

# Our Children, Our Future



## Improving the Child and Youth Advocate Act

Recommendations by the Office of the Official Opposition  
Legislative Assembly of Prince Edward Island  
October 9, 2019

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## Background

Prince Edward Island is one of the few provinces in Canada without an independent child and youth advocate. The Official Opposition caucus has long supported the introduction of an independent child and youth advocate. We are appreciative of government's public consultations on this matter and we hope to see an act tabled that provides that strongest possible protection to children and youth and the greatest possible accountability to the Legislative Assembly and the public.

This document provides recommendations that the Official Opposition believes would strengthen the proposed *Child and Youth Advocate Act* ("consultation draft"). These recommendations were informed by a jurisdictional scan of other Canadian legislation, including:

- *Representative for Children and Youth Act* (BC)
- *Child and Youth Advocate Act* (AB)
- *The Advocate for Children and Youth Act* (MB)
- *Child and Youth Advocate Act* (NB)
- *Child and Youth Advocate Act* (NL)
- *Provincial Advocate for Children and Youth* (ON) (repealed 2019)

In general, each Act was reviewed for the following aspects:

- Definitions, including "child," "youth," "reviewable service," "public body," or equivalents;
- Appointment process, including responsibility for recommending and appointing an Advocate, eligibility, remuneration, suspension or removal;
- Serious injury or death reviews and investigations;
- Recommendations and reporting requirements pursuant to a review or investigation.

Other items of interest are incorporated in this report.

## Analysis

### Process for Appointment

Under the PEI legislation, the Child Advocate:

- is recommended for appointment by Legislative Management Committee, and appointed by resolution approved by at least 2/3rds of members present;
- cannot be a member of the Legislative Assembly; and
- can be suspended or removed for cause or incapacity by resolution of 2/3s members present, or by unanimous LMC resolution if the Legislative Assembly is not sitting.

With respect to the appointment of the Advocate, the consultation draft provides for a process that occurs entirely within the legislative branch. The appointment process is appropriate and does not require amendment.

Figure 1: Recommendation and Appointment Responsibilities by Province			
Recommendation Responsibility		Appointment Responsibility	
Resolution of Assembly (AB, NB, NL, ON)	Recommendation of Committee (PEI, BC, MB)	Cabinet (AB, MB, MB, NL, ON)	Legislative Assembly (PEI, BC)

However, the consultation draft is unclear as to whether the current Advocate will retain their role once the Act becomes law. There are two solutions to this issue. The Act could be amended to state that the current Advocate is deemed to have been appointed as the Advocate upon the Act coming into force, or an opposite amendment could state that the current Advocate is *eligible* for appointment as the Advocate under the Act. Subsection 3(6) of the New Brunswick legislation offers some possible wording:

*3(6) Notwithstanding the prohibition against reappointing an Advocate in subsection (2), the person holding office as the Advocate immediately before the coming into force of this Act shall be eligible to be appointed in accordance with this Act for one term.*

**Recommendation 1: The Official Opposition recommends that a clause be added to allow the current Advocate to be eligible for appointment as the Advocate under this Act, while making it clear that the previous appointment of the Advocate by Executive Council is not for a term under this Act but an interim appointment until an Advocate is recommended and approved by the Legislative Assembly.**

### Eligibility for Appointment

With respect to eligibility, the prohibition on serving concurrently as the Advocate and as an MLA is the only consistent consideration across jurisdictions. Some provinces provide stricter

requirements; Manitoba prohibits the Advocate from holding any other public office (as does NB and as did ON) or engaging in partisan political activity. New Brunswick, Newfoundland and Ontario also prohibit the Advocate from engaging in any other employment while serving as the advocate. Ontario additionally required that the Advocate “must be a person with significant experience in areas such as children’s mental health, child welfare, developmental services, youth justice, education or pediatric health services.”

**Recommendation 2: The Official Opposition recommends that the Advocate, in addition to ineligibility criteria currently outlined in the consultation draft, be ineligible to hold any other public office or employment during their term as the Advocate. Furthermore, the Official Opposition recommends that government outline relevant experience that would be expected of an Advocate, similar to Ontario’s past legislation.**

**Term of Appointment**

With respect to the term of appointment for an Advocate, PEI is an outlier. PEI has the longest term of appointment for an Advocate’s initial term at 7 years, with the possibility of a three-year extension. Most provinces allow for a five-year term to appoint an advocate, along with the possibility for a five-year reappointment.

