the UN Secretary General's report to the UN Security Council in 2004. This definition of Rule of law also emphasizes the foundational importance of adherence to international human rights norms and standards in achieving compliance with the Rule of Law. The UN definition outlined in the UN Rule of Law Indicators Implementation Guide establishes that the Rule of Law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, *and which are consistent with international human rights norms and standards*"[9] (emphasis added).

This emerging consensus in terms of how the Rule of law is to be interpreted and applied reinforces our view that when the New Brunswick Legislature affirms the rights of New Brunswick children and youth in the *Family Services Act* and recognizes that these rights are guaranteed by the Rule of Law and that the interventions by the State to affirm these same rights are also subject to the Rule of Law[10], it has expressly recognized these rights as part of New Brunswick law and acknowledged its obligations to children under the *Convention on the Rights of the Child*, as a matter of domestic law.

These matters were expressly considered by the Provincial Attorney General in 2013 when the Province undertook the process of scrutinizing all Cabinet policy and law reform submissions through a Child Rights Impact Assessment (CRIA) tool. Some had argued that because the Convention has not been directly incorporated into New Brunswick law by an Act of Parliament or of the legislature, that CRIA scrutiny of our proposed laws was unnecessary. After brief consultations and review, the Attorney-General agreed that the problem of domestic enforcement of Convention rights before our superior courts, did not provide a defence to the Crown itself in relation to its legislative duties. Canons of statutory interpretation and principles of legislative drafting both insist that the Legislature is presumed to act in accordance with the

[8] Council of Europe. *European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist*. March, 2016. https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf
[9] The United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools*, https://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf.
[10] *Family Services Act*, RSNB 1973, c.F-2, the preamble provides: "it is recognized that the rights of children, families and individuals must be guaranteed by the rule of law and that the Province's intervention into the affairs of individuals and families so as to protect and affirm these rights must be guaranteed by the rule of law".

State's international legal obligations and so the scrutiny required by CRIA only provides demonstrated due diligence by the State, even in a dualist country such as Canada.

However, from the perspective of the child, the problem of domestic enforcement of their rights under international law remains almost whole. It is little comfort to an individual child if the State can point to stringent measures and processes such as Child Rights Impact Assessment to make sure that rights are fully respected when laws are enacted and enforced, if the law provides the child with no remedy for a violation of those same rights[11]. Since the Canadian Charter of Rights and Freedoms is the supreme law of the land in Canada, and since it begins with an affirmation that "Canada is founded upon principles that recognize the supremacy of God and the Rule of Law" it might be argued that as a matter of constitutional principle children must have access to the domestic remedies needed to enforce their globally recognized universal human rights. As recently as 2007 however, in *R. v. Hape*, 2007 SCC 26, the Supreme Court of Canada has confirmed that the presumption of conformity of Canadian laws with international legal norms is subject to the principle of Parliamentary Sovereignty.

Rather than rely on international legal principles and Rule of Law standards to ensure implementation of universal child rights in New Brunswick, the Province should incorporate these rights into our local law through a clear parliamentary measure. The clear path forward to ensure beyond any doubt that children's rights are protected in New Brunswick, and before our courts, is for the Legislature to proclaim those same rights through an act of the Legislature. For the reasons outlined below, the Advocate maintains that there would be no better place to do so than in new legislation replacing the *Family Services Act*. No single Act of the Legislature already enforces so many provisions of the Convention. Moreover, other rights not specifically covered by this legislative regime, such as the right to Health or the right to Education are inter-related and concomitant rights to the foundational protection rights and the rights to a family environment already enshrined in child protection legislation. Beyond this obvious point, is the equally obvious consideration that the very purpose of a new *Children's Act* would be to set out, for ease of reference in one general law, all of the rights of children, so as to inform not only the application of the *Children's Act*, but all other legislation in New Brunswick, and indeed the Common Law, as applied to children.

We recognize there has historically been apprehension about incorporating rights-based instruments in New Brunswick legislation. We would suggest that this is based upon an outdated perception that such a statute would be unpredictable and open-ended. After all, Canada has been a signatory to the Convention for over thirty years. Courts have affirmed that

[11] Canada's failure to ratify the 3rd optional protocol to the UNCRC, providing Canadian children with a communications procedure to the committee through which to file grievances, further underscores the need for meaningful enforcement mechanisms and domestic remedies.

statutes are to be interpreted to assume an intention of government to comply with these legal obligations. It would be difficult to find a government on record as objecting to any of the rights contained in the Convention. A *Children's Act* which affirms a commitment to these rights would simply affirm what should be assumed, and it would avoid legal heartache for government down the road.

After all, if the UN Convention on the Rights of the Child is not the standard to which government aspires – what possible alternative would be defensible?

The *Family Services Act* currently outlines important ways in which children's rights are preserved and protected. Section 6 of the Act deals with the consideration of the wishes of the child and gives effect to Article 12 of the UNCRC. Section 22 of the Act gives effect to Article 25 of the Convention and provides for the Minister's inspection of community social service agencies serving children. Section 27 of the Act provides for similar oversight of community placement resources, including group homes, foster homes or special care homes. Article 19 of the Convention is implemented in part through the mandatory obligation to report child abuse in section 30 of the Act and the Minister's powers of investigation, entry and apprehension in section 31 of the Act, where the child's security or development may be in danger. Section 32 allows for the Minister to place a child under protective care or allow a child to remain in his or her home with the support of social services as a temporary measure of care. Section 51 of the Act requires the Minister to seek a court order within 5 days of an apprehension in order to determine the child's placement, thereby implementing the province's obligations under Articles 9 and 20 of the UNCRC. This list is not exhaustive and only serves to illustrate the close adherence in our statutory scheme under the *Family Services Act* and the basic child protection standards set out in international law under the UNCRC.

Learning from other leading jurisdictions

In their recent alternative reports to Canada, both the Canadian Council of Child and Youth Advocates[12] and the Canadian Bar Association[13] put forward clear recommendations for the federal government and provincial and territorial governments to enact legislation incorporating the UNCRC into domestic law. This is consistent with the recommendations to Canada from the UN Committee on the Rights of the Child in its last Concluding Observations in 2012 when it recommended in its third recommendation that Canada find "the appropriate

[12] Canadian Council of Child and Youth Advocates, The CCCYA's Alternative Report to Canada's Combined 5th and 6th reports on the Rights of the Child, Edmonton, March 2020. http://rightsofchildren.ca/wp-content/uploads/2020/03/Council-of-Childrens-Advocates-Submission-for-Review-of-Childrens-Rights.pdf

[13] Canadian Bar Association, Child and Youth Law Section, Alternative Report to the UN Committee on the Rights of the Child, Ottawa, February 2020. http://rightsofchildren.ca/wp-content/uploads/2020/03/CBA-Report-for-Review-of-Childrens-Rights-in-Canada.pdf

constitutional path" towards a comprehensive legal framework incorporating the provisions of the Convention and its Protocols into domestic law at all levels[14].

Ontario recently revised its child welfare legislation with a *Child, Youth and Family Services Act*[15], and the new Act clearly endorses a rights-based approach by referencing the Convention in its preamble. New Brunswick's *Family Services Act* of course endorsed a rights-based approach in its preamble 40 years ago, even before the Convention was adopted. The consensus view of Canadian experts and the UN Committee on the Rights of the Child is that these steps do not go far enough. What is required of Canadian governments, in order to comply with their international human rights treaty obligations and the Rule of Law, is to take legislative measures to ensure that the Convention applies as a matter of domestic law. Quebec's Laurent Commission consulted broadly and called for a more robust rights based reform in Quebec[16]. The likelihood of a constitutional conference with federal provincial and territorial agreement on how to act collectively and in unison for domestic incorporation of child rights across all jurisdictions to better protect the welfare of all Canadian children is remote. There is better hope for progress if certain jurisdictions give the example and lead the way. New Brunswick is uniquely positioned to lead through law reform in this area.

Scotland and Wales have both recently adopted Parliamentary Measures for domestic enforcement of the UNCRC into Welsh and Scottish law. The Welsh Parliamentary measure[17] is the earliest and perhaps the more stringent of the two. It imposes a duty on Welsh ministers of the Crown to have due regard for children and child rights in all their decision-making. It may be that the Parliamentary Measure adopted by the Welsh Parliament was a measure of soft law and it may have been promoted as a gradual step towards full incorporation, but the statute underpinning the "Parliamentary Measure" is a clear legislative pronouncement in regards to Welsh law by a sovereign parliament. The Scottish "Parliamentary Measure"[18] was modelled on the Welsh one, but was not supported by as clear a legislative text and so the result was equally

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[14] CRC Concluding Observation to Canada, 2012, CRC/C/CAN/CO/3-4, Dec. 6, 2012, at p. 2 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCAN%2fCO%2f3-4&Lang=en . This submission repeats recommendations to Canada from the 1995 and 2003 Concluding Observations.

[15] Ontario, *Child Youth and Family Services Act*, S.O. 2017, c. 14, Sch. 1

[16] The Commission Laurent, *Commission Spéciale sur les droits des enfants et la protection de la jeunesse*, submitted its report to the Quebec National Assembly on April 30, 2021. Notice 1258349 - Instaurer une société bienveillante pour nos enfants et nos jeunes (assnat.qc.ca)

[17] Welsh Parliament, *The Rights of Children and Young Persons (Wales) Measure, 2011*, 2011 nawm 2 https://www.legislation.gov.uk/mwa/2011/2/contents ; See also the Children's Rights Scheme of 2014 which explains how the measure is enforced across Welsh government: https://gov.wales/sites/default/files/publications/2020-10/childrens-rights-scheme-2014.pdf ; and also the draft Children's Rights Scheme 2021 which proposes further improvements to Welsh efforts at child rights enforcement: https://gov.wales/sites/default/files/publications/2020-10/childrens-rights-scheme-2014.pdf

[18] Scottish Parliament, *The Children and Young People Scotland Act*, 2014 asp 8, cif March 27 2014, https://www.legislation.gov.uk/asp/2014/8/introduction/enacted

unclear. More recently Scotland introduced a new law for domestic incorporation of the Convention into Scottish law[19], but it was successfully challenged before the House of Lords. The Isle of Jersey is the most recent state to adopt incorporating legislation based upon other UK models[20]. The Advocate believes that New Brunswick should follow in lock-step and fulfill its promises to children in keeping with the UN Committee's advice and global best practices. The Scottish law was proposed in part as a response to Brexit to consolidate human rights enforcement efforts as the UK withdraws from Europe, but also as an important aspect of Scotland's COVID 19 recovery plan for children. Careful review of the debates in Jersey, Scotland and Wales in favour of child rights enforcement would provide clear guidance to New Brunswick legislators in terms of tangible, practical, straightforward steps we could take to better protect children in our Province.

There is clear precedent in New Brunswick, particularly in Family Law matters, in relation to Hague Convention laws, as to how to proceed in incorporating international treaty law into New Brunswick Law. We propose that the Convention on the Rights of the Child as a whole be incorporated by reference in one of the introductory provisions of proposed new *Children's Act* and then that the entire Convention be promulgated in an appendix to the Act. There should be no ambiguity in relation to the Legislature's intent and the Convention must be adopted as a whole, as all of its provisions are interdependent. New Brunswick should expressly remove for domestic law purposes in the Province any reservations that Canada has in relation to paragraph 37 (c).

Prior attempts and the continuing need for child-rights based reform

Child welfare services in New Brunswick are regulated under the *Family Services Act* and its regulations. The Act addresses among other areas: child protection matters; provisions for children in the care of the Minister of Social Development; community social services and placement resources; adoption; and parental custody, access and support obligations. It also deals with other family law matters, such as the protection of abused or neglected adults. While the Act makes no direct reference to the *UN Convention on the Rights of the Child* it is through this legislation that the fundamental rights of New Brunswick children are effectively enforced and guaranteed. The preamble to the Act makes it clear that the Act applies in order to uphold the "basic rights and fundamental freedoms of children", to protect their best interests as a primary concern, to protect their right to be heard and to participate in processes

[19] Scottish Parliament, *The United Nations Convention on the Rights of the Child (incorporation) (Scotland) Bill*, SP Bill 80, September 1, 2020, https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/115977.aspx
[20] Children (Convention Rights) (Jersey) Law 202- (jerseylaw.je)

that may affect them, to only be removed from their parents in accordance with the provisions of the Act and to have their rights guaranteed by the Rule of Law[21].

As illustrated by the case scenarios in this report, too often the enforcement of child protection legislation falls short of the proclaimed rights of children. Under the Convention children have express rights to be protected against drug endangerment, against sexual exploitation, against unfair labour practices and other forms of exploitation. They are protected under Article 19 from all forms of violence, whether in institutional care or in their family homes. The scope of protection under the *Family Services Act,* considering its enumeration of factors of child endangerment, may in some regards be even broader than the protection contemplated under the Convention, but in many other regards it falls short of the Convention's requirements. In the Advocate's experience we routinely find cases of harm to children which proceed unchecked. The courts have a broad power of oversight over child protection services. All decisions involving an apprehension or removal of a child must be reviewed by the courts. The courts understandably will show some degree of deference to the Minister's decisions, as decisions to remove a child are never made lightly. But ultimately it is for the courts to enforce the standard of care which the Minister must take in keeping children safe from harm.

Our understanding of the legislative scheme is that the Minister must be and will be zealous in acting to protect New Brunswick children from all forms of harm. The Minister has exceptionally broad powers. Few actions of the State allow for the kind of interference with personal liberty and privacy and family life as do the Minister of Social Development's powers in relation to child protection. This speaks to the overriding importance that child protection concerns have in our society. The power of the courts in this legislative scheme stands as an important limitation to guard against the risk of any excess of authority by child protection professionals. While these officials have all the power and authority needed to do whatever it takes to keep children safe from harm, they must be able to justify their actions at all times before the courts, based upon standards of necessity and of the child's best interests. Government removes a child from their home only when it is necessary in a child's best interests to do so. The State will not hesitate to do so, but must always be ready to have its actions reviewed by an independent judicial authority.

In this context, the Advocate's role is broadly analagous to the courts': that is, we want to act as an impartial external check upon the system and ensure that children are not needlessly removed from their parents' care. We know based upon years of experience working in the area of oversight of child protection services that children in formal systems of state care face all kinds of adversity. They are placed there to protect them from a worse fate, but group home care and foster care systems are not always a walk in the park for troubled youth. Child

[21] *Family Services Act*, SNB c.F-2.2, preamble

protection practice today takes a trauma-informed approach which recognizes that child apprehension and placement decisions are traumatic occurrences in and of themselves and that such responses are not lightly taken. As Advocates we view our role as allies to children in these situations of vulnerability and we understand the pleas, often repeated, of children who want a home, whether their birth parents' or a foster parents', but some home that offers a sense of permanency and belonging. That is why traditionally as an Advocate we have applauded the Province's efforts to reduce the numbers of youth in care. That is why we have generally approved when we observe these rates declining as they have since our office was established in 2006.

Unfortunately, the cases in our caseload that have led us to initiate this review, and the cases we have uncovered in the course of the review, strengthen our opinion that as Advocates we have to start asking different questions of the Minister's staff. Our leading concern is no longer whether we have gone too far and removed children needlessly from their homes and relied on formal systems of care, where families cannot cope, or be trusted to care for their own children. Our questions are increasingly and overwhelmingly about whether the child protection system is doing enough to keep children safe. We see many cases where children are left in situations of harm and where we have been unable to convince the Department that they should do more to protect a child, or an entire sibling group. Most often the answer that we are given, is that the Department is adamant that the courts would not endorse a decision to remove in cases which to our eyes are clear cases of endangerment. Sometimes the perceived judicial standard for removal or for a protection order is so high, that the Department cannot even be convinced to engage the Court of Queen's Bench Family Division, or test its authority, or even confer with the Family Crown attorney's office.

In our view these are instances of a systemic failure of the child protection system in our province. The Courts traditionally take the view that the Department will not hesitate to intervene when child endangerment concerns are reported to them. Naturally, given the vast powers at the Minister's disposal the Court's response must be one to guard against excesses of zeal on the part of child protection staff, whenever cases raise questionable exercises of that authority. Our review has unfortunately revealed a break-down of the systemic relationship between Family Court judges and child protection professionals. In this scenario, the legislative scheme no longer serves its intended purpose, on the one hand child protection professionals have been burned once too often by their come-uppances in Family Court, and they are no longer willing or able to press their cases assiduously before the courts in order to keep children safe. They increasingly play prosecutor, defendant and judge and apply their own interpretation of the law to the cases before them and refuse to take action, except in the most exigent circumstances, and even then, they are cautious to act. Several child protection offices, depending upon the region are increasingly resorting to voluntary child protection agreements.

This may help expedite case management but it also foregoes a higher level of judicial scrutiny of the Department's decisions. When this happens the child's fundamental right, under Article 9 of the UNCRC, to a review before a competent tribunal of a decision for removal is thwarted. Agreements, rather than child protection orders, become the norm, arrangements without orders or agreements are made by child protection staff, and our process slides further away from a system governed by the rule of law, towards a State-run system of care that lacks the accountability and institutional safeguards that children and families deserve.

At the same time we see little evidence in the recent decisions in child protection cases before the Family Division of the Court of Queen's Bench, that judges or the courts in general are aware of the extent to which their willingness to review and correct child protection officials' decisions and applications for protective care may have a dampening effect on the Department's ability to keep children safe. Based upon our review, the Advocate is respectfully raising a concern about the cumulative impact across the system of less deferential judicial controls on administrative actions to keep children safe, of decisions which may be perceived as favouring family reunification over child best interest factors, or of stringent application of standards tasking the Ministry for its failure to meet evidentiary burdens. All decisions which in fact detract from a zealous and primary concern for the best interests of the child, as required under the *Family Services Act* risk reinforcing decision-making at the departmental level that could leave children in situations of endangerment. We are very concerned by the number of frontline workers who candidly admit to us that 'Rule Number One' in child protection practice is to keep families together. Our reading of the *Family Services Act* and New Brunswick law suggests to us that 'Rule Number One' has to be keep children safe *having regard at all times for their best interests*.

It is plausible, and even understandable, that human nature has led the Department over time to overreact to negative experiences in court and to become risk-averse. This would be understandable, but also something to be consciously avoided. The rights of the child to safety and protection must be paramount. This would be another strong reason to entrench the principles of the Convention in legislation so that the legitimate role of the Department is defended and articulated to the judiciary.

The alternative is to send a message to front-line staff that their judgement should be self-censored rather than asserted even in the face of judicial skepticism. This would be unfortunate. As we shall detail, we would prefer a mindset where the Department is more prepared to remove a child from their home when the interests of the child dictate, and more creative and flexible in maintaining and supporting parent-child relationships in cases that merit removal. Child development is too complex to be reduced to a binary choice.

