

**Brief submitted by UNICEF Canada
to the
Standing Committee on Social Policy (Ontario) in response
to Bill 117 (the *Provincial Advocate for Children and Youth
Amendment Act, 2015*)**

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INTRODUCTION

This brief is being submitted by Marvin Bernstein on behalf of UNICEF Canada to the Standing Committee on Social Policy in response to Bill 117, the *Provincial Advocate for Children and Youth Amendment Act, 2015*, which was introduced in the Ontario Legislature on September 14, 2015 and received second reading on September 17, 2015. Mr. Bernstein's short biography is being submitted as an attachment to this written brief.

UNICEF Canada commends the Ontario government for establishing the Office of an independent Provincial Advocate for Children and Youth and for conferring new investigation powers in relation to child protection matters involving a children's aid society. It is our considered view that Bill 117 is consistent with international norms for independent human rights institutions or offices for children and youth, and simply reflects a natural extension of that role.

The views and proposals set out in this brief represent UNICEF Canada's best efforts to bring forward its child human rights expertise and knowledge of international norms that apply to these offices both globally and in other parts of Canada.

ABOUT UNICEF

The United Nations Children's Fund (UNICEF) works in 190 countries through country programs and National Committees. UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the UN Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children.

UNICEF is the world's leading child-focused humanitarian and development agency. Through innovative programs and advocacy work, we save children's lives and secure their rights in virtually every country. Our global reach, unparalleled influence on policymakers, and diverse partnerships make us an instrumental force in shaping a world in which no child dies of a preventable cause. UNICEF is entirely supported by voluntary donations and helps all children, regardless of race, religion or politics. The only organization named in the United Nations Convention on the Rights of the Child as a source of expertise for governments, UNICEF has

exceptional access to those whose decisions impact children's survival and quality of life. We are the world's advocate for children and their rights. For more information about UNICEF, please visit www.unicef.ca.

POSITION OF UNICEF CANADA AND SUPPORTING REASONS

It is the position of UNICEF Canada that Bill 117 should be enacted, subject to the recommended amendments which are set out in this written brief. In our view, it is imperative for the Provincial Advocate to have access to timely and relevant information in order to engage in both individual and systemic advocacy and investigations in the case of child deaths and critical injuries sustained by children or youth where they, or their families, were involved with a children's aid society during the preceding 12 months. The Provincial Advocate is a child-sensitive agency with particular knowledge, skills and duties in relation to vulnerable children that can ensure the insight necessary to support the continuous improvement and accountability of the systems that serve them.

When reviewing Bill 117, it is instructive to compare the proposed section 18.1 of the *Provincial Advocate for Children and Youth Act, 2007* with the relevant provisions set out in the *British Columbia Representative for Children and Youth Act*. The central provision in Bill 117 seems to be patterned in large measure on subsection 11(1) of the *British Columbia Act*, except that there are other definitions and subsections in the *British Columbia Act* that provide additional clarification – such as the definition of 'critical injury' (section 1); the provision authorizing agreed upon protocols for the timing of disclosure of information concerning a child death or injury (subsection 11(2)); and the purposes for which the information of a child death or critical injury may be required (subsection 11(3)). These missing provisions could be added to make greater cohesive sense out of Bill 117.

Where the language is exactly the same in both the proposed Ontario and enacted British Columbia legislation, it suggests that the provisions are working in practice and that effective implementation protocols have been established. That would apply to such language as "becomes aware of a critical injury or death of a child"; and "must provide information respecting the critical injury or death to the representative {for Children and Youth}...", notwithstanding some of the concerns raised in respect of this terminology in earlier parliamentary debates.

