LEGISLATIVE ANALYSIS

Bill 114, *Child and Youth Well-Being Act*

Submitted to the Legislative Assembly by the Child and Youth Advocate

May 30, 2022

Overview

Bill 114 is an important piece of legislation. For children in care, government legally acts as their parent. There is no greater moral responsibility in our society than the charge of being a parent to a child who depends on us. This is especially true when children are at moments of great vulnerability, as children in care often are. Children deserve nothing less than the best of us, whether as legislators or as public servants. That makes careful and thoughtful review of Bill 114 essential.

In reviewing any legislation, the Advocate's office will ask two foundational questions. These will guide our advice to the Legislative Assembly.

1. Is this legislation an improvement upon the status quo?
2. Is this legislation the best that it can be?

We can say that Bill 114 is an improvement on the status quo. It makes improvements in some areas and establishes some new provisions in areas that desperately needed attention. In other areas, it creates the possibility of improvements given good regulations, proper resources, and sound departmental leadership.

Indeed, the very fact that this legislative analysis is being prepared is due to the decision to take up the challenge of renewing New Brunswick's child protection statutes, and the Advocate applauds the willingness of the government to do so. We also applaud the work done by all members who take the time to study and reflect upon this bill with due diligence. Vulnerable children lack political influence, and it is our moral responsibility to focus on their needs without political pressure to do so.

To the question of "Will things be better with or without this Bill?", the Advocate can advise that things will be better with the bill as presented. This analysis will highlight some of those areas.

Indeed, if this was a first draft of legislation, about to go into committee study with expert witnesses and an invitation to suggest thoughtful and reasonable amendments, we would be very enthusiastic. With the improvements over the *Family Services Act* and new ideas here, this would be an excellent starting point for engaging front-line workers and experts in the months we have before proclamation.

Of course, if this is the end of discussions, the bill must be held to a higher standard. We must ask "Is this bill as good as it can be?" For if this is the last word before we wait five years for the review, then we have to go beyond the improvements that are here and talk about what should be here.

By that standard, there are areas where we believe there are improvements that could be made. If we offer more explanation on these points, it should not detract from the very real positives here. As a legislative watchdog, it is the nature of the Advocate's job to highlight work to be done, and that should not detract from the many good things that happen every day in government.

In this analysis of Bill 114, we will propose some possible areas of amendment. We have tried, in the seven days since we received the text of this bill, to be clear in the amendments we would propose so that Members of the Legislative Assembly can have a debate on specific ideas and possible language. We believe that our mandate requires us to provide feedback and alternatives in any debate around bills that impact children, particularly those as vulnerable as the ones impacted by Bill 114.

Page 1...

It is important to be clear on our role in the process so far. The Advocate's Office began looking at issues of child protection in depth with the *Behind Closed Doors* report, which drew lessons from a case of extreme child neglect that went unchecked far too long. Since then, two other extensive reports have been developed; *Easier To Build*, which examines legislative solutions and next week's *Through Their Eyes*, which takes lessons from hundreds of interviews with children who have been in care and the front-line professionals who work with them. Drafts of these reports have been shared with the Department of Social Development over the last two years. We know that they were reviewed, and we see some signs of that in Bill 114. In that sense, the Office of the Child and Youth Advocate has been consulted.

We must also make it clear that at no time were we ever asked for suggestions or amendments on draft legislation. We have offered to do so. In that sense, we have been consulted but not engaged –we gave advice prior to this bill being drafted but we have not been engaged in any give-and-take discussion of the actual legislation now before the Legislative Assembly. The final say should always rest with those who were elected, and the Office of the Advocate will always respect that distinction. The Executive branch of government has no legal obligation to seek our suggestions on how to improve legislation.

However, the Advocate is an officer of the Legislative Assembly itself, and so the Advocate believes we have a legal duty under the *Child, Youth and Senior Advocate Act* to provide analysis and alternatives to the Legislative Assembly as a whole. As such, when the executive branch exercised its prerogative to decline hearing our suggestions for amendments in that forum, we had a legal obligation to provide them in this, the legislative forum. Our guiding statute provides standing direction from the legislative branch of government to provide that advocacy. We will meet our legal responsibility to advise the Assembly of those areas where improvement is needed.