There is ostensibly an important role for the Attorney General's Office and the Court of Appeal in ensuring that the application of child protection laws in New Brunswick remain consistent at all times with the Canadian *Charter of Rights and Freedoms* and our international legal obligations. These external checks and controls should also ensure that we not 'miss the forest for the trees' in relation to the relative role of the courts and the Ministry in keeping children safe from harm. Our vantage point as a Parliamentary Agent with oversight for children's rights writ large, however, gives us a unique perspective; one which has compelled us to the view that any attempt at law reform will not succeed any more that any of the several previous attempts, unless all stakeholders within the Bar, the Bench, the child protection sector and the broader community are engaged in a significant retraining and educational program that will address the historic pro-family bias of our systems and the need for child rights based approaches and child-friendly justice reform.

Our concern about a child protection system that is light on judicial oversight and due process to keep children safe is not only illustrated qualitatively in the case scenarios presented in this report. Empirical data comparing child protection placement rates in New Brunswick today to historical records for New Brunswick, or to current data from other Canadian jurisdictions, also supports the thesis that too little is being done in New Brunswick today to keep children safe. According to the Story of Child Welfare in New Brunswick, the provincial rate of placement of children into care in New Brunswick today, is roughly equal to the rate of placement of children in Gloucester county in the mid-1940s[22]. Again, if we compare our recent placement rates to data from other provinces and territories we see that we have about 6.8 children in care per 1000 youth population compared to 12.9 in Newfoundland or 33 in Manitoba[23]. Studies show that the rates of placement into care have been declining in Canada for the past decade and that serious unexplained differences exist in rates of placement between provinces and territories[24]. It may be that the development of child and youth advocates offices across Canada has had some impact on this overall trend, and we continue to view this trend as a positive one, so long as children are kept safe. We are not recommending Manitoba's approach, and a drastic rise in the rate of placement as a solution, but we do find that the vastly lower rates of placement in New Brunswick corroborates the observations stemming from individual cases reviewed in this study and which suggests that too little is being done by Courts and by child protection professionals in our Province to keep children safe from harm.

[22] Howlett, C., supra at p. 15
[23] Saint-Giron. M., Trocmé, N., Esposito, T. and Fallon, B., Children in Out of Home Care in Canada in 2019, Information Sheet #211E, Montreal November 2020, p.4, Canadian Child Welfare Research Portal, https://cwrp.ca/sites/default/files/publications/Children%20in%20out-of-home%20care%20in%20Canada%20in%202019_0.pdf
[24] Ibid. pp.5-6

None of the departmental managers we met would accept or agree with the suggestion that budgetary concerns may underlie the practice pointing to a dramatic decline in rates of placement of children in formal systems of care in recent years. Other staff that we have met maintain that services to children in care are not wanting for financial supports, that children in care receive all that they need to thrive and prosper. One manager stated emphatically that in individual cases, decisions to remove or seek a supervisory order are never influenced by resource constraints. And yet we have also heard from front line staff, that the lack of placement options seriously hampers their ability to intervene, even in cases of clear endangerment. Even after the George Savoury report that urged more supports for front line workers[25], in some regions child protection social workers are being asked to limit the hours of support worker interventions to help families develop parental capacity, that the department will no longer support cab fare or transportation services to bring families to court hearings, that these reductions in their ability to provide program supports need to be taken in stride, since after all, everyone was given a cell phone. Front line workers would rather keep paying for their phones and have the tools they need to support families. They don't understand why it is that with child protection supports what the one hand gives, the other hand takes away. We agree. New investments are needed now, both to better support children in care, but also to create opportunities for safely placing children in alternative family settings. We also need to start carefully tracking annual expenditures in child protection year over year to make sure this money flows to children and families, and is not part of any shell game.

As Advocates we remain concerned that in the current fiscal climate where Health and Education expenditures are always favoured at the cost of everything else, that child protection services allocations face systemic budgetary constraints that influence decisions in subtle but damaging ways and contribute to the concerning situations that we are denouncing in this report. The 2020 budget was a welcome exception to the rule with its promised new investments in social welfare, but the bulk of new spending was allocated directly to improving income assistance rates. This will relieve the strain on families and may tangentially help protect some vulnerable children, but child protection and other family support services also need new investments. We maintain that child protection services must be forcefully maintained as a priority of every government in this Province. More investment is critically needed in this sector. Our economic welfare and prosperity as a society depend upon it.

[25] Savoury, G. *Review of the Effectiveness of New Brunswick's Child Protection System*, Savoury Consulting Ltd., November 29, 2018, 193 pp. at pp 7-9 and ff. https://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Protection/Child/ReviewOfTheEffectivenessOfNewBrunswicksChildProtectionSystem.pdf

Many studies confirm the return on investment from early years interventions and program supports[26]. Targeted interventions with families known to child protection should have an even greater return on investment as these youth are most at risk of future involvement with chronic health complications in later life, involvement with social assistance and income support or involvement with the criminal justice system. However, failed child protection interventions can also exacerbate pressures on social welfare spending by retraumatizing youth within alternate care settings or worse yet leaving children in a vicious circle of abuse, removal, reintegration and abuse. As Advocates we always argue for best interests solutions for every child, taking a life-cycle and rights based approach to our advocacy. At a systemic level of course decision-makers must remain alert to the fact that the reason why governments around the world have committed themselves to this program of fundamental child rights enforcement is in large part because they realize that our economic prosperity and social development depend upon it[27].

We anticipate that the recent and long-awaited reform proclaiming changes under the *Family Services Act*, to facilitate the use of kinship care placements will allow for a reinvestment in child welfare supports and deliver a new stream of supports to keep children safe. We insist that these placements, as with every innovation, will have to be monitored closely to ensure that children actually benefit from these developments and are not needlessly exposed to new risks in these care environments. One down-side to this reform that Family Court practitioners have warned us about is the impact that kinship care placement processes will place on Family Court dockets which are already straining to keep up with the demands for timely justice under the *Family Services Act*, as we will see below in Part V of this report.

Taking both an historical and a comparative view, we note that the *Family Services Act* reform of the early 1980s was a prescient and far-reaching law reform initiative. It sought to modernize Child Protection practice in New Brunswick by taking a rights-based approach, even as the global effort to develop a UN *Convention on the Rights of the Child* was being initiated. It sought to correct the imbalance between child protection concerns and family reunification concerns by placing strict limits on the amount of time that a youth could spend in temporary care, and by insisting on a best interests analysis of every child's case. This reform also invited child protection professionals to deal with children in the context of the whole child's micro and macro-system by working preventively with families. Over the years new innovations, such as Family Group Conferencing, Integrated Service Delivery, and now finally kinship care have been introduced to reinforce this family supportive model of intervention. The problem is that in

[26] Alexander, C., Beckman, K., Macdonald, A., Renner, C. and Stewart, M., Ready for Life: A Socio-Economic Analysis of Early Childhood Education and Care, Conference Board of Canada, 2017, 96 pp. at p. 61-86. https://www.conferenceboard.ca/e-library/abstract.aspx?did=9231

[27] Sanfilippo, M., de Neuborg, C. and Martorano, B., The Impact of Social Protection on Children: A review of the literature. Working Paper 2012-06, UNICEF Office of Research, Florence, 42 pp. https://www.unicef-irc.org/publications/pdf/iwp_2012_06.pdf

spite of these progressive reforms, the system has auto-corrected itself to the traditional default position which places child best interests analysis as secondary to family unity concerns. Even despite targeted law reform in 1999 to again correct this imbalance, as was pointed out in the recent Savoury report[28], the Courts and the child protection system have continuously acted to protect family unity over children's best interests. This unfortunate situation is playing itself out with increasing frequency to the great disadvantage of many vulnerable children in our Province, and the Courts are increasingly uninformed and unaware of the emergent practice, and unable to review or prevent it. This is why as advocates for children we are calling for a renewed rights-based approach to law reform, for a new Act that is squarely about children and the protection and preservation of their rights, and which proclaims new procedures of child friendly justice which will better ensure access to justice for all New Brunswick children facing situations of either probable or imminent harm.

Building upon Integrated Service Delivery and New Brunswick's child rights leadership

The Child and Youth Advocate calls upon the Province of New Brunswick to enact a new *Children's Act* replacing the *Family Services Act* provisions dealing with services to children and youth, and integrating all government services to children and youth within this legislation, using a rights based framework. This is the natural progression of reforms that have been happening in New Brunswick over the past 15 years. These reforms are for instance reflected in the whole-child, one child, one-file approach of Integrated Service Delivery (ISD) and by various other efforts since 2011 to better enforce child rights in our Province.

We will return to the ISD model below and explore in detail ways in which the current law reform effort can better support and promote that service transformation. Our main point in this first part of the report is that ISD is an approach which is intersectoral and which seeks to bring experts from all fields together in multi-disciplinary practice to wrap services around the child. It is quintessentially a "Build the Village around the Child" approach. Child rights-based legislation is the legal framework best suited to this kind of systems change. A child rights based approach to law reform looks at the needs of the whole child and starts from the premises of enforcement of fundamental rights which are inter-dependent and inter-related, as are for instance the right to live lives free from harm, the right to know one's family, the right to health, the right to education, the right to privacy, the right to an identity, or the right to an adequate standard of living. By adopting this rights-based framework we encourage and require multi-disciplinary practice across all sectors of services to children and youth.

[28] Savoury, supra, at p. 15. The 1999 amendments deleted a provision in the Act which provided that "children should only be removed from parental supervision either partly or entirely when all other measures are inappropriate" and replaced it with "and children should only be removed from parental supervision in accordance with the provisions of this Act".

This will be ground-breaking, but such a reform will be a continuation of the Province's efforts at more principled child rights implementation. For forty years already, our *Family Services Act,* has taken a rights-based approach and invited child protection matters to be implemented using a rights-based lens and a best interests of the child approach. We were the first jurisdiction in North America in 2013 to adopt a child rights impact assessment tool at the cabinet decision-making level, and we have honed our child-rights based approach to service delivery through the use of this tool. We have been publishing as a Province for twelve years already a State of the Child Report which measures indicators of child rights enforcement year over year. We have professional associations, particularly in social work and in the legal profession that have been innovators and early adopters in child rights based analysis. We have a Child and Youth Advocate's Office with legislation that offers a high standard for child rights enforcement, in terms of the Advocate's mandate and mission to defend the rights of every child in the Province. Finally, for nearly ten years also, the Province has invested significantly in child rights training to build up our capacity to meaningfully enforce child rights at every level of administration in the Province. In this context, it is not at all a stretch, but only a maturation of New Brunswick's approach to incorporate the UN *Convention on the Rights of the Child* by reference into our *Children's Act* and to insist upon child protection practices that are rights-based.

RECOMMENDATION 1

It is recommended that the Department of Social Development replace the Family Services Act with a Children's Act for New Brunswick. This Act should proceed from a child-rights based approach and incorporate the UN Convention on the Rights of the Child into New Brunswick law by direct reference, not in the Preamble, but in the initial provisions of the new Act and promulgate the Convention in a separate Appendix to the new Act. The provisions of the new Act should also clearly state that in respect of its application in New Brunswick, the Convention applies without reservations and that Canada's reservation in respect of Article 37(c) of the Convention is expressly lifted. We further recommend that the new Act establish and define the ministerial role in delivering Integrated Service Delivery for children, as we shall define in subsequent recommendations.

PART II – A New Legislative Scheme and Child Rights Enforcement Mechanism

A few years ago, two siblings from a religious community in New Brunswick left their family and local community by running away early one morning from the family farm. They found their way to an RCMP detachment and sought protection from their parents' strict religious upbringing. The children were supported by child protection professionals and after disclosing their history of abuse they were placed in foster care and told they would not have to return home. During a six-month placement in foster care, the youth experienced life as average teenagers with many freedoms that they had never known at 14 and 16 years of age. Soon after their flight, their parents applied to have the children returned to them and demonstrated good faith in following the law and promising to change their parenting practices. The Department agreed with the parents that family reunification was in the children's best interest, but the children remained vehemently opposed to this plan. They were supported by relatives in a nearby province who doubted that the children would fare well once returned home, but neither they nor their relatives could afford to retain a lawyer to plead their case. Our office sought the support of a legal aid clinic to at least bring an application to halt the family reunification process until counsel for the children could be appointed and that their voices could be heard in a judicial determination of their best interests at this stage. Our efforts in that regard were unsuccessful and the children were returned home.

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Another case from a few years ago involved a mother who had experienced abuse as a young girl herself and who had four children from three different unions. There was a concern that her children remained at risk from a relative who had sexually abused her as a child. The mother's second partner also had a history of predation on young children and was eventually subject to an order to have no contact and to keep away from the children. The oldest child in the family, a girl of fourteen, was removed from her mother's care and ordered to remain with her father. School officials became very concerned about the behavior by the eight-year-old daughter observed at school, and her 12-year-old brother. These children had previously been removed from their mother's care when she fled to a neighbouring province. She had left New Brunswick to avoid the scrutiny of child protection, but returned here a few years later immediately after regaining custody from child protection services in the neighbouring province. Our office was contacted because despite a safety plan signed by both the mother and her former partner requiring him to have no contact with the children, the mother had renewed her relationship with this former partner and they were observing the no contact order by insisting that he was living in his truck in her driveway, but had no contact with the children because he never entered the house. Social Development had visited the house and found him inside, but no changes had been

made to the safety plan. We felt the situation cried out for more stringent measures to protect the children from an experience of harm or predation that was concerning to the broader community and manifest in the children's behavior. Child protection professionals maintained however that there was no basis to intervene and that the courts would require much more stringent proof of harm before they would allow any action by Child Protection staff.

* * *

An important challenge in any reform of the *Family Services Act* that seeks to separate out the provisions relating to children and child protection from other provisions of the Act will be in deciding how to reconnect and address the disparate provisions that will be left over. Will they remain as a reduced *Family Services Act*, or will they be splintered off into disparate pieces of legislation as was previously the case? Specifically, these questions must be asked in relation to the provisions for adult protection and community-based services not aimed at children. This is an important question which has been raised with us by interested stakeholders in our mandate as Advocate for seniors and adults under protection. The question is, however, outside the scope of this review and we will return to it in a separate submission.

More germane to our inquiry here is the scope of a new *Children's Act*. Should it encompass child protection services, as well as community-based supports to children with special needs, child in care services, family supports prior to and following placement, adoption services, and post guardianship care and supports? In other words, should the new act deal only with child protection narrowly defined, should it deal with all services to children presently covered by the *Family Services Act,* or should it deal even further with aspects of services to children not currently addressed in the *Family Services Act*? Indeed, there is more than one route by which a child can be known to have need of services. Children who require an individualized learning plan under the *Education* Act, children whose families receive services under the *Family Income Security* Act, children who appear before the courts, or children with complex health needs all engage government's duty to act. All of these examples (and others) should trigger the development of a cross-departmental Integrated Service Delivery plan carried out by the ministry responsible for Children.

As suggested in our analysis above, we believe that a child rights-based approach to law reform requires the Province to take the broadest possible view and seek to regulate in one single piece of legislation, the essential statutory and legal parameters affecting children. In short, the new law should be approached as a codification of New Brunswick law affecting children and informed essentially by a renewed commitment to child rights enforcement.

This is why throughout this submission we are speaking of a new *Children's Act*. A Child Welfare Act would also have a broader connotation than a Child Protection Act *per se*, but it would still be more limited in scope than a *Children's Act*. In the United Kingdom, child protection services are regulated under the *Children's Act*, which provides the basis for coordinating multiple services to children beyond protective care, including educational services, health services, and justice services, while also providing that an Advocate ("Commissioner" must have regard to the UN *Convention on the Rights of the Child*.[29] The essential task of the *Children's Act* would be to bring children in from the margins of New Brunswick society and to provide all services to children and young people with their own governing legislation which promotes and protects children's best interests as a primary consideration in all public policy decisions affecting them. It would also provide for a ministry to serve as the locus for Integrated Service Delivery plans as a proactive measure, rather than the current reactive complex-case protocol.

Not only would a statute governing Integrated Service Delivery make collaboration the norm rather than the exception, it would allow government to address some of the most stubborn barriers to collaboration. Privacy laws often act as a barrier to government departments speaking to one another, even when it is in the child's best interests. New Brunswick's laws governing privacy have never been fully harmonized with Integrated Service Delivery, nor have they been subjected to a child's rights lens. They could be. Just as the unique role of legislative officers have created exceptions to the *Right to Information and Protection of Privacy Act*, we see no reason why a *Children's Act* cannot carve out exceptions that balance privacy interests with the needs of children receiving services. A coordinating secretariat alone may create an office where needed information can be integrated. Beyond that, a statute can create exceptions for information sharing for *bona fide* purposes connected to the best interests of the child and collaboration by front-line workers. Privacy laws involve a balancing of principles, and the right of the child to timely interventions is a principle worthy of balancing.

This is also a trend seen in other jurisdictions. Submissions to the Laurent Commission in Quebec suggest that our neighbouring province may be moving in that direction. In France, following the recent adoption of a new national youth penal code, there is a similar call moving forward for a "Code de l'enfance"[30]. We suggest that this approach would be the most consistent with our holistic approach to child and youth services in New Brunswick and with a robust commitment to child rights. Canadians will recall that in 1982 when we adopted our

[29] *Children Act 1989*, UK Public General Acts, 1989 c. 41 https://www.legislation.gov.uk/ukpga/1989/41/contents; this act sets out all of the relevant child protection provisions under UK law, but see also for all related child welfare provisions the *Children and Families Act 2014*, UK Public General Acts, 2014 c. 6: https://www.legislation.gov.uk/ukpga/2014/6/contents/enacted

[30] Lecture by Philipe Bonfils, Dean of Law at Université Aix-Marseille, *"Convention international des droits de l'enfant et droit pénal »* Novembre 26, 2019, « Colloque sur la Convention Internationale des droits de l'enfant 30 ans après son adoption réalités d'hier et défis d'aujourd'hui », Université de Moncton, November 26-28, 2019.

Charter of Rights and Freedoms we took special measures to protect indigenous rights, Canada's commitment to multiculturalism, and the equality of men and women. Sections 25, 27 and 28 of our *Charter* complement our commitment to equality outlined in section 15. Canadian governments in every province and territory as well as at the federal level were given three years to prepare for the implementation of section 15 of the *Charter* by making the necessary legislative changes to fully implement this defining aspect of our Supreme Law. Similarly, we would recommend that the Province of New Brunswick take a graduated approach to law reform. The initial consolidation under a new *Children's Act* should focus on repatriating all the provisions of the *Family Services Act* applicable to children in one piece of legislation and ensuring that those provisions are framed in rights-respecting language. Within three years, the Province should undertake an important review of its *corpus juris*, its body of laws and regulations, and ensure that these laws are all compliant with the Convention and that relevant provisions are helpfully modified and relocated within the *Children's Act* as appropriate.

Another aspect of this more thorough review should be a careful consideration of the need to modernize the statute and regulations and to remove archaic language or expressions which may be stigmatizing for youth. The recent reform in Ontario took this into account as a result of detailed advocacy by Ontario youth and their allies[31]. In New Brunswick for instance the use of the terms "custody" and "guardianship" should perhaps be reconsidered[32]. Every effort should be expended to make the statute and its implementation as consonant with child friendly justice as possible.