Additional reasons in support of this position are as follows:

1. The provisions of Bill 117 are consistent with international norms for independent human rights institutions or offices for children and youth, such as the Office of the Provincial Advocate for Children and Youth in Ontario (the essential human rights principles are set out later in this written brief).
2. Canada ratified the UN Convention on the Rights of the Child in 1991 and thus the federal, provincial and territorial governments assumed international obligations to promote the protection, provision and participation rights of all children in this country. In fact, subsection 2(3) of the *Provincial Advocate for Children and Youth Act, 2007* states that “*In interpreting and applying this Act, regard shall be had to ..[t]he principles expressed in the United Nations Convention on the Rights of the Child.*”
3. According to the UN Committee on the Rights of the Child’s guidance commentaries and the Paris Principles for independent human rights institutions, these offices are to have broad mandates and powers so as to fully promote and protect the human rights of all children and youth - mandates that exist in many of the independent offices that have been created in other Canadian provinces and territories and in at least 70 countries worldwide.
4. Pursuant to the right of such independent human rights offices for children and youth to have access to relevant information, the Paris Principles call for independent human rights institutions to “*hear any person and obtain any information and any documents necessary for assessing situations falling within its competence.*”
5. The UN Committee on the Rights of the Child, in its General Comment No. 2, has called for such offices to “*possess the power to compel and question witnesses, access relevant documentary evidence ...in order to be able to carry out effective investigations.*”
6. The proposed section 18.1 of the *Provincial Advocate for Children and Youth Act, 2007* mirrors subsection 11(1) of the British Columbia *Representative for Children and Youth Act* (which is set out in Appendix ‘C’ of this Brief and builds on the B.C. Representative’s broad powers of access to information, as prescribed in subsection 10(2) of that *Act*) and contains similar language except that it refers to a “public body” instead of an “agency or service provider” and is guided by a definition of “critical injury” in section 1 of the same *Act*.
7. The proposed section would allow the Office of the Provincial Advocate for Children and Youth to obtain information about a child’s death and critical injuries at the same time as the government – instead of waiting for months or having to rely upon media reports.

8. It is important for parents and siblings (in age appropriate terms) to be informed about the Provincial Advocate's Office when a child dies or sustains a critical injury and for young people with a critical injury to be likewise informed of their right to contact that Office.
9. The proposed new authority would enable the Provincial Advocate's Office, in the language of subsection 11(3) of the *Representative for Children and Youth Act*, "(a) to determine whether to investigate a critical injury or death...; [and] b) to identify and analyze recurring circumstances or trends (i) to improve the effectiveness and responsiveness of a reviewable service, or (ii) to inform improvements to broader public policy initiatives."

CHILDREN'S HUMAN RIGHTS INSTITUTIONS – AN OVERVIEW OF INTERNATIONAL STANDARDS

A) GENERAL

Globally, there are several types of children's human rights institutions – sometimes referred to as advocates, representatives or ombudspersons for children or as children's commissioners. Most such offices or institutions – close to 200 worldwide in 70 countries - were established by national and sub-national governments after ratifying the United Nations Convention on the Rights of the Child after 1989, and so have a broad-based mandate for the promotion and protection of comprehensive children's human rights. Following the international adoption of the Convention in 1989, further international guidance has been provided by the United Nations Committee on the Rights of the Child as to the optimal scope and mandate of such offices.

By ratifying the United Nations Convention on the Rights of the Child on December 13, 1991, federal, provincial and territorial governments have assumed the obligation to implement the Convention fully, including the general measures of implementation, which include the establishment of children's human rights institutions at the national level and in all ten (10) provinces and three (3) territories, with a broad remit to promote and protect children's human rights. Article 4 of the Convention on the Rights of the Child states:

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

B) EXPLICIT LEGISLATIVE REFERENCE TO THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD IN THE *PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH ACT, 2007*

While UNICEF Canada appreciates the particular historical circumstances giving rise to the limited mandate of the Office of the Provincial Advocate for Children and Youth relative to similar offices in other jurisdictions, we are of the view that it is necessary to take a broader perspective - and one that is based on internationally accepted and sustainable standards and norms for independent children's human rights institutions and informed by the good practices in other Canadian jurisdictions.

