Bill 89, the *Supporting Children, Youth and Families Act, 2017*

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Submitted by: The Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the opportunity to make this submission to the Standing Committee on Justice Policy (the "Committee") in respect of Bill 89, the *Supporting Children, Youth and Families Act*, *2017*. The Bill will, if passed, ultimately replace and repeal the *Child and Family Services Act*.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 17,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed by the OBA's Child and Youth Law Section with input from the Aboriginal Law Section. Our members work in private practice, for government agencies, and for not-for-profit organizations, with many in their practice representing parents and children in the areas of child protection law and youth justice.

Overview

Bill 89, the *Supporting Children, Youth and Families Act*, *2017* is a significant step in the recognition of child and youth rights in Ontario. It is the product of a mandatory legislative review of the *Child and Family Services Act* ("CFSA") in 2014-15, a review of residential services for youth in early 2016, and recommendations flowing from Inquests into the deaths of children Jeffrey Baldwin and Katelynn Sampson, in 2014 and 2016 respectively.

The Katelynn Sampson Inquest appears to have had a particular influence on the construction of Bill 89. The Coroner's Jury that examined her death made 173 recommendations. The first recommendation, which they called "Katelynn's Principle," was that the child occupy the centre of all decision-making where they are the subject of, or are receiving services through, the child welfare, justice, and education systems.

Bill 89 incorporates Katelynn's Principle in the Preamble by stating that "children are individuals with rights to be respected and voices to be heard." The OBA welcomes the focus on children's rights in Bill 89 as a positive step toward addressing one of the identified, most pressing gaps in existing child protection legislation. Requiring that children's views are solicited, heard, and respected will help ensure that they are able to meaningfully participate in decisions about them and their lives.

Our Recommendations

The recommendations below concern Schedule 1 to Bill 89, which will be the new *Child, Youth and Family Services Act, 2016* when in force. All recommendations, when referring to specific provisions of Bill 89, are referring to provisions in Schedule 1.

The first three recommendations touch on issues relating to children and youth generally. They are directed toward the expanded purposes of the Act; the application of the Act to First Nations, Inuit, and Métis communities; and the broadened criteria under the best interests test.

The last three recommendations touch on issues specific to youth aged 16 and 17. In general, the OBA is pleased that Bill 89 will extend the full range of child protection services to children aged 16 and 17. This will address a long-standing gap in the legislation that prevented youth from accessing protective services for the first time after their 16th birthday. At the same time, however, the OBA has concerns about how some of the provisions will work in practice as they relate to 16- and 17-year olds, specifically with regard to services provided on a non-voluntary basis, the criteria for a finding in need of protection, and the duty to report.

Expanded Purposes of the Act

Section 1 sets out the purposes of the new Act, building on the purposes currently found in the CFSA. The OBA supports the expanded purposes of Bill 89 as set out in s. 1, particularly in respect of the increased emphasis on building on the strengths of families and recognizing that prevention services, early intervention services, and community support services are invaluable in reducing the need for more disruptive services and interventions.

Too often in our practice, however, we see child protection interventions arising out of concerns that are situational in nature; for example, relating to challenges associated with family poverty, the parents' precarious work situations, and/or single parenting. For this reason, the expanded focus of the Bill on maintaining and supporting family strengths must be accompanied by adequate investment in community-based services that will support early prevention initiatives while reducing the need for more disruptive interventions.

To this end, the incorporation into s. 1 of the United Nations *Convention on the Rights of the Child*'s guiding principle of non-discrimination would ensure that the problem of over-representation of children of Indigenous heritage, children from racialized backgrounds, and those experiencing poverty is addressed in meaningful ways.[1] We also note that s. 24(c) of the Bill will allow the Minister to "provide funding, pursuant to agreements, *to persons*, agencies, municipalities, organizations and other prescribed entities" for a variety of purposes, including providing services [emphasis added]. We hope that s. 24(c) may be used creatively to support the care of children by

[1] United Nations, *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, Article 2.

their families by making additional resources available to address situational concerns, such as housing or poverty issues, that could otherwise necessitate their placement in foster care. This could help directly address the over-representation of Indigenous children in care due to family poverty and inadequate housing.

The OBA also believes that s. 1 of Bill 89 could be further expanded to address the disproportionate criminalization and over-incarceration of youth who are receiving, or who have received, protective services. The federal *Youth Criminal Justice Act* (YCJA), which governs the prosecution of youth criminal offences, emphasizes that custody should not be used as a substitute for appropriate child protection, mental health, or other social measures. In practice, however, we see that current and former youth in care continue to be overrepresented in the criminal justice system.

In order to provide meaningful protective services the law must seek to disrupt the well-established pathway from the child protection system to the criminal justice system. As a result, the purposes of Bill 89 should be expanded to explicitly reinforce the principle that the criminal justice system should be used judiciously and appropriately, and not as a substitute for appropriate child protection services and supports. Clear statutory language would help limit the circumstances under which police and the criminal justice system are engaged in response to the behaviour of youth in care.