Examples of legislative provisions needing review and which could be considered for inclusion with a *Children's Act* are child labour provisions under the *Employment Standards Act*, health and safety provisions applicable to children under the *Occupational Health and Safety Act*, eventual provisions under the *Business Corporations Act* and *Companies Act* allowing minors to own, direct and manage the corporate entities they create, or to participate on the Boards of non-profits which organize youth associations, medical consent of minors legislation and related provisions, youth detention and prosecution laws, licensing provisions of all kinds which apply to minors but could be helpfully standardized in keeping with a child's evolving maturity. In some cases, it may be preferable for the child or youth provision to remain within the existing governing legislation. In other cases, the provisions could appropriately be transposed

[31] Children in Limbo Task Force, *Modernizing the Language of the Child and Family Services Act*, December 2014, Toronto, 20 pp., https://childreninlimbotaskforce.files.wordpress.com/2014/08/modernizing-the-language-submission-final2.pdf

[32] This would complement the task of *Family Law Act*, adopted in December 2020 and replaced the use of the term "custody order" with "parenting order" in divorce proceedings mirroring changes under the federal *Divorce Act*. https://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Protection/Child/ReviewOfTheEffectivenessOfNewBrunswicksChildProtectionSystem.pdf

to the *Children's Act*. The important task will be to carefully review all provisions to ensure compliance with the UN *Convention on the Rights of the Child*.

Again, as Child and Youth Advocates, we do not expect that many legislative provisions will have to be modified, as Canada and New Brunswick have had nearly thirty years experience in child rights enforcement. Nonetheless, the UN *Convention on the Rights of the Child* is a living document and its interpretation is constantly evolving. In its recent General Comment 24 on child rights in child justice systems, the UN Committee on the Rights of the Child called on governments around the world to stop prosecuting youth with neurodevelopmental delays[33]. As the jurisdiction constitutionally competent for the administration of the criminal law, New Brunswick could easily revise its laws in the area of youth criminal justice administration in order to become compliant with this direction from the Committee. We need not wait for the Federal Parliament to amend the *Youth Criminal Justice Ac*t in order to be child rights compliant in this field in New Brunswick.

If New Brunswick can agree on a process to make the Convention binding in New Brunswick law and to make sure New Brunswick laws are compliant with the Convention, our experience advocating for New Brunswick children and youth in cases like those illustrated above tells us that we will also need better mechanisms for the enforcement of those rights in exigent cases. Very often as Advocates we have wanted to intervene more effectively for children, but have seen our recommendations, refused, ignored, or accepted in principle but with no commitment to follow-through. Too often we are aware of a situation needing urgent intervention to require the Minister to take protective action or to withhold a potentially harmful decision, but have no means through which to initiate any court review to have the child's voice and best interests considered and judicially determined.

Advocates in other jurisdictions do have such authority. In Quebec when the Commission des droits de la personne et de la jeunesse's recommendations are not followed or fully executed, they can apply to the Quebec Youth Court for an order to enforce the required State action or decision[34]. In Alberta, the Office of the Child and Youth Advocate runs a youth legal representation office, hiring private sector lawyers on a roster to represent the needs of Alberta Youth involved with formal systems of care[35]. In Ontario, the Office of the Children's

[33] CRC, General Comment 24 *Children's Rights in the child justice system* CRC/C/GC/24 at para. 28. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en

[34] Loi sur la protection de la jeunesse, RSQ, c. P-34.1, s. 25.3 P-34.1 - Loi sur la protection de la jeunesse (gouv.qc.ca)

[35] The Alberta Legal Representation of Children and Youth service within the Advocate's Office represents about 2000 Alberta youth yearly through 1300 certificate appointments: About LRCY | Office of the Child and Youth Advocate (alberta.ca)

Lawyer, represents Ontario children[36], whether in child protection matters, family custody disputes, successions or other civil matters where the child needs legal representation. Other specialized legal aid offices such as Justice for Children and Youth[37] also provide such services as well as criminal legal aid in youth matters. In this context it makes sense for the Advocate's legislation to prevent the Advocate from acting as counsel for a child[38]. In New Brunswick, however, domestic legal aid is often not available to children. Criminal legal aid is almost invariably provided by duty counsel. Even in child protection matters, children are not routinely provided with independent legal representation. New Brunswick's system currently lacks the safeguards children need to ensure that their rights are appropriately promoted and defended when they need it.

As we take new legislative steps to strengthen child rights implementation, it will be necessary to close those gaps and provide accessible, timely and child-friendly mechanisms for redress of rights violations. Sometimes some public administrators raise floodgate arguments about the risks of extending cultural, economic and social rights protection to the Courts. The Child and Youth Advocate's Office maintains that it is well past time for an advanced liberal democracy such as Canada to develop robust enforcement mechanisms for all rights of all of its citizens. It makes most sense, however, to begin enforcing the right to education, the right to health, and the right to an adequate standard of living, for children. The return on investment for such rights enforcement measures will give the highest yield. Nor do we think that the proper institution of meaningful remedies for such rights violations need entail wholesale change. Here again, we recommend a graduated approach. The Advocate's Office is the current mechanism for redress of these grievances and complaints and we have been doing Child Rights Based Analysis in complaints before every level of administration for already ten years using the recommendation powers under our statute, as a specialized ombudsman for children. This should be the privileged path forward under the *Children's Act* for child rights enforcement.

The proposed *Children's Act* should have as its principal enforcement mechanism for any child-rights violation, or any maladministration or complaint in relation to services under the *Children's Act*, a cost-free accessible administrative remedy before the Provincial Child and Youth Advocate. The Advocate would continue to act as a specialized Ombudsman for children, using only its power of recommendation to advance children's rights in normal cases. However, the *Children's Act* should include consequential amendments to the *Child, Youth and Senior Advocate Act* to further bolster this enforcement mechanism. These amendments inspired by

[36] The Ontario Office of the Children's lawyer handles upwards of 10,000 cases per year: The Office of the Children's Lawyer - Ministry of the Attorney General (gov.on.ca)
[37] JFCY provides legal services for youth under 18 and homeless youth under 25. Situated in Toronto, they can take cases from other legal aid offices in Ontario and frequently intervene in appeal cases and at the Supreme Court of Canada. Justice for Children and Youth | JFCY – protecting the legal rights and dignity of children and youth.
[38] Child, Youth and Seniors Advocate Act, SNB 2007, c-2.7, subs. 13(2)

the practice and experience in Quebec, Alberta and elsewhere, should do three things: 1) The Advocate should have the authority to seek enforcement of their recommendations in the Court of Queen's Bench if the Advocate finds that child rights have been violated and responsive actions on the recommendations made are either refused or unnecessarily delayed; 2) The Advocate's authority to offer Advisory Opinions to guide the emerging jurisprudence in New Brunswick on the interpretation and application of the Charter and the UNCRC in cases affecting children's rights should be made explicit, and should be given statutory standing to appear as an intervener before courts and administrative tribunals at all levels[39] in New Brunswick where the implementation of those rights is in dispute or potentially in play; and 3) the Advocate should have the authority at any time to request the appointment of counsel for a child and should be given responsibility and resources for the training and professional development of lawyers retained to act as legal representatives of children.

None of these proposed changes are ground-breaking, some already exist at common law but simply need definition, and they all constitute a modest evolution from the existing model of rights enforcement that we know. All of these changes are well within our grasp and could be implemented with only a modest increase to the Advocate's budget and staff complement. What the recommendations simply require is that government take a hard look at what is working elsewhere and bring all of those changes into law for the benefit of New Brunswick children. Taken together, these legislative changes would have the impact of giving real enforcement to real rights for every child in this province. Following these changes, Canada would be able to report to the United Nations that New Brunswick is taking children's rights seriously and following the advice of the UN Committee on the Rights of the Child to have all of those rights meaningfully enforced.

[39] The Committee on the Rights of the Child considers these court intervenor powers (as well as legal representation of children) as an essential attribute of Children's Commissioners and Advocates Offices: See General Comment No. 2, CRC, *The role of independent national human rights institutions in the promotion and protection of the rights of the child* CRC/GC/2002/2, para. 14.

RECOMMENDATION 2

It is recommended that the Province replace all of the child and youth provisions of the Family Services Act with a new Children's Act consolidating in one law all of the provincial laws affecting children and youth. It is recommended that these legislative changes be carried out in stages with the first phase addressing the Family Services Act reform and that subsequently new changes be brought in, in three years' time following a comprehensive review of New Brunswick laws and regulations to ensure their conformity with the UN Convention on the Rights of the Child.

It is further recommended that the compliance mechanism under the Children's Act for all complaints in relation to child and youth services, or for any alleged violations of any rights guaranteed under the Children's Act be by way of complaint to the Child and Youth Advocate. Consequential amendments should therefore be made to the Child, Youth and Senior Advocate Act to ensure that the Advocate: 1) have authority to seek enforcement of recommendations made following a finding of a child rights violation but not followed by the Deputy Head of a public body, before the Court of Queen's Bench; 2) be granted express authority to offer Advisory Opinions on the implementation of the Convention on the Rights of the Child in New Brunswick and be authorized to seek standing as an intervener on child rights matters at every level of court or administrative tribunal competent to determine such matters; and 3) have the express authority to request the appointment of counsel by the Attorney General for any child in the Province and the mandate and resources needed to train all lawyers in the Province appointed to act as legal representatives of children.

PART III – Recommendations in response to Government's Consultation Paper

Nathan is twelve years old and has significant developmental delay. His teachers were however concerned about his poor hygiene and indications of neglect. They reported their concerns to Child Protection, but failed to see any progress. Child Protection opened a case and began working with the family, but faced with the lack of any significant improvement, school personnel contacted our office and asked for our involvement. Following our investigation and several case conferences involving the child it was decided to place the child in a foster parent setting. Following his placement the symptoms of neglect disappeared and the child began to see improved educational outcomes again.

* * *

Patrick is an 11-year-old autistic child who lives in a specialized care home set up for his individual needs, but has difficulty following rules. He often misbehaves and has had a couple of run-ins with the local RCMP detachment. One officer recently told one of the boy's case workers that they are just waiting for him to turn twelve so that they can charge him. The case worker came to us and asked for help; they need to rely on the police when Patrick acts out or becomes unruly, or runs away, but they don't think that he should be charged, or that prosecuting him will help in any way.

Two months after the child turned twelve he tore a piece of siding off the house he was living in and ran away. His caregivers tried to run after him but lost him and called the police for assistance. He was found with the torn piece of siding from the house in his hands and was arrested and charged with possession of a weapon and attempted assault. Neither the child's mother nor his caregivers were allowed to be present with him while his charges were processed. Why should children in care be treated this way by law enforcement officials? How can we collectively develop more appropriate responses to inappropriate behavior by developmentally delayed youth?

* * *

As our Child Welfare Review unfolded, several developments precipitated the drive for reform and principal among these was the media flurry surrounding a case of chronic neglect that gave rise to our *Beyond Closed Doors* report and the *Savoury Report*. We are pleased that the recommendations from these reports were well received by Minister Shephard and the

government of the day. As we finalized our analysis and completed our reports stemming from our broader child welfare review last year, government was already following up on its commitment to law reform. The consultation paper produced by the Department of Social Development in respect of this reform is both probing in terms of its detailed questions and encouraging in terms of the breadth and scope of the reform. We provided our submissions to the detailed questions in the consultation paper to the Department in late February 2020 and they are set out in a separate appendix to this report. We will also be completing those submissions with the release of *Through Their Eyes,* the companion report to this one, which makes specific recommendations in terms of all child welfare system practices and policies.

While the Department is to be commended for the thoroughness of its review and for taking the time to consult broadly enough to get things right we will make some general comments on the broader consultation questions here and also pause to reflect on the stakeholder engagement and policy development process.

Our point on process is informed in part by the novel experiment in Quebec where the Laurent Commission was given a sweeping 18-month mandate to review child protection services and child rights implementation. The Laurent Commission was comprised of four members of the Quebec National Assembly and four independent experts in relation to child services from across Quebec who assist two vice presidents and the Commission chairperson, Mme. Régine Laurent, former head of the Quebec nurses' union, to propose a new blueprint for child protection services in Quebec. The Commission conducted hearings and had a secretariat and professional research staff at their disposal. Other than the broad mandate and the child rights-based approach that underpinned the Commission's work, what we find commendable about this process is its commitment to hearing from all relevant stakeholders and its innovative practice in terms of having elected officials, from all political stripes, work side by side with appointed experts in the field to develop proposals for reform for government.

In our view this reflects the kind of multiparty commitment to children that New Brunswickers expect from government and provides a refreshing example of how democratic leaders can mix in with unelected experts to find the best solutions for children. We have reported separately on the B.C. legislative committee for the Representative for Children and Youth[40] and welcomed this mechanism for regular engagement of elected officials on priorities identified by BC children and youth to their legislative Advocate. We are convinced that if New Brunswick wants to make real changes to keep children safe, if we really want integrated service delivery to work for the benefit of every child, if we really want to find ways to work across systems and disciplines to ensure accessible child-friendly justice, then the collaboration we speak of has to

[40] BC Select Standing Committee on Children and Youth, Annual Report, 2012-13, at p. ii. Microsoft Word - SSC-CY-2012-2013 Annual Report-FINAL.docx (leg.bc.ca)

come from elected officials themselves. We need a mechanism for members of every party to work together as MLAs and ideally with children and young people themselves, among other stakeholders, to make sure that we offer every New Brunswick child the best possible start in life.

We would urge the Minister to think of ways in which this law reform process can be the starting point for this new way of business and to take measures also in a new *Children's Act* to initiate and sustain this cross-parliamentary collaboration in favour of children.

One of the drawbacks of more traditional public consultation mechanisms, as for instance the hire of an external consultant, as was done very ably with the *Savoury Report*, is that when government engages this sort of external review of a given government service, it will guarantee an impartial recommendation in terms of established best practices, but not ones that are always ideally adapted to the local terrain. We have reservations for instance with respect to the manner in which the *Savoury Report* acknowledged the great advances New Brunswick had made in terms of Integrated Service Delivery, at the outset of the report but then went on to propose solutions from other jurisdictions without taking into account the work of reform and the systems change already underway. The same caveats could be expressed with respect to New Brunswick's efforts to date towards better child rights-based implementation of child protection laws. This is why we return to these significant tenets of reform in this report and urge government to stay the course in terms of these general directions.

Alternatively, in the Department of Social Development's consultation paper we find a few examples of suggestions for reform that clearly come from in-house. In our view these speak to the history of under-resourcing that this Department has always known and an urgent need of front-line staff to manage expectations and limit exposure. A more child-centric law reform consultation would start from another footing. We are concerned of course with the Department's suggestions that the criteria for child endangerment should be reduced by not including violence to children outside their family home and by specifically dropping the referral criterion for educational neglect. We are concerned that a Department mandated to ensure child protection in New Brunswick would actually suggest these kinds of changes, and we fear that it stems from the incredible pressures under which the system is currently operating. However, we would strongly advocate for asking what needs to be done to protect children, not what can be done given a lack of resources.

Clearly, neither proposal for reform can withstand child rights scrutiny. The obligation on government under Article 19 of the UNCRC is to "take **all appropriate … measures** to protect the child from **all forms of physical or mental violence**, injury or abuse, neglect or negligent treatment….while in the care of parent(s), legal guardian(s) **or any other person** who has the

care of the child"[41] [emphasis added]. We are strongly opposed to any reduction of the Minister's mandate for child protection in this province. The current proposal for reform must not be undertaken from a "doing more with less" rationalization of services approach. We have to keep a clear-eyed commitment to our obligations as duty-bearers to children and fund the necessary investments to equip child protection social workers to fully carry out their mandate.

The Child and Youth Advocate recommends that a new *Children's Act*, in keeping with the Province's Strategy for the Prevention of Harm to Children and Youth[42], adopt a comprehensive child protection framework in keeping the government's obligations under Article 19 of the UNCRC, as explained in detail by the Committee on the Rights of the Child in its General Comment No. 13[43]. General Comment 13 recalls government's obligation to protect children from all forms of violence or neglect without exception. Educational neglect is expressly mentioned within the Committee's definition of neglect or negligent treatment[44]. The Committee's general comment also speaks to the cyclical relationship between violence and school abandonment:

> 15. **Survival and development – the devastating impact of violence against children.** Children's survival and their "physical, mental, spiritual, moral and social development" (art. 27, para. 1) are severely negatively impacted by violence, as described below:
>
> …
>
> (b) Developmental and behavioural consequences (such as school non-attendance and aggressive, antisocial, self-destructive and interpersonal destructive behaviours) can lead, inter alia, to deterioration of relationships, exclusion from school and coming into conflict with the law. There is evidence that exposure to violence increases a child's risk of further victimization and an accumulation of violent experiences, including later intimate partner violence.

Regarding the comprehensive nature of the prohibition on violence against children, the Committee takes pains to explain the scope of the State obligation to prevent all forms of violence in paragraphs 19 to 32 of the General comment and provide detailed definitions of neglect or negligent treatment, mental violence, physical violence, corporal punishment, sexual abuse and exploitation, torture and inhuman or degrading treatment or punishment, violence among children, self-harm, harmful practices, violence in the mass media, violence through

[41] UN Convention on the Rights of the Child, UNGA Res 44/25, November 20, 1989, Art. 19: Microsoft Word - Document1 (ohchr.org)
[42] NBCYSA, Provincial Strategy for Prevention of Harm to Children and Youth, 2015, ChildrenYouthSafeFromHarm.pdf (cyanb.ca)
[43] CRC, General Comment 13, *The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13.
[44] See para. 20 (d) of General Comment 13 https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf

information and communications technologies and institutional and system violations of child rights, all of which are considered within scope. Furthermore, the committee also defines caregivers and the expression "while in the care of":

> The definition of "caregivers", referred to in article 19, paragraph 1, as "parent(s), legal guardian(s) or any other person who has the care of the child", covers those with clear, recognized legal, professional-ethical and/or cultural responsibility for the safety, health, development and well-being of the child, primarily: parents, foster parents, adoptive parents, caregivers in *kafalah* of Islamic law, guardians, extended family and community members; education, school and early childhood personnel; child caregivers employed by parents; recreational and sports coaches – including youth group supervisors; workplace employers or supervisors; and institutional personnel (governmental or non-governmental) in the position of caregivers - for example responsible adults in health-care, juvenile-justice and drop-in and residential-care settings. In the case of unaccompanied children, the State is the de facto caregiver.[45]

Furthermore, the Committee's definition of "care settings" is equally embracive and underscores the State's obligation to do much more than merely protect children against intra-familial violence:

> Care settings are places where children spend time under the supervision of their "permanent" primary caregiver (such as a parent or guardian) or a proxy or "temporary" caregiver (such as a teacher or youth group leader) for periods of time which are short-term, long-term, repeated or once only. Children will often pass between caregiving settings with great frequency and flexibility but their safety in transit between these settings is still the responsibility of the primary caregiver – either directly, or via coordination and cooperation with a proxy caregiver (for example to and from school or when fetching water, fuel, food or fodder for animals). Children are also considered to be "in the care of" a primary or proxy caregiver while they are physically unsupervised within a care setting, for example while playing out of sight or surfing the Internet unsupervised. Usual care settings include family homes, schools and other educational institutions, early childhood care settings, after-school care centres, leisure, sports, cultural and recreational facilities, religious institutions and places of worship. In medical, rehabilitative and care facilities, at the workplace and in justice settings children are in the custody of professionals or State actors, who must observe the best interests of the child and ensure his or her rights to protection, well-being and development.[46]

There is no reason why New Brunswick's new child protection measures should provide less protection than the old ones. There is no reason why New Brunswick cannot fully own up to its obligations to children under international human rights instruments. Child protection services will need to have the resources to fully carry out these responsibilities, but the yield from these

[45] Ibid. para 33
[46] Ibid, para 34

meagre additional resources will be transformative, not only for the children and families whose lives will be protected, but for society as a whole.