It is noteworthy that the *Provincial Advocate for Children and Youth Act, 2007* states in section 2(3):

In interpreting and applying this Act, regard shall be had to the following principles:
1. *The principles expressed in the United Nations Convention on the Rights of the Child.*

Given the explicit reference to the United Nations Convention on the Rights of the Child, it is important to also consider the commentaries of the United Nations Committee on the Rights of the Child that assist in the interpretation of the various articles and the full implementation of the Convention – such as found in the Committee's General Comments (particularly General Comments Nos. 2 and 5).

C) PRINCIPLES RELATING TO THE STATUS OF NATIONAL INSTITUTIONS FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS (PARIS PRINCIPLES) (1993)

The Paris Principles (referred to in the Concluding Observations of the United Nations Committee on the Rights of the Child) were adopted by the United Nations Human Rights Commission by Resolution 1992/54 in 1992 and by the UN General Assembly by way of Resolution 48/134 in 1993. The Paris Principles list a number of responsibilities that human rights institutions could and should undertake.

Among other things, the Paris Principles call for human rights institutions to:

- **Possess the necessary competence to promote and protect human rights;**

- **Possess as broad a mandate as possible, which shall be clearly set out in a constitutional or legislative text;**
- Freely consider any questions falling within its competence, whether those questions are referred by government, or on its own motion; and
- **Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence. (Bolding is added for emphasis.)**

D) GENERAL COMMENT NO. 2 OF THE UNITED NATIONS COMMITTEE ON THE RIGHTS OF THE CHILD (2002)

Building on the recommendations set out in the Paris Principles, the UN Committee on the Rights of the Child, in its General Comment No. 2 (2002) on “*The role of independent national human rights institutions in the promotion and protection of the rights of the child*” states that such institutions are “an important mechanism to promote and ensure the implementation of the Convention [on the Rights of the Child]” and calls upon States Parties to establish such institutions underlining its “principal concern” that the institution, whatever its form, should be able, “independently and effectively”, to promote and protect children’s rights.

General Comment No. 2 envisions that children’s human rights institutions will have a broad mandate that includes advocacy, investigations, auditing and monitoring, public education and public reporting. It also sets out, in paragraph 5, a series of reasons as to why the human rights of children need special attention and require separate human rights institutions to protect and promote their human rights:

...children’s developmental state make them particularly vulnerable to human rights violations; their opinions are still rarely taken into account; most children have no vote and cannot play a meaningful role in the political process that determines Governments’ response to human rights; children encounter significant problems in using the judicial system to protect their rights or to seek remedies for violations of their rights; and children’s access to organizations that may protect their rights is generally limited.

In relation to the scope and mandate of national and sub-national children’s human rights institutions, the Committee on the Rights of the Child in its General Comment (No. 2), among other things, calls for such institutions to:

- Be established in compliance with the Paris Principles;

- **Possess a mandate with as broad a scope as possible for promoting and protecting human rights;**
- **Be geographically and physically accessible to all children and reach out in particular to the most vulnerable and disadvantaged, such as (but not limited to) children in care or detention,** children from minority and indigenous groups, children with disabilities, children living in poverty, refugee and migrant children, street children and children with special needs in areas such as culture, language, health and education;
- Undertake investigations into any situation of violation of children's rights, on complaint or on their own initiative, within the scope of their mandate;
- Possess the power to consider individual complaints and petitions and carry out investigations, including those submitted on behalf of or directly by children;
- **Possess the power to compel and question witnesses, access relevant documentary evidence and access places of detention in order to be able to carry out effective investigations;** and
- Conduct inquiries on matters relating to children's rights. **(Bolding is added for emphasis.)**

RECOMMENDATION 1:

That the proposed provisions set out in Bill 117 be enacted, in keeping with international norms for independent human rights institutions or offices for children and youth, subject to further corrective proposed amendments.