Application to First Nations, Inuit, and Métis Communities

The CFSA currently recognizes the culture, heritage, and traditions of "Indian and native children," and gives certain rights of notice and participation to a representative chosen by the child's band or native community. These definitions have the effect of excluding many individuals of Indigenous heritage who do not have formal Indian status or affiliation with a band or designated native community. Section 2 of Bill 89 seeks to broaden these definitions by including "First Nations, Inuit, and Métis" children in an effort to ensure that more Indigenous children are afforded specialized recognition within the Ontario child welfare legislative framework.

The OBA supports Bill 89's inclusion of First Nations, Inuit, and Métis individuals. While the Bill itself does not specify who is to be included in the definition of "First Nation," we would argue that it should include, at minimum, members of tribes and tribal groups in addition to members of bands as defined by the *Indian Act*. We would further argue that consideration should also be given to include individuals who are recognized by the First Nation, Inuit, or Métis community or by the band, tribe, tribal group, or tribal council as being part of their community.

We are also concerned that the definition of "First Nations, Inuit or Métis community" in s. 2 of the Bill includes only "communities listed by the Minister in a regulation." This is the same model found in the CFSA, which defines a native community as a "community designated by the Minister." In our experience, this has the effect of excluding Indigenous people living in non-designated communities, leaving them without recourse in the event that their Aboriginality is challenged.

As under the CFSA, the definition in Bill 89 will pose challenges for individuals of Indigenous heritage who either do not have a formalized affiliation with a particular band or designated community, or who do not know with which band or community they identify. In our experience, it is not uncommon for children and young people to be unfamiliar with their exact heritage or ancestral community, an understandable reality when viewed through the lens of historical removal and assimilation policies, including residential schools, the Sixties Scoop, and the current overrepresentation of Indigenous children in the child welfare system – all of which have served to separate children from their families, communities, culture, tradition, and language.

In an effort to ensure that all Indigenous children are treated equally within the legislative framework, the OBA supports a broad designation of First Nations, Inuit, and Métis communities for the purposes of Bill 89, as well as greater certainty for individuals who are unable to formally identify with a band or designated community. This approach is in keeping with the Supreme Court of Canada's decision in *Daniels v. Canada (Indian Affairs and Northern Development*), 2016 SCC 12.

Best Interests Criteria

Part V of Bill 89 requires that the child's best interests be considered whenever a child protection order or determination is made. This is similar to the current structure of Part III of the CFSA. Under the new s. 73(3) and (4), however, the criteria for what is to be considered in determining a child's best interests will be broadened to include the child's views and wishes (given due weight in accordance with the child's age and maturity), the child's cultural and linguistic heritage, race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression, and, for a First Nations, Inuk, or Métis child, the importance of the child's connection to community.

While the OBA supports these changes, we understand that the federal government is currently reviewing the federal best interests criteria for the purposes of the *Divorce Act*. Though we appreciate the difficulty of coordinating provincial and federal legislative review, we hope to see some consistency at the two levels in order to ensure predictability in the treatment of the best interests test as Bill 89 moves forward.

Voluntary Access to Services in Respect of Older Youth

As noted above, one of the major changes in Bill 89 is the extension of a number of provisions to apply to youth aged 16 or 17 ("older youth"). Currently, access to voluntary services under Part II of the CFSA (i.e. temporary care agreements) and protective services under Part III of the CFSA are not available for youth who need support or care for the first time after their 16th birthday, or who have a need to return to care following their 16th birthday after exiting the system.

The OBA supports the extension of the full range of child welfare services to older youth. Bringing 16- and 17-year-olds into the legislative scheme addresses long-standing concerns about these youth being unable to access protective services despite their vulnerability and clear need for support. We caution, however, that any services provided to older youth must be on a voluntary basis and with their consent.

This voluntary approach to child welfare services for individuals aged 16 and 17 is consistent with the developmental needs of older youth. By the time they reach the ages of 16 and 17, youth seek and are, indeed, entitled to a greater degree of independence and privacy than are younger children. Respecting youths' decisions about whether to accept child protection services would also give effect to Katelynn's Principle and the Supreme Court of Canada's analysis of child rights principles,[2] which state that children should be given the opportunity to participate in any decisions being made about their lives, in accordance with their age and maturity.

Any attempt to provide child welfare services to older youth without their consent also creates practical problems; our experience working with older youth demonstrates that involving 16- and 17-year-olds on a non-voluntary basis makes it much more difficult to successfully engage support services and can contribute to the breakdown of placements, leaving older youth in more vulnerable situations.

For these reasons, we support the extension of the temporary care agreement scheme under s. 74 of Bill 89 to provide for agreements between Children's Aid Societies and youth aged 16 and 17. We support s. 76 of Bill 89, which provides that a Society can only enter into an agreement with a 16- or 17-year-old with the consent of the youth, where the youth "wants to enter into the agreement." We support the extension of continued care and support agreements under s. 121 (currently known as extended care and maintenance agreements under the CFSA) to older youth who entered into an agreement with a Society as a 16- or 17-year-old.