In short, our analysis of this bill should be seen as a guide on how to take this legislation from a very good starting point to a bill that will be at the forefront of Canadian child protection legislation for the next five years. To meet that goal, we can guide members to these amendments and the significant reports released by our office and their call for a rights-based *Children's Act*, harmonized legislation for all services for children, cabinet-level responsibility for integrating services, and the use of Child Rights Impact Assessments (CRIA) by a secretariat that supports that minister.

There are two truths that must be acknowledged to close this introduction. First, the very fact this analysis is being prepared is because the Government of New Brunswick chose to take this issue on and has provided a bill for consideration that addresses several long-standing deficiencies, and that deserves credit. The second truth is that, in many provinces, a bill of this importance would automatically have committee hearings with expert witnesses and, if not the adoption, at least the consideration of amendments from experts and watchdogs so that the Legislative Assembly, and not the Department, has the final say on all available options. And we believe that the legislation is good enough to deserve that, too.

Page 2...

The Strengths of Bill 114

- The range of options established in Sections 48-67 is positive, and we particularly support the Kin Care provisions in Sections 66-67. These are consistent with past recommendations of the Advocate. The needs of children are diverse and highly individualized, and the more options made available to social workers, families, and courts, the more likely it is the right solution will be found. Staff training and practice standards will be essential in making these work, in particular the need for a culture shift from a model focused upon parental rights to one that protects the rights of children.

- The opportunities for collaborative planning both pre-application and in the court process, found in Sections 42 and 62, are good additions and appropriately balanced with the requirement to consider the impacts upon children.

- The ability of other parties besides custodial and birth parents to apply to join applications in S.136(1) is long overdue and brings New Brunswick in line with other jurisdictions. The current *Act* limits courts to granting a ministerial application or restoring the custodial status quo, and this has sometimes meant that caregivers who could provide the child the permanence they need are sidelined in hearings. Bill 114 addresses that problem.

- The Advocate has previously cited unacceptable delays in court applications. We note that some provisions in Bill 114 may assist in making the court system more responsive and ensuring that cases that can be solved collaboratively do not take up as much court time. These changes include time limits on interim proceedings (s.48(7), ss. 60-61), the use of less intrusive options with an onus on parents to challenge (s.49), the ability to ensure parental access when appropriate in custody orders (S.56(10)), ability to vary existing custody orders, including private ones (s. 54(3) & s. 61(1)), the presumptive removal of absentee parents from collaborative proceedings (s. 62(2), and the addition of other options for placement to the same hearing (s.136(1)). As the Advocate noted in the *"Easier To Build"* report, these steps should be combined with a commitment by the Department of Justice to initiate a review of the *Rules of Court* to ensure a child-centered justice system (Recommendation 5) and we strongly urge government to respond to that recommendation as part of the debate on Bill 114.

- The acknowledgement of the need for transitional services when children age out of care (Sections 31, 74) is a positive development. One of the greatest barriers to success for children in care is the sudden end of services when they reach the age of majority. Most of us do not suddenly stop needing the care and support of parents when we turn 19. We rely on parents for financial security, advice and life skills through our early adulthood, and the recognition of the need to provide analogous help for children aging out of care is a welcome addition. We hope that the Department of Social Development will clarify its intentions in this area during the debate on Bill 114.

Page 3...

- The acknowledgement of the need for respite care for parents of children with complex needs and mental health challenges (s.27) is welcome and may prevent more drastic interventions later. Again, resources and staff training will be essential in this area.

- The recognition of the need for decision makers to affirmatively seek age-appropriate participation from children in decisions that affect them (Sections 6, 128) is overdue.

- The clarity around the role of children's counsel (s.129) meets the needs set out by the New Brunswick Court of Appeal in recent decisions.

- The Advocate has repeatedly, beginning with the *Behind Closed* Doors report, reminded the Department of Social Development of the need for child protection laws and practices to favour the child (who cannot make decisions) over the parent. The Advocate is pleased to see some sections of Bill 114 which do place child rights in primacy over procedural rights of parents. These include the clear guidelines for safety in Section 37, Section 50 provisions on removal of offending persons from the family home and the compellability of spouses in court proceedings aimed at child protection as found in Section 53.

- The acknowledgement of the child's need for permanency (s.6) reflects an awareness of the problem cited in *Easier To Build* of the devastating effect of repeated removals without a permanent family home upon children, and the Advocate is pleased by any recognition of this serious infringement upon the rights of children.