RECOMMENDATION 3

It is recommended that the Minister of Social Development take measures to encourage all party support and participation in the development and implementation of a new Children's Act. It is further recommended that the scope of child protection under the new legislation not diminish child protection in New Brunswick but enhance it in full implementation of the government's obligation under the UNCRC and as outlined in General Comment 13 of the Committee on the Rights of the Child and that the law reform follow the recommendations in this report and its appendix.

PART IV – Integrating Integrated Service Delivery into the Children's Act

Justin is an Indigenous youth with FASD who has been living in some form of care since he was six years old. He is now 18 and lives in an individualized placement far from his native community. He still enjoys connecting with his culture and an elder from a neighbouring first nation has been a tremendous mentor for him. At his group home, however, he has had repeated incidents with other youth and lately with his caregivers. One of his caregivers found that he was too forward with her and he was charged with assault. Following his charges he was sent for assessment and then remanded to the secure custody New Brunswick Youth Centre. When returned to court to enter a plea he was held in a courtroom lock-up for three hours awaiting his return to NBYC. During this period he entered into a verbal altercation with one of the Deputy Sheriffs which escalated into a physical altercation. In the scuffle which ensured seven deputy sheriffs were involved in efforts to subdue him and the initial sheriff involved choked him by the throat and bloodied his nose and mouth. The sheriff was eventually dismissed, but the prosecution initiated against him was dropped. No other efforts were made to compensate the youth for his loss. He went on to accumulate more charges and was sentenced to an intensive rehabilitative custodial sentence and spent many more months isolated on a unit by himself in the youth prison. His plans to continue his schooling in an adapted First Nations high school setting and to return to his community were interrupted and the medical interventions needed to treat a significant brain cyst have not been pursued. The community-based FASD interventions to help him learn about his diagnosis and cope with it were also put on hold.

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Jacob is seven years old and has been raised by his Mom and her boyfriend Tom since he was two years old. Jacob calls Tom Dad and is very close to him. One weekend while he was staying at his grandmother's he disclosed to her that a few days before Tom had pulled down his pants and made him suck his penis. The Grandmother called child protection and they made sure that Jacob stayed with Grandma until they could meet with Mom and Tom. Tom was arrested but denied any wrongdoing. Mom believed Tom over Jacob. The police interviewed Jacob and then his Mom with a social worker and both the police and the child protection professionals believed Jacob. The crown prosecutor reviewed the interview tapes however and decided that charges could not proceed. Mom decided to marry Tom and the Department of Social Development made plans to reunite Jacob with his parents. Jacob disclosed to his counsellor that he is happy with this because he "doesn't want Dad to go to jail" and that Dad told him "it would never happen again". Our office became involved when the child's counsellor informed us of the case and asked if we could prevent the reunification. We recommended strongly against

reunification, but the Department determined that this was the best interest solution for the child in question.

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More than anything else the failure of child protection services to make meaningful change in cases like the two troubling tales just outlined above is in our view a failure of the Province as a whole to aid children in a holistic way. As Advocates for children and youth we are convinced that cases like these last two could achieve vastly improved outcomes if child protection services worked more regularly as part of multi-disciplinary and integrated practice teams. Not only would this help better ground child protection social workers, as to the behaviours that their clients are exhibiting in school or in health or community settings, it would also help all other service providers around the child understand the trauma that the child has experienced whether in their birth-family setting, or following placement and removal. That was the great hope we had in recommending a multi-disciplinary practice model in our *Connecting the Dots* report[47]. Integrated Service Delivery was finally rolled out Province-wide in 2018, ten years after the Advocate's report, through the joint initiative of the Departments of Education and Early Childhood Development, Social Development, Health and Justice and Public Safety.

We are convinced that Integrated Service Delivery is making an important difference in the quality of services received by many children and their families in New Brunswick. Other jurisdictions view New Brunswick as a leader in collaborative and integrated practices with children and youth. However, our review of child welfare services over the past two years has also convinced us that ISD is critically not reaching the children at the apex of needs who should have been given priority treatment by local child and youth teams. Most significantly, we routinely find that there are children with a child protection care status or an open case, who do not have an ISD common plan. Our impression and working hypothesis as an Advocate's office is that ISD common planning is not routinely initiated by Child Protection social workers. This is unacceptable.

Child protection social workers will generally cooperate and attend Child and Youth Team meetings or common plan meetings if their client's teacher or health care provider has initiated an ISD common plan for the child, but the information does not always flow both ways. Moreover, Social Development officials often fail to take the initiative in ensuring that ISD

[47] NBCYSA, *Connecting the Dots: A report on the condition of youth at risk and youth with very complex needs in New Brunswick*, 2008 Fredericton: In the Name of Our Children: A report on the condition of youth with exceptionally high needs in New Brunswick (cyanb.ca)

works for the benefit of their clients. Child protection social workers and other social workers from Social Development may observe the multi-disciplinary team discussions, they may offer advice if they think the plan is moving away from a decision which Social Development or child protection services has determined to be a best interest solution for their client, but generally client file information is not shared by the Department at these tables. We have attended ISD common plan meetings where child protection social workers have refused to share information with the Advocate, because other ISD team members were present.

The Advocate's 2008 *Connecting the Dots* report warned about the culture of secrecy which pervaded child protection services at the time. It was expected that the culture shift towards a culture of information-sharing and collaborative work would be more difficultly achieved in Child Protection and policing services environments than in health or education services. It is also not surprising that since ISD was rolled out as a school-based service, with a community mental health lead, that Social Development and Public Safety partners have been less frequently involved and less likely to engage with the service delivery model than other stakeholders and service providers to children. We are adamant, however, that children in conflict with the law and children known to child protection services are the very youth who should be at the top of the line for ISD Child and Youth team services.

Social Development needs to be more proactive in ensuring all partners are involved in integrated case planning with the school, community and family domains. Both our *Behind Closed Doors* Report and the *Savoury Report* found that in the tragic case of childhood neglect under review in those reports that despite the numerous professionals involved in the family's care there was no integrated case plan developed to make all partners accountable and responsible to the children. Social Development staff need to take the lead and be more proactive in sharing information and accessing information from school staff and other professionals as soon as possible.

This is why we are recommending changes to the proposed *Children's Act* to ensure that an ISD common plan be automatically developed for every child with a criminal record and every child for whom Social Development has opened a child protection file, and automatically considered for children with a Personalized Learning Plan (PLP), complex health needs, disability supports and/or lengthy family support under the *Family Income Security Act*. We have consulted with the former directors for ISD and both have indicated that it was never intended that a child in New Brunswick could be flagged by Public Safety or Social Development in this way and not have the benefit of an ISD common plan to ease their rehabilitation and strengthen their ties to family, community and pro-social contacts within the educational environment. A child-rights based approach to service delivery requires this kind of service integration and information-sharing. Courts and parents expect it. Children deserve it. ISD was developed with the needs of

this vulnerable clientele particularly in mind. The fact that these children above all others are not routinely receiving the benefits of this multi-disciplinary practice intervention is a serious flaw that must be immediately and effectively addressed.

We would further stress the importance of assigning cabinet-level responsibilities to a Minister for Children who is empowered to oversee and require case-planning and resource sharing across departments. The Minister charged with this responsibility should have authority to immediately resolve funding disputes between departments and to require participation in case planning. Whether this is a stand-alone Minister or a responsibility designated to one of the existing departmental ministers is a call for the Premier of the day, but these responsibilities are essential to realize the full potential of ISD.

Over the past six years protection and privacy laws have changed to allow for the sharing of information for integrated programs, services and activities not only within government departments and agencies but with non-public agencies as well in order to advance child welfare. Social Development staff need to take the lead on ensuring the implementation of integrated policy and practices in child welfare. Comprehensive training must be provided to front-line staff, in service integration, child rights-based approaches, child friendly justice principles and trauma informed care to ensure that front line staff will seek necessary information from partners and share information with them in order to advance best interests solutions for every child in their care. All four ISD departments, health authorities and school districts need to be accountable and share responsibility for integrated child protection planning and case management.

Given the perennial pressure on government to be more efficient and effective with existing resources the cost overruns of siloed system of care where departments only reach out in moments of crisis is no longer sustainable. The benefits of service integration only accrue if the integration happens early. This will ensure that every child with an open child protection file benefits from ISD's wrap-around model of care. In the past we would define children as complex because multiple systems would fail them by not responding proactively and in a coordinated approach. We have to work better together and much earlier in the process of sharing of resources, services, information, knowledge and skills. Working in silos no longer makes sense. It only makes children suffer longer.

We would also offer that not only will legislative amendments be needed to operationalize this change, but that significant effort in relation to Practice Standards revisions and training will be needed to change the culture of siloed thinking in policing and child protection and move towards a multi-disciplinary child-centric practice. The new law should also take measures to ensure that parents who abuse their children cannot simply avoid ISD involvement by refusing their consent. Deemed consent to information sharing within ISD should be inferred wherever

public services are provided to children. We believe that trauma-informed care cross-training efforts, child rights-based approach cross-training, network of excellence training and collaborative process development, and multi-sector efforts to renew and revise the Provincial *Child Victims of Abuse and Neglect Protocols*, can all be very helpful in operationalizing this change and bringing about the culture shift that is needed. We remain concerned about the slow pace of reform in relation to the renewal of the provincial *Child Victims of Abuse and Neglect Protocols*[48] and would formally offer the Advocate's assistance in co-steering this renewal process in order to ensure timely and child-rights friendly revisions to the Protocols.

Our 2019 Behind Closed Doors report contained four recommendations, the first of which called for a new integration of services to support ISD in early years and in early childhood education centres. Most critically, ISD needs to work for the benefit of infants, toddlers and young children, since early years trauma is the most impactful and long lasting. However, the multi-disciplinary practice teams in early years are entirely different from the professionals who may need to support school-aged children and adolescents. So ISD in early childhood needs to be approached differently from the ground up, with added support from pediatricians, ob-gyns, maternity ward professionals, public health nurses, day-care workers and operators and many other early childhood specialists and community supports. Guidance may be available from our neighbours in Quebec who have developed an interesting model for service integration in early years which the Laurent Commission aims to improve even further.[49] Three years after the release of our report, and despite the Minister's acceptance in principle of the recommendations, we are concerned with the lack of progress in regards to this critical recommendation and the other recommendations from *Behind Closed Doors*.

Finally, to ensure that ISD, using a child-rights based approach to service delivery, becomes the new normal in New Brunswick and not an erstwhile flavor of the month reform that comes and goes, we are recommending that the ISD and network of Excellence Board of Governance be formally laid out in the *Children's Act* as the overarching governance structure for the coordination of services to children and youth in New Brunswick. In this respect it should replace the more recently established Interdepartmental Committee on children and youth and take-over that ECO led Committee's mandate for: 1) monitoring and training in relation to the Child Rights Impact Assessment Tool; 2) monitoring and evaluation and implementation and renewal of the *Strategy for the Prevention of Harm to Children and Youth*; and 3) cross-government coordination of services to children and youth. We would further recommend that this Committee be expanded to include representation from child and youth serving

[48] Child Abuse Protocols (gnb.ca)
[49] Services intégrés de périnatalité pour la petite enfance (SIPPE), https://www.csdepj.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-052_Bilan_travaux_2019_Prem_recommandACTIONS_VF.pdf

departments represented on the Interdepartmental Committee on children and youth, and that it continue its practice of rotating co-Chairs among the Ministers and Deputy Ministers of Education, Health, Public Safety and Social Development, but also include ECO. Additionally, the Advocate should have an observer status at this ISD governance table and the new structure should be given a mandate to assist the Child and Youth Advocate's Office with its child rights training efforts and data-monitoring efforts, specifically in relation to the annual publication of, and development of, an online portal for the Child Rights Indicator Framework (CRIF) and in relation to the piloting of the GlobalChild data-monitoring tool and subsequent revisions of the CRIF.

RECOMMENDATION 4

It is recommended that the Children's Act include a separate part of the Act dealing with Integrated Service Delivery (ISD). This Part should define ISD and provide that this coordinated approach to interdepartmental information-sharing and multi-disciplinary practice is mandated as the integrated service delivery mechanism for all services to children and youth in the Province. Children in conflict with the law, or whose behavior would be criminalized but for their age, and children known to child protection services must have an ISD common plan developed for them, and other children at risk or with high needs should be included where appropriate. The Act should set out the Governance structure for ISD, including the authority of a designated minister, and the existing governance structure should be expanded to include the membership and mandate of the Interdepartmental Committee on Children and Youth, while retaining the system of rotating chairs among the existing ISD departments, with the addition of Executive Council Office. The Child and Youth Advocate should be allowed to designate an observer to be a member of this Committee and the Committee's mandate should include assisting the Advocate with child rights data monitoring across government.

It is further recommended that the ISD governance table develop, in consultation with the Child and Youth Advocate, a new integrated service delivery and child rights training program and other cross-training programs for all ISD departments (old and new), in relation to child-rights based approaches, trauma-informed care, new child abuse and neglect protocols and other ISD training needs. The Department of Social Development should also invite the Child and Youth Advocate to co-chair a renewed process with all ISD partners to expedite the new edition of the Provincial Child Victims of Abuse and Neglect Protocols, with particular emphasis on the new guidelines for neglect. Finally, a separate working group between the ISD governance table and the Advocate's Office should be tasked with monitoring the implementation of the recommendations from the current Child Welfare review and should be mandated to report to the Legislative Assembly within six months of the release of this report on the status of recommendations from the 2019 Behind Closed Doors Report.

PART V – Practice and procedure in Child Protection Matters in Family Division

Alicia is 14 years old and has a half-sister of 11 and a half-brother of 5. They all have separate birth fathers but have never known another parent than their mom. Mom is 32 now but has been battling addictions since she was 16. The children have all had some experience of life in care at different times when their mother fell into her addictions. They have lived in many different homes, in different provinces, often trying to avoid child protection's gaze. The fathers of each child are estranged from them. Two of them are in prison serving time for drug offenses and crimes of violence. For the last year the three children are living with their maternal grandparents, but the Department has made a plan to reunite them with their mother and Alicia is very much opposed to that plan. She is afraid that her younger siblings will be parentified, as she once was. She knows that she can insist on staying with her grandmother, but she feels as though that would be placing her younger siblings at risk.

We intervened in this case and recommended against reunification, but the Department decided that reunification was the best interest solution. The younger children were reunited with Mom and Alicia was allowed to stay with her grandmother. To this date Alicia has been asking for our assistance in being able to maintain contact with her siblings, as communications have pretty much broken down between she and her mother, and between her mother and grandmother.

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Jayden, Lisa and Alex are young siblings whose family has been supported by social workers from the Department of Social Development (DSD) since their mother's teenage years. Michelle, the children's mother, began receiving services through DSD's Youth Engagement Services (YES) program at age 17 as she was pregnant, homeless and struggled with addictions to alcohol and a variety of drugs. At 18 years of age, she was now a mother to Jayden and had little insight into how to care for an infant, many times putting young Jayden's physical and emotional well-being at risk. Michelle's relationship with Jayden's father, Kevin, was quite volatile as she was the victim of intimate partner violence on several occasions. Kevin also found the demands of parenthood very challenging and would frequently lose his temper at the sound of young Jayden's cries. This fragile relationship was further damaged by Kevin's unpredictable mental health crises, sometimes leading to hospitalizations after attempts to take his own life.

At just under a year of age, Jayden was taken into protective care by DSD as Michelle ignored the safety plan not to allow Kevin unsupervised access to Jayden who consequentially sustained minor injuries from an accident that neither parent could explain. At this point, the family's file transferred from Family Enhancement services to the Child Protection program as it was clear that their needs had become more acute. Jayden remained in foster care over the following two years as several custody orders and extensions were granted with neither parent demonstrating much progress or cooperation with the case plan. Two years later, the Department decided to apply for a guardianship order of Jayden. The reasoning behind this decision was substantiated by a parental capacity evaluation of Michelle that raised serious issues with her ability to parent.

During this time, Jayden's younger sister, Lisa, was born. The Department planned to include Lisa on the guardianship order application, however, was prevented from doing so by the family crown who advised that, "Every child is a clean slate." As such, the only option left was to apply for a concurrent 6-month custody order of Lisa when applying for guardianship of Jayden. In the end, the judge did not grant either order and both children were reunited with their parents under a 6-month supervisory order, meaning they could live with their parents as long as the family agreed to work with a Child Protection social worker. This court decision was not what the supervisor had predicted as she felt that the application included overwhelming evidence against reunification. Are the courts in a better position to determine the child's risk of endangerment than the professionals tasked with child protection and who have been working with the family for months? Was the outcome influenced by a last-minute change in the Family Crown prosecutor taking carriage of the case? Did the fact that the children were the subject of separate orders weigh against guardianship or temporary care? The Department was left with many questions and remained very preoccupied about this family.

Six months later, Michelle gave birth to her third child, Alex. At 3 months of age, Alex sustained a severe head injury necessitating airlifting to the IWK where intensive and specialized medical follow-up concluded that blunt trauma, either accidental or intentional, was the cause. Similar to when Jayden suffered injuries from an accident as an infant, neither parent could offer an explanation as to what occurred. The police investigated, found conflicting evidence from both parents regarding what had caused the injury, but were left with an inconclusive investigation and no charges were laid. Once more, Jayden and Lisa were placed in foster care. Alex joined them once released from the hospital.

During this most recent involvement with Child Protection, both Michelle and Kevin were cooperative with the case plan. Addictions were managed, parenting advice was followed and the overall quality of their visits with the children improved with increased affection and supervision. For these reasons, all three siblings have since been reunited with their parents under a supervisory order. It is our hope that the trauma these children have endured in their young lives has finally come to an end. The case however raises troubling questions about how much trauma should young infants have to endure? Is there a higher burden of proof in child protection cases in relation to infants? If the burden of proof is differential, should it not be lower for children of tender years? Was every decision to reunite this family justified having regards to a best interests analysis for each child? What is the cost of these repeated placements into care in early years? Will the family be supported sufficiently to avoid further disruption or child protection involvement?

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As discussed at the outset of our report, some of the main drivers for our child welfare review were the concerns brought to us informally through discussions with members of the family bar, regarding delays in Family Court and the judicialization of child protection matters. Justice

Guerette chaired a Family Court Task Force[50] some ten years ago, but that process, in which the Advocate participated, was not the appropriate forum in which to advance the case for independent legal representation of children, or the concerns of lawyers involved in child protection matters. Most of the family bar practitioners are routinely or exclusively engaged in divorce and custody and matrimonial property disputes and child protection concerns are unfortunately the orphan child in this area of practice. This is why the CBA[51], again on New Brunswick's initiative, has recently established Child and Youth law sections where these areas of practice, along with other child and youth law concerns can be more thoroughly addressed.