However, while we support in principle the extension of protective services under Part V of Bill 89 (currently Part III of the CFSA) to older youth, we are concerned that under Part V older youth could become the subject of protection applications and made subject to court orders and dispositions where they do not consent. As noted above, it is vital that any involvement by child welfare authorities with older youth be on a voluntary basis with the youths' consent.

Criteria for a Finding in Need of Protection for Older Youth

Under Bill 89, as in the current legislation, the criteria for finding that a child is "in need of protection" is critical to the overall legislative scheme. Where the court finds that a child is "in need of protection," it can make a number of different orders, up to and including an order for "extended

[2] See for example *A.C. v. Manitoba (Director of Child and Family Services)*, [2009] 2 S.C.R. 181 at para 93.

society care," which results in the permanent severance of parental ties (known as "Crown wardship" under the CFSA). The criteria for finding a child in need of protection also informs Society decision-making about whether to investigate a protection concern, whether to try to provide a family with support on a voluntary basis, and whether to commence a protection application. Further, Bill 89 will require the Society to determine that a 16- or 17-year-old "is or may be in need of protection" before entering into an agreement with the youth in accordance with s. 76.

The criteria for finding a child in need of protection is therefore enormously important in determining whether, and how, the child protection system is engaged. Bill 89 enumerates the various grounds on which a finding in need of protection may be made and essentially replicates what is found in the CFSA. However, for youth aged 16 and 17, Bill 89 creates an additional ground. Subsection 73(2)(o) states that "a child is in need of protection where… the child is 16 or 17 and a prescribed circumstance or condition exists."

The OBA has a number of concerns about s. 73(2). As currently drafted, it is unclear whether the grounds set out in the subsections 73(2)(a) through (n) are intended to apply to 16 and 17-year-olds in addition to (o), as we assume to be the case, or whether subsection (o) is intended to create a separate scheme for finding 16 and 17-year-olds in need of protection. In either case, the OBA is concerned that Bill 89 would extend child protection services to youth aged 16 and 17 but leave certain criteria for a protection finding for these youth to be prescribed later by regulation. Given that the finding in need of protection is such a central concept to the overall legislative scheme, it is difficult to assess the impact of Bill 89 on older youth without knowing all of the criteria that could be used to determine when they are in need of protection.

Further, proposed regulations are not generally subject to the same level of public debate and scrutiny as bills and, in our experience, generally involve less consultation than do statutory changes. We would like to see space in the decision-making process for diverse voices, including those of children and youth, in determining when older youth will be considered in need of protection. As noted above, we feel that youth ought to have the opportunity to participate in determining what kind of services they need and when, giving effect to Katelynn's Principle.

For these reasons, we recommend that s. 73(2) of Bill 89 be amended so that the grounds for finding a youth aged 16 or 17 in need of protection be specifically included in the Bill or, in the alternative, that the voices of youth be specifically consulted and considered during the regulation-making process.

Duty to Report for Older Youth

Under the CFSA, as in Bill 89, all individuals are required to report to a Children's Aid Society any reasonable belief that a child under the age of 16 is in need of protection. This is generally known as the "duty to report." However, for youth aged 16 and 17, s. 122(4) of Bill 89 states that an individual

may make a report, leaving it in the individual's discretion whether or not to do so. In our submission, professionals and agencies ought to be obligated to report protection concerns in relation to 16- and 17-year-olds, but only where the youth consents to the reporting.

In addition to the concerns identified above regarding the need to respect older youths' rights to self-determination and participation in decision-making, the mandatory duty to report engages significant privacy interests on the part of youth. In our experience, the kinds of relationships where information giving rise to protection concerns is likely to arise are precisely those relationships where trust and confidentiality are critically important – for example, counselling or therapeutic relationships. If professionals and agencies working with older youth are required to report information gained in confidence, the foundation of trust on which these relationships depend will be eroded.

We suspect that the policy rationale supporting the differing duty to report for those under 16 and those over 16 is to allow the professional or agency to consider the older youth's perspective before making a report. However, in our experience, leaving the decision about whether to report entirely in the hands of the individual is problematic. We are concerned that for the sake of simplicity and consistency, agencies who work with children and youth will adopt blanket policies in favour of reporting, notwithstanding the fact that reporting is voluntary in respect of 16- and 17-year-olds. Again, older youth have a significant privacy interest in this kind of information and they ought to be able to choose whether or not to engage with child protection agencies at all stages.

In the event that the reporting provisions regarding older youth remain an exercise of discretion, it would be prudent for the Bill to clarify the circumstances under which it is expected that this discretion be exercised.

Conclusion

Once again, the OBA supports Bill 89 as addressing some of the pressing and compelling gaps in current child protection legislation. We commend the attention the Legislature has provided to the need for enhanced protection for some of society's most vulnerable individuals.

The best practices and common principles in the area of child protection will continue to change and evolve over time. For this reason, we look forward to participating in the Legislature's periodic reviews of the new legislation, and any regulations made thereunder, to ensure that they always respect the voices and opinions of children moving forward.