- The decision to explicitly give the new *Child and Youth Well-Being Act* primacy over the *Right to Information and Protection of Privacy Act* (s.19) will assist the advancement of Integrated Service Delivery (ISD) by removing a perceived bureaucratic barrier to information sharing between government departments.

- The commitment to regular review is a positive development.

In all of these cases, success will also depend upon the willingness to devote resources and provide solid practice standards, and we encourage the Assembly to inquire during its deliberations on Bill 114 how the Department of Social Development will ensure the full realization of these legislative goals. These remain areas where there is improved language over the existing *Family Services Act*.

It should not detract from these very real improvements to also note that in other areas, Bill 114 does not fully deliver on the promise of a child-focused piece of legislation. Some of the issues which we will raise here may even diminish the effectiveness of the positive changes in the Bill. As such, we will detail here some areas for improvement and suggest possible steps for amendment during the study of Bill 114.

Page 4...

Areas for Improvement and Amendment

A. Advancing the rights of children and youth

One area of Bill 114 which we hoped to cite with approval was Section 8, which requires the Minister to advise children "receiving social services" of their "rights under this *Act*". Advising children of their rights and of advocacy service is a best practice already in place in most Canadian jurisdictions, and an improvement over the old law. However, there is a significant problem.

Bill 114 does not explicitly recognize any children's rights in the receipt of social services.

Bill 114 does not explicitly recognize any children's rights in education, security, culture, safety, stability, community, health care, recreation, or the necessities of life.

The only children's right explicitly recognized in Bill 114 is the right to be heard, and that right is limited to being heard in a "matter" or "proceeding" (s.6(4), or before the Minister enters into a custody agreement (s.56(3)) or a guardianship agreement (s.57(2)). (Section 7 references a privacy right in the heading, but not in the text of the law.). Even the Section 6(4) "right" is limited by the completely undefined use of the phrase "if appropriate", which is inconsistent with the normal understanding of a right.

In the case of the rights of a child in receiving services, these are framed only as duties or options for the Minister or courts. While one could note that rights may exist in other statutes or at common law, the same is true of parental and ministerial rights, yet those are referred to repeatedly (see sections 17(2), 55(1), 55(3), 56(1), 56(13), 57(1), 57(9), 58(1), 58(2), 58(3)). To cite the right to be heard in proceedings and administrative decisions (which also exists at common law) and yet decline to term the other needs of children to be "rights" risks depriving children of the full consideration of their rights by decision makers.

Bill 114 aims to be child-centered, and in some key areas, it is. However, we cannot fully call a bill "child-centered" if it declines to acknowledge or grant any rights of the child in the provision of services. This is especially glaring because the two most recent provincial changes to child protection statutes recognize children's rights. Prince Edward Island does so in the preamble to the *Child Protection Act*, and Ontario devotes all of Part II of the *Child, Youth and Family Services Act* (section 3 through 17) to children's rights, including a provision requiring "all service providers" to respect these substantive rights (section 15).

We will propose several amendments that provide rights to children in receiving services, but we would start by recognizing children's rights explicitly as essential to interpreting the new *Child and Youth Well-Being Act*.

Amendment One:

That Bill 114 be amended by adding to Section 2 the following:

", and the child's rights to protection, security, development, services and participation as recognized

Page 5...

in the United Nations Covenant on the Rights of the Child"

And by adding to Section 5 the following:

5(3) The Minister shall, at all times, ensure the child's rights

(a) to participate in the development of their individual plan of care and in any changes made to it;

(b) to have access to food that is of good quality and appropriate for the child or young person, including meals that are well balanced;

(c) to be provided with clothing that is of good quality and appropriate for the child or young person, given their size and activities and prevailing weather conditions;

(d) to receive medical and dental care, subject to section 14, at regular intervals and whenever required, in a community setting whenever possible;

(e) to receive an education that corresponds to their aptitudes and abilities, in a community setting whenever possible; and

(f) to participate in recreational, athletic and creative activities that are appropriate for their aptitudes and interests, in a community setting whenever possible.

And by adding to Section 8(a) the following:

",including the right

i. To express their own views freely and safely about matters that affect them.

ii. To be engaged through an honest and respectful dialogue about how and why decisions affecting them are made and to have their views given due weight, in accordance with their age and maturity.

iii. To be consulted on the nature of the services provided or to be provided to them, to participate in decisions about the services provided or to be provided to them and to be advised of the decisions made in respect of those services.

iv. To raise concerns or recommend changes with respect to the services provided or to be provided to them without interference or fear of coercion, discrimination or reprisal and to receive a response to their concerns or recommended changes.

v. To be informed, in language suitable to their understanding, of their rights under this Part.