NEED FOR FURTHER AMENDMENTS TO THE *PROVINCIAL ADVOCATE FOR CHILDREN AND YOUTH ACT, 2007*

1) DISCLOSURE OF UN-REDACTED INFORMATION AND SUMMARY OF CIRCUMSTANCES SURROUNDING CHILD DEATH OR CRITICAL INJURY

It appears from previous statements made by the Provincial Advocate that reports currently provided to his Office contain heavily redacted information, such as the child's age or the date of his or her death. However, as an Officer of the Legislature, the Provincial Advocate's role is to serve as an independent voice for all children who are seeking or receiving services from the children services sector. If a child dies or suffers a critical injury while receiving services from an agency of the provincial government, the Provincial Advocate should be notified immediately and given the same timely and complete access to information as the government.

Given that the Provincial Advocate has been given new powers of investigation, it is difficult to see how he could initiate an individual or systemic investigation without receiving un-redacted and complete information.

Accordingly, the information provided to the Provincial Advocate should not be redacted and should include a summary of the circumstances surrounding the death or critical injury of the child or youth. If there is a privacy concern, then the *Provincial Advocate for Children and Youth Act, 2007* prevents the Provincial Advocate from disclosing any personal information without consent.

RECOMMENDATION 2:

That Bill 117 be amended to include a provision requiring that the information disclosed to the Provincial Advocate be complete and un-redacted, and include a summary of the circumstances surrounding the death or critical injury of the child or youth.

2) CLARIFICATION OF TIMING OF DISCLOSURE OBLIGATION

One concern expressed during the parliamentary debates was in respect of the obligation to “inform the Advocate promptly.” The point was made that the term “promptly” is too vague and does not take into account current protocols for frequent disclosure at specified time intervals. One example cited was the Ministry of Children and Youth Services’ practice of currently sharing information on a monthly basis with the Advocate’s Office. The risk mentioned was that this amendment could potentially increase the frequency of that information-sharing.

As to the question of the vagueness of the term ‘promptly’ and how that might be interpreted, it is our view that such language should be replaced with other terminology, such as “without unreasonable delay”.

In addition, given that disclosure protocols are often used in the area of independent critical injury and child death investigations, one solution to consider is that referenced in subsection 11(2) of the British Columbia *Representative for Children and Youth Act*, which states:

For the purposes of subsection (1), the public body may compile the information relating to one or more critical injuries or deaths and provide that information to the representative in time intervals agreed to between the public body and the

representative.

A similar provision could thus be incorporated into Bill 117. In this way, the obligation would be to inform the Advocate without unreasonable delay and in accordance with any agreed to protocols which have been established in advance.

RECOMMENDATION 3:

That Bill 117 be amended to include an obligation by an agency or service provider to inform the Advocate of a child death or critical injury, of which it has become aware, without unreasonable delay, and in accordance with any time intervals agreed to between the agency or service provider and the Provincial Advocate.

3) CLARIFICATION OF MEANING OF “CRITICAL INJURY”

One of the impediments to realizing the legislative intent of Bill 117 is the ambiguity in the meaning of a ‘critical injury’. This could be interpreted differently by various agencies and service providers. In addition, there is in the child welfare sector, the language of “critical incidents” with its own set of reporting requirements, which could cause additional confusion.

It is therefore suggested that a definition of ‘critical injury’ be incorporated into the Bill, having regard to other related definitions of ‘critical injury’, such as those appearing in the British Columbia *Representative for Children and Youth Act* and the internal policies of my former Office, the Saskatchewan Office of the Advocate for Children and Youth.

In the first case, section 1 of the British Columbia legislation provides:

“critical injury” means an injury to a child that may
(a) result in the child’s death, or
(b) cause serious or long-term impairment of the child’s health

In the second case, the Saskatchewan Office of the Advocate for Children and Youth has on its website reproduced its own internal definition of ‘critical injury’ as:

An incident where the injury sustained by the child or youth necessitates his or her hospitalization and major medical treatment. Additionally, the Advocate may investigate

an attempted suicide as a critical injury, regardless of whether hospitalization or major medical treatment was required.