Our child welfare review has not been able to address this topic as thoroughly as it should and we recommend that the Department of Social Development and the Attorney General's Office in consultation with our Office, the Legal Aid Commission, the Court Rules Committee and representatives of the Family Court Division undertake a larger process of review to ensure expedient and child friendly access to justice for all New Brunswick children. In the interim, we offer some five recommendations in few priority areas urgently needing reform and we would encourage all stakeholders to take up the challenge on the basis of the discussion points and recommendations outlined below.

During our jurisdictional scan we found and were impressed by the quality and quantity of work being done in Europe to advance child-friendly justice. For many years already, UNICEF, Terre des Hommes, Save the Children, Defence of Children International (DCI) and other international organizations and NGOs for children have taken up the Committee on the Rights of the Child's call to make courtrooms and court proceedings more accessible and more open to children. As early as 2008 the UN Secretary General established a Guidance note on the UN Approach to Justice for Children[52]. In 2010 the Council of Europe established its own guidelines that were much more detailed and really put forward a realistic plan as to how justice systems and police services and social services could all come together to adapt their services in ways that meet children where they are and give them timely and effective access to justice.[53] These guidelines gave rise to significant policy development and practice changes at the national level in many European States. In 2015, the European Fundamental Rights Agency (FRA) carried out for the Council of Europe an assessment of the changes. Its report from interviews with professionals in 10 EU member states to evaluate child friendly-justice practice summarizes the chapter on the child's right to be heard in part as follows:

[50] https://cfcj-fcjc.org/inventory-of-reforms/new-brunswick-family-court-pilot-project/
[51] https://www.cba.org/Sections/Child-and-Youth-Law-Section
[52] https://www.unicef.org/protection/RoL_Guidance_Note_UN_Approach_Justice_for_Children_FINAL.pdf
[53] Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, Strasbourg, 2010 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9

> Participation is a core principle of the *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. The meaningful participation of children requires that child-friendly procedures be developed within a system originally designed for adults. The relevant authorities must create a safe and friendly environment and use appropriate methods of questioning to determine and take into account a child's specific needs. They must also protect them, to keep children, especially those who have been victims or witnesses to a crime, from suffering further psychological trauma. Authorities must respect and empower them, while ensuring their well-being – an important element to consider given the stress and trauma of judicial proceedings.[54]

We would want to see a similar process unfold in New Brunswick to develop child-friendly justice practices here, based upon these European and UN models.

Our initial concern as Advocates has traditionally been with the rotating door to child protection. Too many of the cases that come to our office involve children who may have spent their entire childhoods in and out of care. The *Family Services Act* puts a strict limit on the number of months children can stay in temporary care arrangements because the law recognizes the child's need for permanency. A child who reaches age 12 having been in and out of temporary care arrangements has been robbed of a childhood and an equal chance in life, yet cases exist where the Department continues to leave the child in limbo while treating the parent's journey and not the child's as its chief preoccupation. There needs to come a point where the loss of stability for a child becomes urgent and pressing.

Unfortunately, because the law had been interpreted as requiring 24 consecutive months in care before a child should be required to be placed permanently, children were often returned to their family for an attempt at reunification, after 18 or 20 months. Then, if the family reunification plan broke down again, there was a new placement in care and the 24 month clock was set back. During the periods of placement in care, children with behavior challenges may have experienced two, or four, or more placements. This is why children experience a loss of connection to any real family and talk about the experience of being robbed of their childhoods, of never knowing a forever home, of not having a significant person or family with whom to share their joys or sorrows, of being alone in the world for birthdays or Christmas holidays. Today the law has changed so that 24 months is clearly interpreted to mean 24 months cumulatively and not consecutively, and that will require resourcing and adjustments as we discuss below. Our point here is that the stricter interpretation required by the courts is a classic illustration of the way in which the jurisprudence in New Brunswick has traditionally

[54] FRA, Child Friendly Justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States, Vienna, 2015 https://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf

protected family unity over the best interests of children, even when the statute clearly requires the opposite. One of the challenges in the proposed law reform will be to insist upon ways in which judges will be able to hear directly from children and young people about their lived experience and also to ensure that judges like all other stakeholders benefit from the child rights training and child friendly justice training that must accompany the law reform.

The recent reform in relation to the 24-month calculation will cause many new cases to come forward, as will the development of kinship care. Domestic legal aid services estimated that as many as 150 new cases were in the queue as a result of only some of these changes. Over a year into the new reforms the Advocate is concerned with the uptake of the new provisions and its impact upon already congested caseloads. Moreover, we are concerned that the real reform that is needed is not merely with how should we calculate the 24 month period, but whether 24 months is too long a period already. In some jurisdictions 12 months is the rule, recognizing that children have an urgent need for permanency[55]. Moreover, whether time is calculated consecutively or cumulatively, the problem of the revolving door will still continue, albeit potentially with shorter periods of removal or placement. A truly child-friendly rule might be to say to parents that the 24-month rule should be counted chronologically. If the child protection concerns are not definitively resolved within 24 months of an initial placement, then the removal will be sought. There will always be exceptions that can be covered by ministerial discretion, but the presumption should exist that permanency while a child is still young enough to benefit should be the norm.

There should also be discretion to shorten the period when a parent has a history of referrals and removals. To treat each new child born to a parent as a "clean slate", as seen in Alicia's story, is to import a criminal law sensibility (in which the parent's procedural rights are foremost) into a family law context (where the child's best interests are paramount). One of our core concerns is that the 24-month rule does too little to protect infants from chronic neglect and abuse. Neglect in early childhood as we have previously stated is often more harmful than abuse. But our child protection system tends to give parents all the leeway they need to fail repeatedly until the child is old enough to denounce harm themselves, and even then, the system will not always listen. This is senseless, especially now that the neuroscience clearly establishes the life-long impacts of trauma in early childhood. We ask whether the Court system can respond more proactively in child protection matters involving infants. We would favour a rule that gives the priority to any child under seven involved in a child protection matter to have the benefit of independent counsel. And we would encourage the bench and

[55] In Ontario there is a graduated approach where the law sets a 12 month maximum for interim care of children under 6 and the 24 month rule applies to children over six.

the bar to take an active interest in cases where early years childhood neglect is alleged and to be more responsive to the needs of these children.

None of this is to diminish the legitimate consideration of family unity or connections to birth parents, even ones who cannot fully care for their child. As we have recommended in Part One of this report, that balance can best be met by expanding the options for family contact outside of the question of placement. For example, right now the Department will often leave a child in placement limbo when a parent spends years wrestling with addiction and has long periods of being unable to provide for that child's security. Yet despite being slow to make a permanent placement decision, the Department can also be incredibly rigid in denying parental contact during temporary placement, sometimes denying even supervised parental contact when a parent fails a drug test or appears intoxicated. This can be seen as the worst of both worlds – denying the child permanency and limiting contact with the one permanent parent. A superior approach, we believe, is to be quicker to grant the child permanent placement but allow the Minister and courts a range of options in maintaining parental contact as is in the child's interests.

All of the efforts at reform will have to be supported by a robust education and training program for members of the Bench, the Bar, child protection professionals and the broader community to make sure that child rights based approaches, integrated multidisciplinary practice, child-friendly justice and best interests approaches are understood and fully implemented in every case.

Other concerns that child protection law practitioners and child protection social workers have brought to us deal with the delays in family court. Children of course experience time differently than adults, but lawyers tell us that courts are now issuing "interim-interim" orders, because matters cannot be set down within the timelines prescribed by statute. Sometimes an interim order that is only supposed to last six months, takes six months to be scheduled. This runs against both procedural fairness under Section 7 of the *Charter of Rights and* Freedoms and the child's interests. It is anathema to the kind of thoughtful planning that each case deserves. Hopefully these are outlier cases, but they speak to the frustration that the bar has in relation to child protection proceedings given the congestion of court dockets. Of course, child protection matters are expedited, and this causes grief for parties in other family matters who may have their court dates bumped to make room for a child protection hearing. In some court jurisdictions family court matters are currently being set down for dates almost two years away, which has led to some instances of limbo where the family court matter is forever bumped by the renewal of ministerial orders every six months and the lack of resolution of the family file becomes a reason why the child cannot be permanently placed. If these delays existed in other civil matters the business community would demand and obtain change. We should as a society

be more concerned about the emotional harm and cost of such delays on New Brunswick families and children. The cost of justice delayed is arguably greater in family contexts than in criminal matters or other civil matters given the changes a child can experience, developmentally, in two years. Newfoundland and Nova Scotia, among other provinces have recently reached agreement with the federal government to expand the number of Family Court judges in those jurisdictions[56]. While New Brunswick was a pioneering jurisdiction in terms of Unified Family Court processes, consideration should be given to making additional appointments to the Family division in the Court of Queen's Bench, recognizing the human and social cost of delayed justice in these matters.

Part of the cause of delay is the concern with the increasing weight of the evidentiary burden in child protection proceedings and the length of such hearings in certain cases. Recently lawyers have been taken to task for inordinately lengthy cross-examinations in child protection matters. Experts are retained to provide voice of the child reports that take time and do not offer judges the information or value for money anticipated. What was required by statute as judicial oversight of an administrative decision taken to protect a child turns into a full-blown trial. And yet throughout the entire process, the child's voice is lost.

We have also heard through our review that Moncton Courts will frequently appoint independent legal representation for children, but that in many other jurisdictions children often do not have access to their own lawyer. Some jurisdictions are having success with judicial case-conferencing as a means of narrowing issues, expediting cases and better managing the court's docket, but the practice is not very much extended throughout the Province. We have also heard the Rules of Court do not provide sufficient guidance in relation to family matters in general or child protection matters specifically; as a result the practice in this area of law varies frequently from one judicial district to another and a consolidation of practice is required. Guidelines for counsel representing children and particularly younger children could helpfully be developed as has been done in other jurisdictions.

Finally, our overarching concern throughout this report has been to awaken concerns with respect to what we see as a dysfunction inherent in the legislative scheme, that gives the Minister all the powers needed to protect children and relies on the courts to guard against any over-reaching by the Minister. The problem with that approach is that it will too easily default towards protecting family unity over children's best interests. When, however, the Minister is given these vast powers, but the mandate is not backed up with sufficient resources, it results with problems such as we have today. Child protection professionals may shy away from their

[56] 39 new Family Court judicial positions were created following the 2018 Federal budget in Alberta, Ontario, Nova Scotia and Newfoundland: https://www.canada.ca/en/department-justice/news/2018/05/government-of-canada-announces-new-measures-to-strengthen-and-modernize-family-justice.html

legislated duty, and resort increasingly to private custody agreements, in ways which will diminish judicial oversight of child protection matters. The outcome is a cash-strapped system which leaves children, and particularly young children, in situations of real risk, and then resorts at the last hour to a removal and unsupervised placement by agreement with family members where the risks to the child are not fully mitigated and where the child does not have the full benefit of the judicial oversight that the removal warrants.

To guard against further slippage in this regard we believe that the Attorney General should have departmental solicitors situated within the Department of Social Development to regularly advise on departmental decision-making, supervise the preparation of affidavits, liaise with the family crown with respect to Court applications and ensure that all children abandoned or removed from their parents' care receive the equal benefit and protection of the law and of their rights. For many years in the recent past, the Department of Transportation had the benefit of in-house counsel to assist with the important solicitor's work that highway maintenance and administration requires. The Attorney-General should afford New Brunswick children the same respect or even greater priority than our roadways. Having Attorney General lawyers embedded within the department of Social Development, even on a transitional basis as the new legislation comes into effect would be an excellent way of improving outcomes and due process in child protection matters.

We believe that a *Children's Act* will provide an opportunity to establish new ground rules but that the courts must also establish some new rules of their own to guard against lapsing back into the very situations decried above in our report. In our view, this has to do with the Court's approach to its standard of review in child protection matters. Child protection professionals need to know that they have the authority required at all times to fully exercise their mandate and to protect children, via removal and placement if necessary, whenever a child is in danger and their best interests requires it. The reviewing Court may take a different view than child protection services as to whether removal was necessary in the child's best interest, but we all need to have a common understanding of the standard for removal and a broad consensus on what it means. The Court of Appeal and the Attorney General's Office have a role to play in clarifying the applicable standards for removal and review of those decisions and law reform itself should help greatly. This could be further assisted by practice directives and guidance from the Courts. This review has allowed us however to take a historical perspective and note that the balance between child best interests and family unity considerations is an age-old problem which legislators have addressed repeatedly, but without success.

The law reform process should be accompanied by an independent process led by the Court and the Rules Committee involving all the necessary stakeholders to consolidate the rules of practice in family division. Other mechanisms however should be considered. The Chief Justice

might address challenges in relation to delay or the over-judicialization of this process of judicial control of administrative action or the deference or respect due to the Minister or child protection professionals through practice notes or directives to the Bench or Bar. Our practice could become more child friendly by instituting the practice of judicial interviews of children as is routinely done in many US jurisdictions[57], or by instituting Hear the Child reports via specialized legal services as is done in B.C.[58] We might innovate and improve access to legal representation for children via a pro bono roster of family law practitioners as was done over a decade ago in Saskatchewan, or the more recent Counsel for Children roster program administered by their Public Guardian and Trustee[59]. We can learn from Ontario's experience of almost twenty years ago when they incorporated a case management timetable into the Family Law Rules with accelerated time periods beyond those stipulated at law. Case management judges were introduced to guarantee continuity of judicial oversight and hold all counsel more accountable for moving the process along. The challenges that New Brunswick children and families are facing in Family Court and child protection hearings are not unique to our province. There is a wealth of best practice that we can draw upon in reaching local solutions that will help us overcome the human and social cost of delayed access to justice in child protection family law matters.

In our view Article 9 of the UNCRC aptly summarizes that global standard for removal and is presently reflected in the provisions of our *Family Services Act*. Little will be served by engaging in long debates over what the criteria for Best Interest of the Child determinations should be. The essence lies in recognizing that we only remove when necessary, but never hesitate to do so when the best interests of a child requires it. We would encourage the Department to consolidate the language of the proposed *Children's Act* provisions governing placement and removal decisions around these twin standards of necessity and best interests as outlined in Article 9 of the UNCRC. The necessity criterion requires that the Crown meet its burden of proof of child endangerment and best interests determinations necessarily imply careful consideration of the child's views and opinions. Successful implementation of the new legislation will require significant educational and training efforts, preferably cross-disciplinary ones where the Courts, the bar and child protection professionals will be able to learn together about the new legislation and achieve a consensus understanding of the thrust of the reforms.

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[57] Bala, N., Birnbaum, R. et al, *Children's Voices in Family Court: Guidelines for Judges meeting Children*, Family Law Quarterly Vol 47 No. 3 (Fall 2013) pp. 379-408. ABA© 2013

[58] Hear the Child non-evaluative interview practices are offered by trained lawyers and counsellors to assist tribunals and other decision makers make best interest determinations affecting children by offering children meaningful participation and opportunities to have their views heard. https://hearthechild.ca/the-society/

[59] https://pubsaskdev.blob.core.windows.net/pubsask-prod/82294/82294-Counsel_for_Children_and_Youth_Program_Manual_-_January_2016.pdf

The Court's task is an important one because of the nature of the rights in play. So much hangs in the balance in these proceedings for the children concerned, as well of course for their parents and loved ones. It is because of the invasive nature of child protection proceedings and their impact upon rights that judicial oversight is needed. However, that judicial oversight cannot come at the cost of inordinate delays, otherwise the very rights the law seeks to protect are thwarted. We need to return to a new normal in child protection matters where child protection professionals work within legal processes and procedure rather than through informal agreements and work arounds, where they press the case for child protection concerns assiduously and professionally, knowing that their professional judgment will be afforded some deference. Moving forward, the court oversight function should be carried out effectively and expeditiously, largely on the basis of a review of the written record, always keeping in mind the child's best interests as a primary consideration.

RECOMMENDATION 5

It is recommended that the Province consult with the Chief justice of Queen's Bench and the Family Court Division to engage the Bench fully with respect to the proposed Children's Act and law reform initiative and work collaboratively with the Child and Youth Advocate and other relevant stakeholders towards the development of child-friendly justice services, particularly in ways to enhance children's rights, application of the best interests principle and the child's voice and participation in decisions that affect them. To this end we recommend that:

I. The Government and the Bench work collaboratively with the Child and Youth Advocate's Office in the development of a comprehensive educational and training program for all child welfare system stakeholders focused on the Children's Act law reform initiative and addressing child rights-based approaches, child friendly justice principles, best interests determinations and trauma informed care;

II. The Department of Social Development and the Office of the Attorney General take immediate and effective measures to improve the independent legal representation of children in child protection proceedings, particularly in cases involving children in early childhood, under 8 years of age; for older children other mechanisms, such as judicial interviews of children or Hear the Child reports, as exist in British Columbia, should be developed to improve children's participation in decisions affecting them;

III. *That the Department of Social Development and the Attorney -General's Office take immediate steps to improve the quality of file preparation and the prosecution of guardianship applications to ensure more successful outcomes in every case, in particular by: i) assigning permanent departmental counsel to work within the head office of social development under the direction of the Family Crown's Office and as liaison with the family Crown in guardianship matters; and ii) developing an internal best interests determination process to guide departmental decision-making in the case-planning process and lay the groundwork for more successful court applications.*

IV. *Finally, that the Department of Justice establish in consultation with the Bench, its Rules Committee, the Department of Social Development and the Advocate's Office a task Force to undertake a comprehensive review of Family Court services respecting children to commence this year with the participation of all relevant stakeholders and solutions should be fast-tracked in relation to the following:*

i. *Plans to introduce the new provisions for kinship care and new computation of time in relation to the 24 month rule must be established to reduce any concomitant delays on an already overburdened Family Division of the Court of Queen's Bench;*

ii. *Additional steps need to be taken to reduce delays in Family Division generally and in particular to ensure that child protection matters proceed expeditiously in keeping with the legal requirements established under the Children's Act; these may include amongst others: increased use of court masters, judicial case-conferencing and other case-management systems while working towards new approaches to streamline court oversight in child protection matters keeping in mind that this is an exercise of judicial oversight of administrative action, required only by the nature of the rights in play;*

iii. *Additional steps need to be taken to reduce delays in Family Division generally and in particular to ensure that child protection matters proceed expeditiously in keeping with the legal requirements established under the proposed Children's Act, these may include amongst others:*

a. *increased use of court masters,*

b. *judicial discretion to join family and child protection matters;*

c. *expanded discretion in the Act for judges to consider parties beyond birth parents for placement in child protection cases;*

d. discretion in the Act for the court to define parental contact when granting a permanent placement;

e. judicial case-conferencing and other case-management systems

while working towards new approaches to streamline court oversight in child protection matters keeping in mind that this is an exercise of judicial oversight of administrative action, required only by the nature of the rights in play;

iv. Proceedings and practice in Family Division should be consolidated across all judicial districts through new rules of court and practice directives to create more uniformity in proceedings in family matters generally, and in particular to facilitate and ensure strict adherence to timelines established under the new Children's Act;

v. The proposed Children's Act reform should closely mirror the provisions of Article 9 of the Convention on the Rights of the Child in establishing clear guidelines to ensure that all decisions for removal and placement of children have the benefit of judicial oversight and are made on the basis of the child's best interests.