B. Participation Rights

As noted, the Advocate applauds the enhanced language around children's participation in decisions that affect them. We do note that these could be strengthened by explicit reference to supported decision making, which recognizes that even children who cannot act with full autonomy should have a right to such assistance as may make their rights more fully known.

Amendment Two:

That Bill 114 be amended by adding to Section 6(1):

(c) consider whether the child could more fully participate in decision making with the assistance of a third party or other supports

And by adding to Section 128(1)(a)

",or could more fully participate with the provision of assistance in decision making, including but not limited to a Voice of the Child report prepared by a third party."

C. Giving Children a Voice in Placements

One of the most frequent concerns of young people in care, as told to the Advocate through hundreds of interviews conducted in preparing our most recent report, is that they are required to move foster homes or residential placements without notice or consultation. Most unfairly, this often destroys the abilities of the young person to maintain social connections and friendships or participate fully in recreational and extra-curricular activities. Yet children in care are often most desperately in need of exactly these things. These should be protected to the greatest degree possible, both because they are rights and because it is the right thing to do.

Amendment Three

That Bill 114 be amended by adding:

6(4.1) For greater certainty, in all matters involving the child's or young person's placement in or discharge from a residential placement or transfer to another residential placement, the child shall be heard regarding, and the Minister shall consider, the social, educational and recreational needs of the child and any family and sibling relationships."

D. Meaningful Transition Services

One thing the Advocate learned through interviews with children in care is that their needs after age 19 are not well-met. In particular, numerous youth expressed profound discouragement that even if they got accepted into post-secondary education institutions that the Department of Social Development imposed a second screening process on them to prove that they were worthy of financial support. The Advocate believes that any child in care who overcomes those challenges to gain acceptance from a university or college should be applauded, not discouraged.

Further, transitional services should come with some recognition that the child has a right top ongoing support from the government that is acting as a parent. After all, the law recognizes parental obligations to support children for private citizens. The Department that scrutinizes parents for fitness should not hold itself to lower legal standards than other parents.

Page 7...

Amendment Four

That Bill 114 be amended by adding to Section 31

"31(3) The Minister shall provide services under this section in a manner which ensures that no eligible youth is denied full participation in post-secondary education or training for which they are qualified in the opinion of the Minister or an accredited post-secondary institution within the Province for financial reasons."

E. Supporting Families Through Relief Care

While we applaud the explicit inclusion of relief, or respite, services to families, we believe that it would further advance the laudable goals of Bill 114 if explicit consideration is given to the potential benefits of relief care prior to any more intrusive action. Supporting families is always quicker, more affordable and better for children than removal or supervision.

Amendment Five

That Bill 114 be amended by adding to Section 27:

"27.1 Prior to making any application under Section 59, the Minister shall consider whether the provision of relief services under Section 27 would provide for the satisfactory safety and development of the child with the existing parents."

F. Protecting Children When Refusing Services

Section 36 of Bill 114 allows mature youths to refuse services, which is also the case under the existing law. However, our interviews discovered some disturbing cases of young people being pushed to refuse services in a coercive way, such as frustrating their rights to question rules in their residential placements. In one unsettling case, a young people questioning restrictions on their social activities while in a group home was told they would have to refuse services if they did not like the rule. When they did, the young person was immediately told to leave the group home and spent the night on a park bench. There should be safeguards to ensure that young people are not being coerced to refuse services simply to avoid their discussions around rules.

Amendment Six

That Bill 114 be amended by adding to Section 36:

"36(3) If a youth refuses a protection service under subsection (1), the Minister shall conduct a review within 14 days of the reasons for the refusal, including any explanation the youth may provide, and shall communicate any alternate means by which services could be provided in a manner which addresses the young person's reasons for refusal."

Page 8 ...

G. Advancing Integrated Service Delivery

As noted, the Advocate applauds the provisions of Bill 114 that allow the Minister of Social Development to engage in planning and to compel information sharing when it meets the needs of young people. This is an improvement to be noted. We also believe that young people in care deserve to have all government departments collaborating. As noted in *Easier To Build*, it makes to have social workers develop a plan to address the urgent needs of a child in crisis only to have the process begin anew at Health or Education. This was cited by the first Child Advocate in *Connecting The Dots* and, while progress has been made, more can be done to ensure collaboration.