<b>Figure 2: Terms of Appointment by Province</b>			
<b>Province</b>	<b>Term of Appointment</b>	<b>Possibility of Reappointment</b>	<b>Other Notes</b>
PEI	7 years	Yes, for three years	
British Columbia	5 years	Yes, for five years	
Alberta	Not more than 5 years	Yes, for additional term	
Manitoba	5 years	Yes, for additional 5 year term	
Ontario	5 years	Yes, for additional 5 year term	
New Brunswick	Not less than 5 years, no more than 10 years	No	Term may be extended for 6 months to complete review/investigation
Newfoundland	6 years	Yes, for additional 6 years	

**Recommendation 3: The Official Opposition recommends that subsection 2(4) be amended to provide for a five-year initial appointment with an option to reappoint for an additional five years, in accordance with Canadian common practice.**

**Suspension or Removal**

In other jurisdictions, the process for suspension or removal usually follows the appointment process (for example, where Cabinet makes an appointment based on resolution by the Legislative Assembly, Cabinet must also remove an Advocate if such a resolution is passed by the Legislative Assembly). In the consultation draft, the Legislative Assembly is responsible for appointing and suspending/removing the advocate.

One area that could use more clarity is the suspension of the Advocate. In 6(3) of the consultation draft, the Legislative Management Committee may suspend the the Advocate with(out) pay when the Legislative Assembly is not sitting, but 6(2) is unclear as to whether the Legislative Assembly has a similar ability to suspend the Advocate with or without pay.

**Recommendation 4: The Official Opposition recommends that government add greater clarity in the Act about whether the Advocate is suspended with or without pay when they are suspended by the Legislative Assembly.**

**Serious injury or death reviews and investigations**

In the consultation draft, the Advocate is authorized but not required to conduct an investigation under the Act after conducting a review, even if the review determines that (a) the manner in which a reviewable service was provided may have contributed to the serious injury or death; and (b) the serious injury or death occurred, in the opinion of the Advocate, in unusual or suspicious circumstances, or was, or may have been, self-inflicted or inflicted by another person.

<b>Figure 3: Reports regarding serious death or review</b>			
	<b>Review/ Investigation Required</b>	<b>Reports Must be Public</b>	<b>Notes</b>
PEI	Advocate is authorized but not required.	May publish a report by any means the Advocate considers appropriate and effective	
Alberta	Yes, for death	Yes, within one year, and in a form and manner the Advocate considers appropriate	Must report to speaker if unable to meet that timeline.

BC	Authorized but not required.	No	
Manitoba	Advocate is authorized but not required. Yes, if compelled by LGIC or committee	No	
New Brunswick	May refuse to investigate. Yes, if compelled by committee or LGIC	No	
Newfoundland	No, may refuse to investigate. Yes, if compelled by LGIC	May publish a report if it is in the interest of children and youth, or public, or a government person/body	
Ontario		At a time and in a form and manner that the Advocate considers appropriate	

The consultation draft also does not allow for Cabinet or the Legislative Assembly to refer a matter to the Advocate for investigation, while some organizations do.

New Brunswick allows a standing committee of the Legislative Assembly to refer a matter to the Advocate for investigation or review (see section 15 of the *Child and Youth Advocate Act*). Manitoba allows a standing committee of the Legislative Assembly or the Lieutenant Governor in Council to refer a matter to the Advocate for investigation (see section 28 of *The Advocate For Children and Youth Act*).

**Recommendation 5: The Official Opposition recommends that government consider allowing both Cabinet and the Legislative Assembly to compel the Advocate to investigate a matter.**

**Response to reports of the Advocate**

While the consultation draft makes the Advocate responsible for monitoring the implementation of recommendations in this Act, public bodies do not have a legislative requirement to respond to the recommendations of the Advocate.

<b>Figure 4: Requirement for public body to respond to report and its recommendations</b>			
	<b>Yes</b>	<b>No</b>	<b>Other</b>



Requirement to respond to recommendations	ON, NL (s24), AB (s15: 75 days), NB (s23)	BC, MB	MB: may report on compliance with past recommendations in annual report (s30) NB: yes, on request of Advocate
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**Recommendation 6: To promote accountability, the Official Opposition recommends that the consultation draft be amended to include a provision that requires public bodies or community organizations to respond to the Advocate’s recommendations.** Consideration should also be given to the time period available to those groups to respond to the recommendations with a course of action. Alberta, for example, sets the time limit at 75 days.

### Agreements

Under 17(1) of the consultation draft, “the Advocate may enter into an agreement with the head of a public body or community organization for the purposes of exercising the Advocate’s powers and performing the Advocate’s functions and duties under this Act.” However, there is no provision that allows the Advocate to enter into similar agreements with out-of-province bodies, which fall outside of the consultation draft’s definitions of public bodies and community organizations. In particular, such out-of-province bodies might include health facilities (such as the IWK) or departments in another province by which Island children and youth might reasonably be treated or cared for.