CONCLUSION

The opportunity to go back to the drawing board, or to completely overhaul an important piece of legislation like the *Family Services Act* does not come along very often. This is a good thing, but it underscores the importance of doing it right, since changes like this may happen only once in every generation. This is part of the reason why we would encourage the Department to engage in a process of law reform and legislative review in the area of child welfare which would guarantee a process of continuous improvement. We suggest that the law should include a provision requiring a mandatory review of the *Children's Act* every five years. Our main concern however has been to point to areas where the system of child protection is weak, to cases where the remedies available for children have failed them, to try and make the case for a thoroughgoing reform premised upon the rights of the child as proclaimed in the UN Convention on the Rights of the Child ratified by Canada in the decade that followed the adoption of the *Family Services Act.*

By developing a new *Children's Act* that formally incorporates the principles and rights contained in the Convention into New Brunswick law and provides children with an enforceable remedy for when their rights are violated, we will be meeting our legal obligations at international law to keep children safe and keeping our promises to children. Just as importantly, we will meet the ethical obligation that inspired the Convention in the first place and the sound policy goals of ensuring that we meet children's needs while they are still children. The cases that have come to our attention over the past ten years tell us that this is the right approach, the approach that other jurisdictions are now tending towards and the best way for our Province to capitalize on its leadership in the area of child rights implementation.

Beyond these foundational elements we believe that it is critically important that the new law take a comprehensive approach to violence towards children and protect children from every kind of harm whether it be institutional harm, predation or bullying by their peers or coaches, or violence within their family homes. We think the new law also has to enshrine the multidisciplinary practice and collaborative approach to services to children and youth that the Province has pioneered with Integrated Service Delivery. Finally, we have recommended some preliminary adjustments to smooth the functioning of Family Division matters, particularly in relation to child protection proceedings in the Court of Queen's Bench, recognizing that these changes would benefit from a more sustained process of reform engaging all relevant stakeholders. We have outlined in an appendix below suggestions for reform in response to the Department's consultation paper. We will also have much more detailed recommendations and suggestions to make, particularly in relation to the lived experience of children in care, in the companion report to this one *Through Their Eyes*. If we can make one final recommendation to law-makers as they consider these reforms, it is that they should take extra precautions with this law reform initiative to be very attentive to the voices of New Brunswick children and youth. They know what hurt is, and what should be done about it.

TABLE OF RECOMMENDATIONS

RECOMMENDATION 1

It is recommended that the Department of Social Development replace the Family Services Act with a Children's Act for New Brunswick. This Act should proceed from a child-rights based approach and incorporate the UN Convention on the Rights of the Child into New Brunswick law by direct reference, not in the Preamble, but in the initial provisions of the new Act and promulgate the Convention in a separate Appendix to the new Act. The provisions of the new Act should also clearly state that in respect of its application in New Brunswick, the Convention applies without reservations and that Canada's reservation in respect of Article 37(c) of the Convention is expressly lifted. We further recommend that the new Act establish and define the ministerial role in delivering Integrated Service Delivery for children, as we shall define in subsequent recommendations.

RECOMMENDATION 2

It is recommended that the Province replace all of the child and youth provisions of the Family Services Act with a new Children's Act consolidating in one law all of the provincial laws affecting children and youth. It is recommended that these legislative changes be carried out in stages with the first phase addressing the Family Services Act reform and that subsequently new changes be brought in, in three years' time following a comprehensive review of New Brunswick laws and regulations to ensure their conformity with the UN Convention on the Rights of the Child. This should also include explicit consideration of how privacy laws should be tailored to support, not hinder, Integrated Service Delivery.

It is further recommended that the compliance mechanism under the Children's Act for all complaints in relation to child and youth services, or for any alleged violations of any rights guaranteed under the Children's Act be by way of complaint to the Child and Youth Advocate. Consequential amendments should therefore be made to the Child, Youth and Senior's Advocate Act to ensure that the Advocate: 1) have authority to seek enforcement of recommendations made following a finding of a child rights violation but not followed by the Deputy Head of a public body, before the Court of Queen's Bench; 2) be granted express authority to offer Advisory Opinions on the implementation of the Convention on the rights of the Child in New Brunswick and be authorized to seek standing as an intervener on child rights matters at every level of court or administrative tribunal competent to determine such matters; and 3) have the express authority to request the appointment of counsel by the

Attorney General for any child in the Province and the mandate and resources needed to train all lawyers in the Province appointed to act as legal representatives of children.

RECOMMENDATION 3

It is recommended that the Minister of Social Development take measures to encourage all party support and participation in the development and implementation of the new Children's Act. It is further recommended that the scope of child protection under the new legislation not diminish child protection in New Brunswick but enhance it in full implementation of the government's obligation under the UNCRC and as outlined in General Comment 13 of the Committee on the Rights of the Child and that the law reform follow the recommendations in this report and its appendix.

RECOMMENDATION 4

It is recommended that the Children's Act include a separate part of the Act dealing with Integrated Service Delivery (ISD). This Part should define ISD and provide that this coordinated approach to interdepartmental information-sharing and multi-disciplinary practice is mandated as the integrated service delivery mechanism for all services to children and youth in the Province. Children in conflict with the law, or whose behavior would be criminalized but for their age, and children known to child protection services must have an ISD common plan developed for them, and other children at risk or with high needs should be included where appropriate. The Act should set out the Governance structure for ISD, including the authority of a designated minister, and the existing governance structure should be expanded to include the membership and mandate of the Interdepartmental Committee on Children and Youth, while retaining the system of rotating chairs among the existing ISD departments, with the addition of Executive Council Office. The Child and Youth Advocate should be allowed to designate an observer to be a member of this Committee and the Committee's mandate should include assisting the Advocate with child rights data monitoring across government..

It is further recommended that the ISD governance table develop, in consultation with the Child and Youth Advocate, a new integrated service delivery and child rights training program and other cross-training programs for all ISD departments (old and new), in relation to child-rights based approaches, trauma-informed care, new child abuse and neglect protocols and other ISD training needs. The Department of Social Development should also invite the Child and Youth Advocate to co-chair a renewed process with all ISD partners to expedite the new

edition of the Provincial Child Victims of Abuse and Neglect Protocols, with particular emphasis on the new guidelines for neglect. Finally, a separate working group between the ISD governance table and the Advocates Office should be tasked with monitoring the implementation of the recommendations from the current Child Welfare review and should be mandated to report to the Legislative Assembly within six months of the release of this report on the status of recommendations from the 2019 Behind Closed Doors Report.

RECOMMENDATION 5

It is recommended that the Province consult with the Chief justice of Queen's Bench and the Family Court Division to engage the Bench fully with respect to the proposed Children's Act and law reform initiative and work collaboratively with the Child and Youth Advocate and other relevant stakeholders towards the development of child-friendly justice services, particularly in ways to enhance children's rights, application of the best interests principle and the child's voice and participation in decisions that affect them. To this end we recommend that:

V. The Government and the Bench work collaboratively with the Child and Youth Advocate's Office in the development of a comprehensive educational and training program for all child welfare system stakeholders focused on the Children's Act law reform initiative and addressing child rights-based approaches, child friendly justice principles, best interests determinations and trauma informed care;

VI. The Department of Social Development and the Office of the Attorney General take immediate and effective measures to improve the independent legal representation of children in child protection proceedings, particularly in cases involving children in early childhood, under 8 years of age; for older children other mechanisms, such as judicial interviews of children or Hear the Child reports, as exist in British Columbia, should be developed to improve children's participation in decisions affecting them;

VII. That the Department of Social Development and the Attorney -General's Office take immediate steps to improve the quality of file preparation and the prosecution of guardianship applications to ensure more successful outcomes in every case, in particular by: i) assigning permanent departmental counsel to work within the head office of social development under the direction of the Family Crown's Office and as liaison with the family Crown in guardianship matters; and ii) developing an internal best interests determination process to guide

departmental decision-making in the case-planning process and lay the groundwork for more successful court applications.

VIII. Finally, that the Department of Justice establish in consultation with the Bench, its Rules Committee, the Department of Social Development and the Advocate's Office a task Force to undertake a comprehensive review of Family Court services respecting children to commence this year with the participation of all relevant stakeholders and solutions should be fast-tracked in relation to the following:

vi. Plans to introduce the new provisions for kinship care and new computation of time in relation to the 24 month rule must be established to reduce any concomitant delays on an already overburdened Family Division of the Court of Queen's Bench;

vii. Additional steps need to be taken to reduce delays in Family Division generally and in particular to ensure that child protection matters proceed expeditiously in keeping with the legal requirements established under the Children's Act; these may include amongst others: increased use of court masters, judicial case-conferencing and other case-management systems while working towards new approaches to streamline court oversight in child protection matters keeping in mind that this is an exercise of judicial oversight of administrative action, required only by the nature of the rights in play;

viii. Additional steps need to be taken to reduce delays in Family Division generally and in particular to ensure that child protection matters proceed expeditiously in keeping with the legal requirements established under the proposed Children's Act, these may include amongst others:

a. increased use of court masters,

b. judicial discretion to join family and child protection matters;

c. expanded discretion in the Act for judges to consider parties beyond birth parents for placement in child protection cases;

d. discretion in the Act for the court to define parental contact when granting a permanent placement;

e. judicial case-conferencing and other case-management systems

while working towards new approaches to streamline court oversight in child protection matters keeping in mind that this is an exercise of judicial oversight of administrative action, required only by the nature of the rights in play;

ix. Proceedings and practice in Family Division should be consolidated across all judicial districts through new rules of court and practice directives to create more uniformity in proceedings in family matters generally, and in particular to facilitate and ensure strict adherence to timelines established under the new Children's Act;

x. The proposed Children's Act reform should closely mirror the provisions of Article 9 of the Convention on the Rights of the Child in establishing clear guidelines to ensure that all decisions for removal and placement of children have the benefit of judicial oversight and are made on the basis of the child's best interests.

APPENDIX I

CHILD AND YOUTH ADVOCATE RESPONSES TO FAMILY SERVICES ACT REVIEW DISCUSSION PAPER

1. General questions

Question 1 (a)

What do you think is working well in the Family Services Act as it relates to child and youth welfare?

The *Family Services Act* was an attempt to bring all legal provisions relating to families into a single legislative framework, starting from the premise that the family is the fundamental unit of society. This is commendable as a foundational premise and it places child protection services within the envelope of family supports that children need. The premise has served the Province well for nearly forty years, but a more child-centric approach has been recommended in the 2018 *Review of the Effectiveness of New Brunswick's Child Protection System*.[60] That review focused solely on Child Protection Services (and almost entirely on the roles of social workers). Child Protection Services are a crucially important but small proportion of the entire child welfare system. The current *Family Services Act* includes, for example, provisions on children in care and adoption. These should remain and be augmented with other imperative aspects of child welfare in a more holistic new *Children's Act*.

The Advocate recommends a principled approach to this task recognizing that Child welfare is a critical State responsibility pursuant to Canada's ratification and New Brunswick's obligations under the *UN Convention on the Rights of the Child*.

What is working well for the moment is the Family Group Conferencing work and efforts through early mediation to keep children out of care. At this time however the pendulum has swung too far in this direction and a correction is in order. The separation of Family enhancement services and child protection services may have been well-intended but it was improperly executed and created an added division of labour in an under-resourced work environment, leading to confusion of roles and poor service outcomes for families. The need however for Child protection services as a whole to work more preventively cannot be underscored enough.

Question 1 (b)

What changes should be made to the Family Services Act in relation to child and youth welfare?

[60] Savoury, George. *Review of the Effectiveness of New Brunswick's Child Protection System*. November 29, 2018. https://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Protection/Child/ReviewOfTheEffectivenessOfNewBrunswicksChildProtectionSystem.pdf

New legislation needs to have a robust prevention focus, collaboration focus, and child rights focus. This requires deep consideration of how the law can aid in *preventing* harm to children, how it can aid in *providing* all children the basic necessities needed for their optimal development, particularly when children must be taken into government care, and how it can ensure that *rights of all children are respected*. Child participation in the process of reform should be facilitated and welcome and child participation should inform all decision-making affecting children under the new legislation.

Reviewing how other provinces approach their child welfare legislation and adapting practices to fit New Brunswick's current child welfare structure is of importance but cannot adequately address the situation. New Brunswick must not simply pick and choose from legislative provisions in other provinces, but must look to jurisdictions worldwide and also be creative in terms of the New Brunswick context, to do far more to provide holistic supports to children requiring protection. UNICEF's Innocenti Research Centre produced a global report canvassing best practices from around the world on legislative reform for child rights enforcement in 2008 and that study is still a helpful reference[61].

The best guidance however comes from the Committee's General Comment #13 which provides clear guidance to the Province on how to implement a comprehensive and preventative child protection system[62]. As a rule of thumb the Province should factor that for every dollar spent in child protection and child in care services, a dollar or more should be invested in prevention measures, in family and community supports, training and education and data monitoring. A Child Protection system that assumes that those prevention investments are the responsibility of Early Childhood and Education, or of Health, or of housing or income assistance, is not a child protection system at all.

The Committee was emphatic in its insistence for strong prevention measures and its advice is instructional as the Province approaches this program of reform and is worth setting out in full:

> 46. **Prevention.** The Committee emphasizes in the strongest terms that child protection must begin with proactive prevention of all forms of violence as well as explicitly prohibit all forms of violence. States have the obligation to adopt all measures necessary to ensure that adults responsible for the care, guidance and upbringing of children will respect and protect children's rights. Prevention includes public health and other measures to positively promote respectful child-rearing, free from violence, for all children, and to target the root causes of violence at the levels of the child, family, perpetrator, community, institution and society. Emphasis on general (primary) and targeted (secondary) prevention must remain paramount at all times in the development and implementation of child protection systems. Preventive measures offer the greatest return in the long term. However, commitment to prevention does not lessen States' obligations to respond effectively to violence when it occurs.
>
> 47. Prevention measures include, but are not limited to:

[61] UNICEF Innocenti Centre, Law Reform and Implementation of the Convention on the Rights of the Child, Florence 2008, 120 pp. https://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf

[62] UNCRC, General Comment 13, *The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13, 18 April 2011, https://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf

(a) *For all stakeholders*:

(i) Challenging attitudes which perpetuate the tolerance and condoning of violence in all its forms, including gender, race, colour, religion, ethnic or social origin, disability and other power imbalances;

(ii) Disseminating information regarding the Convention's holistic and positive approach to child protection through creative public campaigns, schools and peer education, family, community and institutional educational initiatives, professionals and professional groups, NGOs and civil society;

(iii) Developing partnerships with all sectors of society, including children themselves, NGOs and the media;

(b) *For children*:

(i) Registering all children to facilitate their access to services and redress procedures;

(ii) Supporting children to protect themselves and their peers through awareness of their rights and development of social skills as well as age-appropriate empowerment strategies;

(iii) Implementing "mentoring" programmes that engage responsible and trusted adults in the lives of children identified as needing extra support beyond that provided by their caregivers;

I *For families and communities*:

(i) Supporting parents and caregivers to understand, embrace and implement good child-rearing, based on knowledge of child rights, child development and techniques for positive discipline in order to support families' capacity to provide children with care in a safe environment;

(ii) Providing pre- and post-natal services, home visitation programmes, quality early-childhood development programmes, and income-generation programmes for disadvantaged groups;

(iii) Strengthening the links between mental health services, substance abuse treatment and child protection services;

(iv) Providing respite programmes and family support centres for families facing especially difficult circumstances;

(v) Providing shelters and crisis centres for parents (mostly women) who have experienced violence at home and their children;

(vi) Providing assistance to the family by adopting measures that promote family unity and ensure for children the full exercise and enjoyment of their rights in private settings, abstaining from unduly interfering in children's private and family relations, depending on circumstances.[20]

(d) *For professionals and institutions (Government and civil society)*:

(i) Identifying prevention opportunities and informing policy and practice on the basis of research studies and data collection;

(ii) Implementing, through a participatory process, rights-based child protection policies and procedures and professional ethics codes and standards of care;

(iii) Preventing violence in care and justice settings by, inter alia, developing and implementing community-based services in order to make use of institutionalization and detention only as a last resort and only if in the best interest of the child.

We imagine a system where child protection services would have programs to provide respite care for children and families in poverty, to properly fund and support a Big Brother/ Big Sister for every child victim of violence, to support child rights youth committees through local community social pediatric hubs, to properly fund a network of integrated treatment and diagnostic centres such as the Boreal Centre for all child victims of violence, to properly fund large scale media campaigns to encourage foster care parents to come forward, to promote positive parenting and combat violence to children, just as we have promoted adoption services in the past, to work with, initiate and lead collaborative intersectoral committees on curriculum reform to combat bullying and racism, internet violence to children, to convene local collaborative tables and policies for child-friendly cities. Why does all of this always fall to health and education? Why should Social Development not be supporting children and delivering child protection in a proactive and preventative fashion?

Question 1

What values and principles should serve as the foundation of the new legislation?

From the perspective of the Child and Youth Advocate, the following principles must provide the foundation for new legislation.

1. It needs to be a child-centred, rights-based, and holistic Act.
    a. There should be full incorporation of the UN Convention on the Rights of the Child.
    b. Consideration should be given to incorporating areas of child and youth services in one Act – including the Custody and Detention of Young Persons Act, the Medical Consent of Minors Act, the Child labour standards provisions from the Employment Standards Act, and perhaps eventually the Early Childhood Services Act, and the Education Act.
    c. Collaborative practices including Integrated Service Delivery and ‘one child one file’ public service interventions must be mandated in legislation;
2. The new legislation needs to be more comprehensive in order to adequately protect New Brunswick children and better safeguard all their rights:
    a. We can no longer afford to only protect children from the violence within their homes. Child protection must be concerned about protecting children in institutional care, those at risk from predation or bullying within their

communities, as well as protecting all children from the many online risks to which they may be exposed.

b. The child's right to protection cannot be fully materialized if a child's right to health, education, to an adequate standard of living, or their right to play are compromised. All rights are inter-related and the legislation seeking to keep children in New Brunswick safe needs to fundamentally guarantee all of their rights. Child protection professionals need to act in appropriate cases as the State's guarantors and early defenders of all child rights. This requires a fundamental shift in philosophy from thinking reactively from a risk-based assessment lens to thinking proactively from a rights-based enforcement lens.

c. Ultimately what would guarantee a comprehensive, multi-disciplinary and holistic approach is a new law that unifies all services to children in a single legislative framework.

3. It needs a prevention and early support focus.

4. There should be strengthened due process protections for children

    a. Specific provisions for how the voice of the child being heard in all matters concerning the child – both administrative and judicial – should be included. Processes and mechanisms should be enshrined in law including the right of the child for representation in court, and the right of the child to appeal any administrative decision made concerning their education, protection, care, or adoption.

    b. Child-friendly justice system approaches (including supports for children through court processes) should be enshrined in law.