We believe that, if government is going to act as parent to hundreds of children in care, the Minister of Social Development should have real authority to make government work with urgency and with collaboration. We also note that other provinces acknowledge the urgency of helping children in crisis by requiring plans to be ready through a substantive guarantee of timeliness.

There is much to applaud in Section 40 of Bill 114, including the wise requirement to develop alternate plans upon intake. The Advocate urges doing even better by ensuring collaboration and urgency in the responses.

Amendment Seven

That Bill 114 be amended by adding to Section 40(1)

"the Minister shall establish within 30 days of that determination...."

And by adding to Sections 42(2) and 23(3)

"(e) a District Education Council established under the Education Act"

And by amending Section 42(1) to read:

"42(1.1) If the Minister uses multidisciplinary planning, the Minister may require any person or entity listed in Section 42(2) to participate in the development of the plan or to provide services to a child or youth."

H. Avoiding Unchecked Administrative Authority

While the Advocate wholeheartedly supports the expanded use of kinship care and alternate family placements, we have concerns over past use of these options under ministerial discretion. In particular, there have been times that the Department of Social Development has removed children from foster or kin placements with little notice and in a way which has drawn judicial criticism for failing to consider the bonds and affection that children form with these new families. If a child is placed with someone who acts as a parent, those new bonds should have some protection beyond the unchecked discretion of the Department. We urge the government to ensure some oversight of administrative decisions that affect the child's right to stability and permanency.

Amendment Eight

That Bill 114 be amended by adding to Section 16(1), after "natural justice"

"and in the best interests of the child....."

And adding to Section 54:

"54(5) When the Minister terminates a placement made under Section 43 or Section 55, the kinship provider or foster parent may apply to the Court for a review of the termination within 30 days of having received notice of the termination, on the grounds that the termination

(a) Was not in accordance with the principles of due process and natural justice, or
(b) Was not in the best interests of the child"

I. Accountability and Information Gathering

In the course of our reviews of the child protection system, the Advocate discovered worrying gaps in what the Department of Social Development knows about children in its care. There was no tracking of how these children are doing in school, how many children pursue post-secondary education, how many have trouble with the law, how many have mental or physical health issues, and a host of other indicators. We would expect a competent parent to know this.

Further, the failure to track outcomes can lead to bad practice, where front line social workers are measured by mindless compliance with regulation without having to worry about outcomes. The Advocate believes that the Department should be expected to know how the system is working if future reviews of this *Act* are to be meaningful.

Amendment Nine

That Bill 114 be amended by adding the following:

"144.1 The Minister shall maintain, in a form to be prescribed by regulation, and report annually to the Legislative Assembly in a form to be prescribed by regulation, the following information regarding children receiving services under this Act

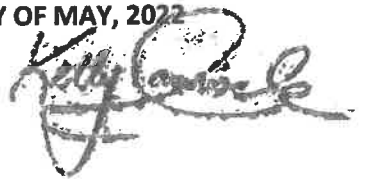
(a) educational attainment and graduation rates,
(b) participation in post-secondary education,
(c) adverse events in their mental or physical health requiring significant intervention,
(d) criminal charges,
(e) such other information as may be prescribed by regulation.

J. Final Comments on Amendments

The Advocate is aware that some of the foregoing concerns may be addressed by future regulation or policy (though not the sections pertaining to child rights, which must be legislated). However, we urge the Legislative Assembly to either consider these amendments or to ensure clear communication of intentions regarding any regulatory action.

Regardless of subsequent amendments, the Office of the Child and Youth Advocate will be active in tracking outcomes for children in care and urging actions by other departments to complement the beneficial changes in Bill 114. We will be working with government to better understand and apply the Child's Rights Impact Assessment process. We will be reviewing practice standards. We will push for the review of the *Rules of Court* that is needed to make legislation work. We will collaborate with government to aid in the training and recruitment of social workers in any way we can. And we will always work to amplify the voices of children and youth so that they are heard.

SUBMITTED TO THE LEGISLATIVE ASSEMBLY THIS 30th DAY OF MAY, 2022



Kelly A. Lamrock, Q.C.
Child & Youth Advocate