RECOMMENDATION 4:

That Bill 117 be amended to include a definition of ‘critical injury’, having regard to other related definitions of ‘critical injury’, such as those appearing in the *British Columbia Representative for Children and Youth Act* and the internal policies of the Saskatchewan Office of the Advocate for Children and Youth.

4) ADDITIONAL REQUIREMENT ON AGENCIES AND SERVICE PROVIDERS TO NOTIFY PARENTS AND SIBLINGS OF THE EXISTENCE OF THE PROVINCIAL ADVOCATE OFFICE

An additional element that would strengthen Bill 117 is the inclusion of a provision that would place an obligation on agencies and service providers to notify the parents and siblings (in age appropriate terms) of a child or youth who has died or sustained a critical injury about the existence of the Office of the Provincial Advocate, its mandate and how to contact that Office.

In this way, the parents and siblings would be able to approach the Provincial Advocate’s Office and seek advocacy or investigation services, as appropriate. In the case of siblings, they may feel as though they are at risk themselves and may wish to speak with a support person at that Office.

If the Office of the Provincial Advocate of Children and Youth is contacted by the parent(s) of a child who has died or sustained a critical injury within his mandate, an advocate can help parent(s) identify questions; initiate contact with service providers or investigative bodies if appropriate; and facilitate a process that allows the parent(s) to raise questions and access information about the death or critical injury of their child from involved parties.

RECOMMENDATION 5:

That Bill 117 be amended to include a requirement that agencies and service providers notify the parents and siblings (in age appropriate terms) of a child or youth who has died or sustained a critical injury about the existence of the Office of the Provincial

Advocate for Children and Youth, its mandate and the means by which to contact that Office.

5) ADDITIONAL REQUIREMENT ON AGENCIES AND SERVICE PROVIDERS TO NOTIFY CHILDREN OR YOUTH WHO SUSTAIN CRITICAL INJURIES OF THE EXISTENCE OF THE PROVINCIAL ADVOCATE OFFICE

Another provision that would strengthen Bill 117 is the addition of a provision that would place an obligation on agencies and service providers to notify children or youth (in age appropriate terms) who sustain critical injuries about the existence of the Office of the Provincial Advocate, its mandate and how to contact that Office.

In this way, such critically injured children or youth would be able to approach the Provincial Advocate's Office and seek advocacy or investigation services, as appropriate. In the case of critically injured children or youth, they may be able to shed light on the factors and gaps in service that may have contributed to their injuries; may be able to indicate if other children are at risk in the same residence; and would be able to seek referral information as to which office could assist them in determining whether they are entitled to compensation or damages in relation to their injuries.

RECOMMENDATION 6:

That Bill 117 be amended to include a requirement that agencies and service providers notify children or youth (in age appropriate terms) who have sustained a critical injury about the existence of the Office of the Provincial Advocate for Children and Youth, its mandate and the means by which to contact that Office.

CONCLUSION

In our respectful submission, the introduction of Bill 117 provides an excellent opportunity to strengthen the child welfare system by providing the Provincial Advocate with the tools and capacity to carry out his mandate as fully and effectively as possible. By obligating agencies and service providers to inform the Provincial Advocate, if they become aware of the death or critical injury of a child or youth, it enables the Advocate to bring forward the voices of those who can no longer speak for themselves and amplify the voices of young people who have been critically

injured, as well as those children or young people who could potentially suffer serious harm in the future.

Respectfully submitted on behalf of UNICEF Canada by:

“MMB”

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APPENDIX 'A' – LIST OF RECOMMENDATIONS

RECOMMENDATION 1:

That the proposed provisions set out in Bill 117 be enacted, in keeping with international norms for independent human rights institutions or offices for children and youth, subject to further corrective proposed amendments.