5. There should be no changes to child welfare legislation without broad consultation of children and youth in care.

6. There needs to be specific legal rights provisions for children under any kind of care status, beyond the generality of rights enshrined in the UN Convention on the Rights of the Child. These must include rights for children in foster care, group home care, kinship care and specialized placements.

7. In closing we would recall the fundamental assumptions and observations in relation to violence to children noted by the Committee on the Rights of the Child (CRC) in its general comment 13:

> (a) "No violence against children is justifiable; all violence against children is preventable";

(b) A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as "victims";

I The concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy;

(d) The principle of the rule of law should apply fully to children as it does to adults;

I Children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes;

(f) The right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention;

(g) Primary prevention, through public health, education, social services and other approaches, of all forms of violence is of paramount importance;

(h) The Committee recognizes the primary position of families, including extended families, in child caregiving and protection and in the prevention of violence. Nevertheless, the Committee also recognizes that the majority of violence takes place in the context of families and that intervention and support are therefore required when children become the victims of hardship and distress imposed on, or generated in, families;

(i) The Committee is also aware of widespread and intense violence applied against children in State institutions and by State actors including in schools, care centres, residential homes, police custody and justice institutions which may amount to torture and killing of children, as well as violence against children frequently used by armed groups and State military forces.

2. Best Interests of the Child Criteria

Question 2 (a)

How should the "best interests of the child" criteria be updated?

First

Immediately following the definitions section and the sections incorporating the UNCRC by reference into domestic law, the Act should begin with a provision requiring that all decisions in respect of a child, made under any Act of the Legislature, must be made in the best interests of the child. This thereby binds not only court decisions but all administrative decisions. This disposition should also provide that the 'paramount purpose of this Act is to promote the best

interests, participation, protection and well-being of children'.[63] It should also be stated that in all cases where the best interests of the child and the interests of the adults are in conflict, such conflict must always be resolved in favour of the rights and the best interests of the child, which shall be provided fair, large and liberal interpretation. It should also provide that the best interest of the child (BIOC) must be interpreted in a way that reflects and addresses the child's evolving capacities and in keeping with international child rights standards and norms.

Second

As a further overarching recommendation, the BIOC factors should be distinct for various purposes under the Act or under related legislation. For example, there should be different BIOC criteria for removal of a child from a home, court-ordered custody, court-ordered guardianship, decisions made for children in care, and adoption. Similarly, BIOC factors may vary and be adapted in education, early childhood, immigration, child justice settings, etc. The danger with the previous provision under the *Family Services Act* is that it invites too rigid a view of what may be a best interest factor and what is not, rather than insist on a Best Interest Determination process that takes into consideration all relevant factors for the decision at hand.

Third

The BIOC factors should reflect guidance from the UN Committee on the Rights of the Child, specifically in General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration[64].

- For example, consideration of any unique situation of vulnerability such as disability, refugee status, non-citizen status or homelessness should be included for BIOC determinations. The importance of maximum potential development should be noted as a factor, as should the right to education. In relation "the child's cultural and religious heritage" in the current definition of the BIOC in the *Family Services Act* it should be noted that "Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention."[65]

Fourth

The BIOC principle should be incorporated into legislation as a three-fold concept and all three aspects should be reflected fully in the legislation, as follows.

i. The BIOC is a substantive right. It must be a primary consideration in all decisions and actions taken concerning the child. In this context the purpose of the BIOC is to ensure the child's maximum and holistic development. This requires a rights-based approach that looks to all UNCRC provisions relevant to the particular situation of a child; it is therefore to be determined on a case-by-case basis considering the individual child's personal context in conformity with all rights of the child.

[63] Adapted from *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, <http://canlii.ca/t/547lr>
[64] UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14
[65] Ibid.

ii. The BIOC is an interpretive principle. When a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests has primacy.

iii. The BIOC is a procedural right. Decisions must be timely due to the well-recognized adverse effects that delays in or prolonged decision-making have on child development. The procedural aspects of the BIOC principle may require legal representation when the child's best interests are to be determined by courts or administrative bodies. The procedural aspects of the BIOC also include the right to be given clear reasons for how a decision was reached, what factors were considered in the decision, and how the child's views were considered and given due weight.

Fifth

The BIOC factors listed in various legal instruments should be considered. This includes not only provincial legislation and federal legislation, but also US state legislation and other foreign law. Contexts other than child welfare (e.g. immigration law) should be researched to determine whether factors in those contexts should be applied in child welfare contexts.

Some examples include the following:

- The Ontario *Child, Youth and Family Services Act* includes considerations such as "the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community", "the child's family diversity, sex, sexual orientation, gender identity and gender expression", and "linguistic heritage". It also provides some separate criteria for questions such as access to a child in care (e.g. "whether the ordered access will impair the child's future opportunities for adoption") and for adoption (e.g. the "child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community").[66]
- The recently amended federal *Divorce Act* includes, in relation to parenting orders and contact orders, "history of care of the child".[67]
- Colorado's *Children's Code* includes as a provision that it is in the best interests of a child who has been removed from their own home "not be indiscriminately moved from foster home to foster home".[68] A comprehensive review of US state legislative provisions would provide a wealth of important factors to consider.[69]

[66] *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, <http://canlii.ca/t/547lr>
[67] Divorce Act (R.S.C., 1985, c. 3 (2nd Supp.)) https://laws-lois.justice.gc.ca/eng/acts/d-3.4/FullText.html
[68] Colorado Revised Statutes Title 19. Children's Code § 19-1-102. https://codes.findlaw.com/co/title-19-childrens-code/co-rev-st-sect-19-1-102.html
[69] Child Welfare Information Gateway. (2016). *Determining the best interests of the child.* Washington, DC: U.S. Department of Health and Human Services, Children's Bureau. https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/best-interest/

Sixth

The BIOC principle should be determined in accordance with scientific understanding of the child's developmental needs, including general neuroscience evidence as well as determinations made by health professionals in relation to the individual child.[70]

This is in keeping with the Supreme Court of Canada's determination that "It is not only an option for the court to treat the child's views as an increasingly determinative factor as his or her maturity increases, it is, by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates."[71]

Seventh

While the current criteria in the *Family Services Act* are relatively comprehensive and should not be jettisoned wholesale, the language must be made gender neutral.

Question 2 (b)

How can the "best interests of the child" criteria be updated to focus on the safety of the child as paramount?

The Advocate recommends against any graduated or prioritized identification of BIOC criteria. The BIOC should be determined by an analysis of all the rights applicable to the individual child on a case by case basis. Safety does not always trump liberty, child participation, the right to play, education or other fundamental aspects of childhood. Safety must inform the best interest determination in keeping with all the other rights in balance, otherwise it is no longer a best interest of the child analysis.

Again, we believe this question raises a concern about a possible bias from child protection services informing the reform. Viewed holistically, from the perspective of stakeholders in Education, or Health services, for instance, the question might not even ever be asked. What we must do is to nurture intersectoral approaches that encourage all services providers to view their service delivery from the client's perspective, holding in balance all of the child's rights.

Question 2 (c)

If Part VII of the Act becomes a stand-alone piece of legislation, should the "best interests" criteria be the same under our child welfare legislation and the Divorce Act? [Part VII of the Family Services Act contains provisions regarding support obligations, custody and access, and will likely not form part of the new child

[70] Skivenes, Marit and Line Marie Sørsdal. "The Child's Best Interest Principle across Child Protection Jurisdictions," in Human Rights in Child Protection: Implications for Professional Practice and Policy, Falch-Eriksen and Backe-Hansen, eds. 2018. Palgrave MacMillan, ISBN 978-3-319-94800-3. https://link.springer.com/content/pdf/10.1007%2F978-3-319-94800-3.pdf

[71] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, at para. 88.

and youth welfare legislation. The Department of Justice and Attorney General is reviewing Part VII to determine if it should mirror the language and principles of the Divorce Act of Canada coming into force July 1, 2020. The "best interests of the child" criteria in the Family Services Act currently also apply to Part VII.]

We recommend against stand-alone legislation for Part VII of the Act. These provisions should be kept as an aspect of the new *Children's Act*. While New Brunswick provisions relating to custody, access and support should mirror the Divorce Act as closely as possible, the BIOC criteria for these provisions should be crafted to fit particular circumstances of family breakdown and reconstituted families, taking the same context specific approach to identifying BIOC criteria as was suggested above.

Question 2 (d)

What is the potential impact if the "best interests of the child" criteria are not the same under our child welfare legislation and the Divorce Act?

As noted above, the BIOC criteria should be tailored to separate parts of the legislation, such as child protection, child in care, adoption, or family separation. There is no potential deleterious impact from BIOC criteria differing in the new provincial child welfare legislation for different purposes. Any contradiction between Divorce Act criteria and those for BIOC determinations under a new *Children's Act* should be minimized to the extent possible, but the new provisions might very well choose to go a step further than the federal legislation. In 2018 when the Divorce act changes adopted by Bill C-78 were brought in the national CBA Family Law and Child and Youth Law sections made a joint submission on the reform proposals. The Advocate adopts the CBA recommendations in relation to BIOC criteria for proceedings under the Divorce Act and would recommend similar language be included in new provisions in New Brunswick under the *Children's Act.*[72]

3. When is a child or youth in need of protection?

Subsection 31(1) of the Act sets out 12 circumstances under which a child or youth may need protection:

> **31**(1) The security or development of a child may be in danger when
>
> (a) the child is without adequate care, supervision or control;

[72] https://www.cba.org/CMSPages/GetFile.aspx?guid=eca537fe-0ee4-405d-99b7-e3b5e3acd1ad

(b) the child is living in unfit or improper circumstances;

(c) the child is in the care of a person who is unable or unwilling to provide adequate care, supervision or control of the child;

(d) the child is in the care of a person whose conduct endangers the life, health or emotional wellbeing of the child;

(e) the child is physically or sexually abused, physically or emotionally neglected, sexually exploited, or in danger of such treatment;

(f) the child is living in a situation where there is domestic violence;

(g) the child is in the care of a person who neglects or refuses to provide, obtain or permit proper medical, surgical or other remedial care or treatment necessary for the health or well-being of the child;

(h) the child is beyond the control of the person caring for him;

(i) the child by his behaviour, condition, environment or association, is likely to injure himself or others;

(j) the child is in the care of a person who does not have a right to custody of the child, without the consent of a person having such right;

(k) the child is in the care of a person who neglects or refuses to ensure that the child attends school; or

(l) the child has committed an offence or, if the child is under the age of twelve years, has committed an act or omission that would constitute an offence for which the child could be convicted if the child were twelve years of age or older.

Question 3 (a)

Do the circumstances outlined above adequately describe when a child or youth may need protection?

They are not comprehensive enough. A child rights impact assessment of the existing provision would show that it does not address the child's right to be protected from drug endangerment as guaranteed by Article 33 of the UNCRC, nor the child's right to be protected against economic exploitation or hazardous work (Article 32). Nor do the existing provisions adequately protect the child's rights under Articles 34 and 35, or under the 2nd optional protocol in relation to child pornography, child prostitution or child trafficking.

We would also refer the department to General Comment 13 of the Committee on the Rights of the Child for a comprehensive definition of the scope of protection that should be envisaged under this section. Child Protection measures will be complete and sufficient when we start thinking about child protection in relation to Articles, 5, 9, 18 and 27 of the UNCRC. Parents are

the primary caregivers for their children, but children must not be completely abandoned to their parents' care. Parents need to be supported by government in meeting their child-rearing duties. We should not be waiting in anticipation for harm to occur. We must be working with every family, and particularly with children in vulnerable families at all times to ensure that they live lives free from violence and that they have the adequate supports to enjoy a decent standard of living. The *Children's Act* operating within the full mandate of the department of Social Development and working collaboratively with other child and youth serving ministries will be able to enhance child protection services and be fully compliant with the Provinces obligations under international law.

Interjurisdictional analysis will also suggest many other risks to which children are exposed and which could be more specifically addressed. To take only one example, Ontario's legislation includes factors such as the following:

- the child has been sexually abused or sexually exploited by another person where the person having charge of the child knows or should know of the possibility of sexual abuse or sexual exploitation and fails to protect the child;
- the child requires treatment to cure, prevent or alleviate physical harm or suffering and the child's parent or the person having charge of the child does not provide the treatment or access to the treatment;
- the child has suffered emotional harm and the child's parent does not provide services or treatment or access to services or treatment;
- the child suffers from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development and the child's parent or the person having charge of the child does not provide treatment or access to treatment;
- the child is younger than 12 and has killed or seriously injured another person or caused serious damage to another person's property, services or treatment are necessary to prevent a recurrence and the child's parent does not provide services or treatment or access to services or treatment;
- the child is younger than 12 and has on more than one occasion injured another person or caused loss or damage to another person's property, with the encouragement of the person having charge of the child or because of that person's failure or inability to supervise the child adequately.

Moreover, the lack of comprehensiveness of the circumstances of when a child is in need of protection as currently listed in the *Family Services Act* is not the entire issue. An equally important issue is that the provisions of the Family Services Act are ignored in practice.

For example, the circumstance that "the child is in the care of a person who neglects or refuses to ensure that the child attends school" is almost never deemed to be a child protection issue by Child Protection Services. Furthermore, when asked when refusal to provide education to children becomes a situation of neglect such that DSD will act, a former Director replied "never."

Our concerns here echo the findings globally of the Committee on the rights of the child in

General Comment 13:

> The Committee acknowledges and welcomes the numerous initiatives developed by Governments and others to prevent and respond to violence against children. In spite of these efforts, existing initiatives are in general insufficient. Legal frameworks in a majority of States still fail to prohibit all forms of violence against children, and where laws are in place, their enforcement is often inadequate. Widespread social and cultural attitudes and practices condone violence. The impact of measures taken is limited by lack of knowledge, data and understanding of violence against children and its root causes, by reactive efforts focusing on symptoms and consequences rather than causes, and by strategies which are fragmented rather than integrated. Resources allocated to address the problem are inadequate.

Question 3 (b)

What circumstances in subsection 31(1) of the Act should be added or deleted?

In order to determine the important circumstances to include, thorough research of best practices in legislation nationally and internationally is required. The Advocate however would warn against any deletion of currently identified harms, unless it were to replace the provision with a more comprehensive way of capturing the same harm. In our view the list is under inclusive, but not overinclusive in any way. The best way of ensuring a comprehensive and effective rights based reform is to follow the guidance from the CRC in it General Comments.

Question 3 (c)

How can these circumstances recognize the cumulative impact of abuse and neglect over time on the child? [Cumulative harm is defined as the effects of multiple episodes of abuse or neglect experienced by a child, over time, that result in the child's diminished sense of safety, stability and well-being.

A section should be added. For example, if the intention was only to amend the current family Services Act, a new section 31(1.1) would be added to this effect:

In the determination of whether the security or development of the child may be in danger under section 31(1), consideration must be given to the cumulative effects of a pattern of conduct, behaviour or inaction by the person having care of the child.

More broadly this question underscores the Advocate's preoccupation with the need for a preventive focus to the current reform. We need provisions in the new Act that implement the proactive program of prevention recommended by the CRC in its general comment at paragraphs 46 and 47 set out in full above under our response to question 1(b).

Question 3 (d)

Consideration is being given to amending two of the circumstances in subsection 31(1) of the Act:

> In all Provinces and Territories in Canada except New Brunswick, the circumstances when a child or youth may need protection are limited to the action or omission by the child's parent, guardian, or person having charge or custody of the child. The New Brunswick legislation is broader in that a child or youth's security or development may be endangered by the action or omission of any person. This means that a child or youth could become the subject of a child protection investigation without the parent's knowledge or consent, even when the allegation is against someone other than the parent.
>
> Please outline your concerns if government's authority to intervene to protect children was limited to the actions or omissions of the child's parent or guardian. This would mean that if a child was harmed by someone other than the parent, it would be a criminal matter and not be a child protection concern unless there was an indication that the parent was failing to protect the child from the perpetrator of the harm.

From the very highest levels at the Department of Social Development we are told that these issues <u>are not</u> child protection matters. Again, the legislation and the practice diverge. In our opinion it is imperative for child protection services to be involved in these matters – Child Protection Services should not be and should not be perceived to be the bogeyman that takes children from parents; children in situations of abuse by anyone should bring CPS into the matter to assure appropriate supports to family and child, as well as ensuring protections for other children if the adult is not convicted or does Alternative Measures, and remains in a situation where they can harm a child again.

Moreover, the threshold for action is higher in the criminal context than the child protection context. Removing this provision would unquestionably lead to circumstances wherein charges are not laid or are dropped, and therefore no criminal record would exist, and due to the Department's lack of involvement no Departmental record would exist. This would leave the perpetrator free to work in daycare, school, group home, be a foster parent, etc.

A child rights based analysis of our statute and other Canadian laws suggests that child protection practice in Canada is leaving a wide gap in child rights enforcement by being only concerned with intra-familial violence. The problem is that this approach allows the Karl Tofts and Donny Snooks in Canada to perpetrate repeated harm to children over years. If they are caught somewhere they will often run and hide and then start over again. It is a pattern that the we are well acquainted with and that the new law has to put an end to. Our human rights obligations to children require us to do so. It is not an answer for New Brunswick legislators to say, "but Ontario doesn't do it". Our children deserve better. Sometimes the harm is at the community level – and this is deeply disturbing to communities and they have told the Advocate they want better laws, but sometimes the violence towards children happens while they are in public institutional care. Children are victims of violence in prisons, in hospitals, in schools and even in group homes or treatment centres while under the care of the Minister appointed to protect them. Why should the State have a lower threshold of care, or a lower standard of protection for harms that are at the very hands of government, than when the violence occurs in a child's home?

Question 3 (e)

Among all Provinces and Territories in Canada, only New Brunswick and Quebec currently refer to a child's failure to attend school as grounds for child protection involvement in their legislation.

Please outline your concerns if New Brunswick removed the failure to attend school as a reason for child protection involvement.

The Child and Youth Advocate's caseload in relation to child welfare files point to a situation wherein the criteria for Child Protection Services involvement already provide an inadequate threshold for intervention. Removing one would be the opposite of necessary progress. As stated by a Canadian Child Welfare Research Portal article: "Educational neglect is a serious form of child maltreatment that can have devastating consequences."[73] The article analyzed data from the Ontario Incidence Study of Reported Child Abuse and Neglect, 2013, and found that "children who were subject of educational neglect investigations were more likely to demonstrate internalizing issues and developmental or other disabilities, compared to investigations of other forms of neglect." This heightened vulnerability necessitates inclusion of educational neglect as a reason for child protection involvement. Moreover, it was found that "investigations of educational neglect are more likely to note caregiver risk factors such as mental health issues and few social supports as well as child functioning concerns such as internalizing issues and developmental disabilities."

The Child and Youth Advocate feels compelled in this circumstance to assert that a recurring problem with legal protections in New Brunswick for children is that this province tends to be the last in the country to make changes to our legislation, and when the province does make the changes to keep up with the modern world, we do not undertake best practices but instead are satisfied with the bare minimum standard.