**Recommendation 7: The Official Opposition recommends adding an additional subsection, or using more general language in subsection 17(1) that authorizes the Advocate to enter into agreements with bodies in other provinces for the purposes of exercising their authority under this Act.**

### Scope of Reviewable Service

The consultation draft provides a definition for a “reviewable service,” which are services that may be the subject of a review or investigation by the Advocate. The definition includes educational programs and services pursuant to the *Education Act*, the *Early Learning and Child Care Act*, and the *Private Schools Act*. However, this definition excludes the *University Act*, the *Holland College Act*, and the yet-to-be-proclaimed *Postsecondary Institutions Sexual Violence Policies Act*. Given that some students begin postsecondary studies on PEI at the age of 17, and as early as 12 years old<sup>1</sup> - both of which are within the scope of “child” and “youth” as defined in the consultation draft - the Advocate should have a level of jurisdiction over these services.

**Recommendation 8: The Official Opposition recommends that postsecondary institutions be included under the definition of reviewable services.**

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<sup>1</sup> The Canadian Press. “13-year-old acs 1st year at UPEI.” CBC News. May 3, 2018. Available here: <https://www.cbc.ca/news/canada/prince-edward-island/pei-vivian-xie-upei-1.4646371>





## Summary of Recommendations

### 1. Greater clarity about whether the Advocate is reappointed

The consultation draft is unclear as to whether the current Advocate will retain their role once the Act becomes law. There are two solutions to this issue. The Act could be amended to state that the current Advocate is deemed to have been appointed as the Advocate upon the Act coming into force, or an opposite amendment could state that the current Advocate is *eligible* for appointment as the Advocate under the Act. Subsection 3(6) of the New Brunswick legislation offers some possible wording.

**The Official Opposition recommends that a clause be added to allow the current Advocate to be eligible for appointment as the Advocate under this Act, while making it clear that the previous appointment of the Advocate by Executive Council is not for a term under this Act but an interim appointment until an Advocate is recommended and approved by the Legislative Assembly.**

### 2. Strengthening eligibility for appointment

The prohibition on serving concurrently as the Advocate and as an MLA is the only consistent eligibility consideration across jurisdictions. Some provinces offer additional employment or public office restrictions, and another provides expectations for the background experience of the Advocate.

**The Official Opposition recommends that the Advocate, in addition to ineligibility criteria currently outlined in the consultation draft, be ineligible to hold any other public office or employment during their term as the Advocate. Furthermore, the Official Opposition recommends that government outline relevant experience that would be expected of an Advocate, similar to Ontario's past legislation.**

### 3. Term of appointment consistent with common practice

The proposed term of appointment for the Child Advocate is inconsistent with what is seen in other provinces. While most other provinces have opted for an initial five-year term with the possibility of reappointment for an additional five-year term, the consultation draft proposes an initial seven-year term with the option for a three-year reappointment.

**The Official Opposition recommends that subsection 2(4) be amended to provide for a five-year initial appointment with an option to reappoint for an additional five years, in accordance with Canadian common practice.**

### 4. Greater clarity about the suspension of the Advocate

While subsection 6(3) authorizes the Legislative Management Committee to suspend the Advocate for cause or incapacity, *with or without pay*, subsection 6(2) is unclear as to whether the Legislative Assembly can suspend the Advocate with or without pay.

**The Official Opposition recommends that a small addition be added to subsection 6(2) to clarify whether the Advocate is suspended with or without pay when they are suspended by the Legislative Assembly.**

#### **5. Referrals for investigation by the Legislative Assembly or Cabinet**

The consultation draft lacks provisions that allow both Cabinet and the Legislative Assembly to request an investigation by the Advocate.

**The Official Opposition recommends that government consider allowing both Cabinet and the Legislative Assembly to compel the Advocate to investigate a matter.**

#### **6. Requirement to respond to recommendations by the Advocate**

Under the consultation draft, public bodies and community organizations are not required to respond to the recommendations of the Advocate. Ontario, Newfoundland and New Brunswick all have some level of requirement to respond to the Advocate's recommendations.

**To promote accountability, the Official Opposition recommends that the consultation draft be amended to include a provision that requires public bodies or community organizations to respond to the Advocate's recommendations.**

Consideration should also be given to the time period available to those groups to respond to the recommendations with a course of action. Alberta, for instance, sets the time limit at 75 days.

#### **7. Expanding authorization for agreements**

Section 17 authorizes the Advocate to "enter into an agreement *with the head of a public body or community organization* for the purposes of exercising the Advocate's power and performing the Advocate's functions and duties under this Act."

**The Official Opposition recommends adding an additional subsection, or use more general language in subsection 17(1) which authorizes the Advocate to enter into agreements with other provinces for the purposes of exercising their authority under this Act.**

#### **8. Expanding scope of reviewable service**

The consultation draft provides a definition for a "reviewable service," which are services that may be the subject of a review or investigation by the Advocate. However, the definition excludes postsecondary institutions.

**The Official Opposition recommends that postsecondary institutions be included under the definition of reviewable services.**

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