RECOMMENDATION 2:

That Bill 117 be amended to include a provision requiring that the information disclosed to the Provincial Advocate be complete and un-redacted, and include a summary of the circumstances surrounding the death or critical injury of the child or youth.

RECOMMENDATION 3:

That Bill 117 be amended to include an obligation by an agency or service provider to inform the Advocate of a child death or critical injury, of which it has become aware, without unreasonable delay, and in accordance with any time intervals agreed to between the agency or service provider and the Provincial Advocate.

RECOMMENDATION 4:

That Bill 117 be amended to include a definition of 'critical injury', having regard to other related definitions of 'critical injury', such as those appearing in the *British Columbia Representative for Children and Youth Act* and the internal policies of the Saskatchewan Office of the Advocate for Children and Youth.

RECOMMENDATION 5:

That Bill 117 be amended to include a requirement that agencies and service providers notify the parents and siblings (in age appropriate terms) of a child or youth who has died or sustained a critical injury about the existence of the Office of the Provincial Advocate for Children and Youth, its mandate and the means by which to contact that Office.

RECOMMENDATION 6:

That Bill 117 be amended to include a requirement that agencies and service providers notify children or youth (in age appropriate terms) who have sustained a critical injury about the existence of the Office of the Provincial Advocate for Children and Youth, its mandate and the means by which to contact that Office.

APPENDIX 'B' – REFERENCES AND SELECTED BIBLIOGRAPHY

Provincial/Territorial Legislation

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British Columbia, The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165.
Ontario: The *Child and Family Services Act*, R.S.O. 1990, c. C.11.
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Other Documents/Sources

Saskatchewan, Advocate for Children and Youth, *Child Death and Critical Injury*, available at <http://www.saskadvocate.ca/investigations/child-death-and-critical-injury-investigations>

APPENDIX 'C' – RELEVANT EXCERPTS OF THE BRITISH COLUMBIA REPRESENTATIVE FOR CHILDREN AND YOUTH ACT

A) British Columbia *Representative for Children and Youth Act*, S.B.C. 2006, c. 29

Definitions

1 In this Act:

"critical injury" means an injury to a child that may

- (a) result in the child's death, or
- (b) cause serious or long-term impairment of the child's health

Right to information

10 (1) In this section, **"officer of the Legislature"** has the same meaning as in the *Freedom of Information and Protection of Privacy Act*, but does not include the representative.

(2) The representative has the right to any information that

- (a) is in the custody or control of
 - (i) a public body other than an officer of the Legislature, or
 - (ii) a director, and

(b) is necessary to enable the representative to exercise his or her powers or perform his or her functions or duties under this Act.

(3) The public body or director must disclose to the representative the information to which the representative is entitled under subsection (2).

(4) This section applies despite

- (a) any claim of confidentiality or privilege, other than a claim based on solicitor-client privilege, and
- (b) any other enactment, other than a restriction in section 51 of the *Evidence Act*.

Part 4 — Reviews and Investigations of Critical Injuries and Deaths

Reviews of critical injuries and deaths

11 (1) After a public body responsible for the provision of a reviewable service becomes aware of a critical injury or death of a child who was receiving, or whose family was receiving, the reviewable service at the time of, or in the year previous to, the critical injury or death, the public body must provide information respecting the critical injury or death to the representative for a review under subsection (3).

(2) For the purposes of subsection (1), the public body may compile the information relating to one or more critical injuries or deaths and provide that information to the representative in time intervals agreed to between the public body and the representative.

(3) The representative may conduct a review for the following purposes:

(a) to determine whether to investigate a critical injury or death under section 12;

(b) to identify and analyze recurring circumstances or trends

(i) to improve the effectiveness and responsiveness of a reviewable service, or

(ii) to inform improvements to broader public policy initiatives.

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