The *Education Act* was amended long ago to require school officials to report chronic absenteeism from school as a form of neglect. The problem is that when such reports are made they are seldom acted upon. The problem is that truancy officers were all released by the school districts, but child protection services were never given the resources to take on the task and they have balked at it ever since. It does not matter to these officials what the *Education Act* says, or what the *Family Services Act* says, they simply are too busy dealing with more important matters than to look into a school truancy report. The problem with that view is that it ignores the evidence that educational neglect is a serious problem and it ignores the law. Changing the law in a way that ignores the evidence, does not solve anything. It just buries the problem and gives bureaucracy a final victory over the rule of law to the detriment of child welfare. We are convinced that New Brunswick legislators can find a better way forward.

[73] Fallon, B., & Van Wert, M. (2017). Educational Neglect in Ontario. CWRP Information Sheet 183E. Toronto, ON: Canadian Child Welfare Research Portal. https://cwrp.ca/sites/default/files/publications/en/183e.pdf

2. Services and Supports

Question 4 (a)

What types of in-home and community-based services and supports should be provided by government and be available to children and families to help restore their functioning?

The continuation and expansion of the Family Supports for Children with Disabilities is critically important. The program could provide a model of intervention for all children and families known to the department of Social Development. Whether because of their status in care, their experience of trauma, their need for social housing or income assistance all children with these needs share a relative disadvantage with Children with Disabilities. The Department should support them all to the same extent and the standard or threshold of investment should be raised. This is how we will achieve a level playing field for all children, in keeping with the aspirations of the Province's fabled Equal Opportunity Program. The department needs to move radically beyond merely providing parental capacity training, in-home relief and support worker assistance and remedial interventions. It also develop an array of pro-social preventive intervention services, as outlined above in question 1(b). The objective has to be to move beyond the goal of helping families achieve "restored functioning", to a situation where we can see children thrive.

These investments need not be shouldered by Social Development alone. Ideally the programs would be ISD-driven supports, with a focus on public health provision. Leveraging SD's investment in these kinds of program supports would be another good way to ensure that SD staff are equal partners and fully invested in ISD approaches.

Question 4 (b)

How long should services and supports be provided to children and families by government?

The challenge here is to be sanguine about our ability to support families without being too close-fisted. As Advocates we often see the impact of dropping supports to families once "family function is restored". In most cases families can relapse into dysfunction as soon as the supports disappear. We need to recognize the impact of trauma and admit that families will need to be stabilized for a period of time with adequate State supports. This is fully in keeping with our obligations under Articles 19 and 27 of the UNCRC. The downside costs to the State of an alternate approach are measured in terms of school drop-outs, involvement with crime, increased bullying and victimization thereby extending a cycle of violence intergenerationally. We would do better to keep the supports in place. A 12 month stabilization period following restored functioning goals should be the norm and there should be flexibility in the system to allow for a gradual cessation of supports, and their extension where needed, as the case demands.

Question 4 (c)

Under what circumstances should someone (child, youth or adult) who is legally competent have a right to refuse services?

In its CRIA Advisory Opinion MEFDS18-01 the Advocate has commented at length on this issue We do not favour the maintenance of section 29.2 of the Family Services Act in a new Children's Act, nor would we extend any part of it to other parts of the Act beyond Part III where it presently applies. We believe that the Department should assume its full child protection obligations in relation to every child up to their age of majority. A best interest analysis of the child's situation will allow and require meaningful consideration of the child's views and the vast majority of cases will be able to be resolved through dialogue and child rights based interventions in the child's best interests. It should not be answer for child protection services merely by saying the "child refused services". It's a cop out that places the bar way too low for a public authority. Parents would not get away with it. Why should the State?

Question 4 (d)

Should the court have the authority to order a child or youth to attend a secure treatment facility against their will for a specified period to address mental health, addictions or other identified issues?

Yes. Here again what are required are strong best interest of the child determination processes that are fully respectful of the child or young persons views and explore all possible alternatives to a protective measure of constraint. However, in our experience there are exceptional circumstances where a best interest analysis of a child's situation would support an involuntary placement in a secure treatment facility as a designated place of safety as section 57 of the FSA currently contemplates. In our view these placements could be made by the Provincial Director of child protection upon satisfactory medical or psycho-social evidence and they should be subject to a court approval process within the week. The Child and Youth Advocate should be notified of any and all such placements.

3. Cultural Competence, Safety and Sensitivity

The best interests of the child criteria include "the child's cultural and religious heritage". In New Brunswick, there are three distinct First Nations peoples: the Mi'gmaq, Wolastoqey, and Peskotomuhkati, as well as a growing population of newcomers and refugees, many of whom could be categorized as persons from minority cultures.

Question 5 (a)

How can child and youth welfare services be provided in a manner that respects cultural diversity while ensuring basic standards of child safety and healthy development?

The Advocate appreciates the recommendations made in the Savoury report prompting this line of questions in the Consultation document and emphatically supports the development of cultural competence, safety and sensitivity across the child welfare system, both through provincial services and in Band operated services. We are at a juncture in the TRC process where there is a great deal of learning that has to be achieved in this area. At the same time New Brunswickers can be proud of the fact that First Nations communities in this process were among the first in the Country to achieve band administration of these services within community, and that since the Hand in Hand report of 2010, continuing efforts have sought to improve the administration of these services, extend NB families as a case management tool, and rationalize services, for instance through the recent creation by Mi'kmaq chiefs and councils of the Mi'kmaq child and family services agency.

New developments in this sector have to be approached with consideration recognizing the prime role that First Nations Communities will have under Bill C-92 in shaping their own futures with respect to child protection services. The Advocates perspective is that beyond these considerations full adherence to UNCRC and UNDRIP rights and principles should be touchstones for legislative and practice developments in this area.

Considering the question under the broader lens of cultural diversity we would also urge the government to be proactive and to put in place accommodations for linguistic and cultural minorities that will make child protection standards and services easily accessible to these communities as well and facilitate their full participation and integration into Canadian society.

Question 5 (b)

How can we ensure that children and youth who come into the care of the Minister continue to have the opportunity to participate in their cultural heritage, identity and traditions, if it is in their best interests?

We cannot imagine a situation where any disruption of a child's ability to participate in their cultural heritage, identity and traditions would be contrary to their best interests. Removal from family as a child protection measure should never have as an effect to strip a child of their heritage, culture, language or identity. BIOC criteria should reflect, strengthen and reinforce the rights of minority children as guaranteed by Article 30 of the UNCRC. Child protection services should work assiduously and proactively to promote culturally appropriate placements, to nurture foster parent services within minority communities to promote multiculturalism and encourage maintenance with linguistic and cultural ties when separation from families might otherwise put these supports at risk. The Practice Standards for child protection should clearly reflect this and children in care should be informed of their rights, specifically of all relevant rights in relation to minority identity under the UNCRC and indigenous rights under UNDRIP.

Question 5 (c)

How can we ensure that historical and generational trauma from both Residential Schools and the Sixties Scoop is acknowledged and addressed when working with Aboriginal children, youth and families?

Again, to the extent that Child and Family Services on Reserve in New Brunswick are operated by autonomous agencies of Bands and Councils, the Advocate will defer to those agencies and their directors on this question. However, the more germane question in our mind is about how to equip child protection social workers and ISD workers within the provincial systems of care with the training and knowledge required in relation to Canada's colonial past in order to properly serve aboriginal children and families living off reserve. This task should be undertaken immediately and it should be significantly resourced to ensure that the training provided equips sufficient staff in all regions to meet the service demands as they present themselves.

Question 5 (d)

How can the court system better serve Aboriginal children, youth and families?

Youth Criminal Justice Act processes are developing an adapted Gladue report for young offenders. To date however, New Brunswick's experience with Gladue factors has been very poor compared to practices elsewhere. At the same time the Gladue report process in the Criminal justice system may serve as a model for the kind of sober second thought that court services in Family Division may need in properly meeting the needs of indigenous children and families. New Brunswick needs to take measures to significantly reduce the numbers of First Nations children coming into care. In large part this will have to be achieved by stronger supports to First Nations families, through TRC Calls to Action, through the MMIWG Calls to Justice and the AFN and FNCFCS Human Rights Tribunal Order. However, training of judges and development of specialized processes such as Gladue Type reports in a child protection setting, to indigenize colonial systems of justice may be one aspect of the solution.

6. Voice of the Child

Question 6 (a)

What provisions should be included in the new legislation to ensure that it is child and youth-centered?

The Advocate submits that a child rights-based approach to the reform will greatly strengthen the new law's child-centredness. Incorporation of the UNCRC into our domestic law will eventually help children achieve access to justice in child-friendly court services. The work ahead in developing these approaches in New Brunswick is significant but the models from Europe are very clear and in many respect reflect emerging practice in New Brunswick and other parts of Canada. What they do is to provide us with a theoretical model and an accountability framework to measure our commitments to children. New Brunswick is also very much along this path given its work to date on child rights monitoring and in the development of GlobalChild.

Question 6 (b)

What is the best way to meaningfully understand the child's wishes, and ensure that their voice is heard in all matters that impact them? How do we understand the wishes of very young children or those with complex needs who may not be able to express themselves or understand the choices available to them? [The United Nations Convention of the Rights of the Child enshrines the right of the child to be involved in all decisions that affect their lives. The Family Services Act states that the "child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him, shall be given consideration in determining his interests and concern….".]

We have recommended above a process to provide every child under the age of seven with independent legal representation in every case involving their possible removal or placement decisions affecting them. We have also recommended judicial interviews of children and Hear the Child reports for older children. Hear the Child Reports for several years now have been available in British Columbia through members of the Family Bar who are specially trained to prepare these reports. The Advantage of training lawyers to do this work is that they can usually prepare reports that address and inform the key issues before the court while also being faithful to the child's own voice and words. We also recommend giving the Advocate authority and the necessary resources to apply to court for the appointment of counsel for a child in any case it deems it necessary and to be given a mandate and resources with which to train the bar and the bench with respect to child participation practices. We believe that these measures, in combination with a robust program to develop child friendly justice systems, based upon European models will place New Brunswick on a path of transformation where we will become the practice leaders in this field in North America. Already other jurisdictions are looking towards us and asking us for training materials and presentations in relation to our Child Rights impact Assessment Processes. Recent research funding proposals should help New Brunswick improve upon this start and develop even more robust CRIA practices augmented by child participation processes.

Question 6 (c)

What provisions should be included in the new legislation to decrease formality and increase flexibility in court proceedings involving children and youth?

Our submissions on this point are outlined in Part V of the *We Are what We Live* report above. It is a critically important point which the Courts will have to address themselves. Here again youth criminal justice practice models may provide a good starting point where much of the decision-making can be deflected to case conferencing models. New Zealand has had great success with this where their FGC process actually serves as a Family Court process and obviates the need for lengthy Family Court proceedings. New Brunswick has had significant success with FGC but we have shied away from engaging court processes with this kind of outside the box thinking. Canadian and New Brunswick Courts are having increased success with this model of decision-making in child justice models in a criminal justice setting. There is every reason to believe that superior court judges would be equal to the task and willing to come down from the Bench and roll-up their sleeves in a multi-disciplinary practice setting

alongside other professionals and quickly find best interests solutions for all the children concerned.

7. Child's Sense of Time/Timelines

Question 7 (a)

What benefits would you anticipate if there were speedier child protection proceedings and decisions?

The need to achieve more timely results for children, and the means of achieving this have also been touched upon in part V of our report above. The benefits in our mind are clear. The greatest impediment to a child's rehabilitation and recovery from a traumatic event is the prospect of having to relive it through protracted court hearings. Justice system officials must be conscious of the traumatizing effect of court proceedings, even when they do not involve cases of child abuse. The more decision-making can be taken away from adversarial trial processes and expediting in child-friendly dispute resolutions settings, and ideally ones that are court led, or court informed, the swifter and fuller will the child's recovery be.

Question 7 (b)

What risks would you anticipate if there were speedier child protection proceedings and decisions?

The benefits greatly outweigh any risks. The key will be to avoid reforms that maintain traditional adversarial processes, while sacrificing due process. We admit that currently there is an overjudicialization of a judicial control of administrative action function that results in a trial de novo, rather than a judicial oversight role. We need to get away from that. But much more important, is the challenge of making the justice system child-friendly and to support dispute resolution processes that will support child participation, provide judicial oversight, support multi-disciplinary decision-making in a best interests decision-making model.

Question 7 ©

How long should a child or youth stay in temporary care? Should the same timeframes exist for all children and youth, regardless of their age?

Twenty-four months consecutive is clearly unworkable. In our view 24 months cumulative will also prove unworkable in many situations and leave children at the mercy of a protracted cycle of revolving doors in and out of care. As stated in our report, the system is particularly disadvantageous to child victims of abuse or neglect in early years. Their supposed resiliency, their parents' inexperience, and youth, so many factors compete towards the notion that any parent can fail a few times. In this way children abused in early childhood end up paying the price

of a system of temporary care which was initially set up to protect them. The 24 month ceiling becomes a floor and permanent placement decisions are refused pending the attempt of a temporary placement solution. We would support any reform that provides more flexibility to allow children who need to be placed permanently early on to have the benefit of such permanent placements. We also feel that a 24 month cumulative rule may allow the meter to spin out too sporadically for many youth and that there should be a firm limit on how much a child's childhood should have to be lived in and out of trauma, parental abuse or neglect. If the Department has worked continuously for five years or more with a parent, without success, and children continue to be traumatized, younger siblings should not have to suffer the same fate because their parents were given the same chance with the older ones. The legislative standards could better reflect this.

Question 7 (d)

What factors should be considered in deciding whether a parent has had enough opportunities to demonstrate their capacity to appropriately parent?

This seems to us to put the shoe on the wrong foot. Too often in our caseload, we come across departmental decisions which seem to be informed by a supposed parent's right to parent. This approach to the issue proceeds entirely from a preservation of family unity above all perspective. A best interest of the child approach asks how many times should a child be neglected, abused or maltreated. It is a different question altogether.

Question 7 (e)

Should there be a provision in the new legislation regarding post-guardianship access between the parent and child?

Yes, but this should be the child's decision, not the parent's and only within determination of the best interests of the child by the Minister.

Question 7 (f)

If so, what factors should the court consider in granting post-guardianship access?

The court should only make such an order pursuant to two criteria: 1) that the decision is justifiable within a best interests of the child test; and 2) that the decision may only be made with the child's agreement, if the child's views can be ascertained. The latter criterion is essential for the child's rights to be upheld, and must be determinative. However, provision should be made for the potential of varying an order if the child's views change.

8. Intimate Partner Violence

Question 8 (a)

What provisions should be included in the new legislation to protect children from intimate partner violence?

Here again the measures required are largely preventative. The existing provisions taking exposure to intimate partner violence into consideration in the circumstances that may constitute a danger to the child, should be carried over. Similarly they could helpfully be referenced in most BIOC criteria identified in the new statute. The real impact on this front however would come from a massive education and awareness campaign that informs all New Brunswickers on the consequences for children of this kind of mental violence to them. For too long this discourse has been carried by the women's movement, and them alone. Child protection professionals and child advocates need to speak together about the disparate impacts of this violence, as violence towards children. Whether it is physical or emotional abuse the toll on children of parents who cannot behave civilly towards one another is very heavy. Change will come in this area not through better, stricter enforcement, but through education and children are well situated to be the educators we need on this topic.

9. Privacy

Question 9 (a)

What provisions should be included in the new legislation to prevent a person from distributing, recording, videotaping, or otherwise disclosing confidential information about a child protection matter?

This is a double-edged sword. Too often the Child Protection system's zealous commitment to protect referral source information and child protection files masks an unease with transparency and accountability We should not talk about privacy and confidentiality, without having a prior and more important conversation about reporting, measurement, results and accountability. When we do raise the issue of protecting child privacy, the concern should not be so much about protecting the privacy of child protection file information or insisting that every one who blurts a child's name by mistake gets fired. The concern should be about protecting children's privacy. This is a concern not just for child protection professionals, but for school officials, for health professionals, court officers and parents and community service providers as well. We hear of foster placements and group home placements where children and youth are significantly deprived of important aspects of privacy. These are the situations where the Department needs to focus its attention. Wilful or reckless disclosure of confidential child protection information should be punishable under the *Provincial Offences Procedures Act* as a category A or B offence.

10. Information Sharing

Question 10 (a)

What provisions should be included in the new legislation to improve information sharing with community professionals to ensure appropriate services are provided in the best interests of the child while still protecting the child, youth and family's right to privacy?

The proposed provisions in the *Children's Act* in our paper above in relation to ISD should encompass and address this issue in full. The provisions in the *Right to Information and Protection of Privacy Act* in relation to exemptions for sharing information in relation to Integrated Service Delivery programs, could be considered and carried over into the Children's Act. We would also need to provide a mechanism to ensure that information sharing can occur also with community partners and all stakeholders in the child's circle of care. The *Children's Act*, by proclaiming the child's right to privacy, the right to information, to health care and the right to be free from violence will provide the rights-based framework within which these several foundational rights of children can be promoted and enforced even in situations where there may be an apparent clash of rights.

Generally, in our experience Social Development can be faulted for defending privacy too vigorously. Most often it is well intentioned, sometimes it has rung hollow. They must be team players working within a multidisciplinary, best interests of the child, information-sharing circle of care. That is the problem we need to focus upon and that the legislation needs to address.

11. Review Process

Question 11 (a)

How often should child welfare legislation be reviewed? Should this timeframe be entrenched in the new legislation?

Given the rapidly growing understanding of the science of child development, and the ever-increasing ways in which collaborative processes and technology are used, the legislation should undergo a thorough review at a minimum every five years.

Question 11 (b)

How should the review be carried out? Who should be involved?

The review should be led by the reformed ISD governance Committee proposed in our report above. Comprehensive input from external stakeholders such as the New Brunswick Association of Social Workers, the Youth in Care Network, group home and foster home associations, and the academic community should be solicited as well.

12. Other Considerations or Issues

Please outline any other considerations or issues that should be included in new legislation.

The Advocate's further submissions in this regard are outlined in its two companion reports to *Behind Closed Doors*; *Easier To Build* and *Through Our Eyes*, the three reports constituting together our submissions in relation our recent review of child welfare services in New Brunswick.

Appendix II

Review Team CYA Staff

Kelly Lamrock, Child and Youth Advocate

Christian Whalen, Deputy Advocate and Lead Writer

Gavin Kotze, Director of Systemic Advocacy

Wendy Cartwright, Coordinator of Systemic Investigations

Mélanie Leblanc, Director of Individual Case Advocacy

Amélie Brutinel, Education and Outreach Coordinator

Michelle Lepage, Individual Case Delegate, First Nations Advisory Council Liaison

Juliette Babineau Moore, Office Manager

Chelsy Dutcher, Individual Case Delegate

Timothy Roberts, Individual Case Delegate

Alexandra Dejong, Individual Case Delegate

Amy Clements, Individual Case Delegate

Heidi Cyr, Communications Director