



Psychiatric Patient Advocate Office

Bureau de l'intervention en faveur des patients des établissements psychiatriques

April 25, 2007

Lorenzo Berardinetti, MPP
Chair, Standing Committee on Justice Policy
Room 1405, Whitney Block
Queen's Park
99 Wellesley Street West
Toronto, ON M7A 1A2

Dear Mr. Berardinetti:

RE: Bill 165, *Provincial Advocate for Children and Youth Act, 2007*

The Psychiatric Patient Advocate Office (PPAO), an arm's length organization of the Ministry of Health and Long-Term Care, provides independent rights protection and advocacy services to mental health consumers across the province. I am writing to provide you with the PPAOs comments regarding Bill 165, the *Provincial Advocate for Children and Youth Act, 2007*.

The PPAO applauds the government's commitment to children by establishing the position of Provincial Advocate for Children and Youth as an officer of the Legislative Assembly.

It has been noted that "Canada has a tragic history of abuse, neglect and rights violations of children in state care in places such as juvenile detention facilities, residential schools, mental hospitals and foster homes." It has also been shown historically that the previous government of Ontario attempted to exert political and administrative interference over the current Office of Child and Family Service Advocacy (OCFSA).¹ Thus, the vulnerability of children and the threat of real or perceived interference by the government necessitate an independent advocate. This fact is already recognized by the majority of the nine provinces across Canada with child and youth advocates.²

According to Mary Anne Chambers, the Minister of Children and Youth Services, "this legislation, if passed, will better protect the interests of children and youth by ensuring that no government, current or future, would be able to suppress the voice of the advocate."³

¹ Paul Whitehead, Nicholas Bala, Alan Leschied and Debbie Chiodo, *A New Model for Child and Youth Advocacy in Ontario*, August 20, 2004, pp. 9 and 10.

² *A New Model for Child and Youth Advocacy in Ontario*, pp. 9 and 15.

³ Hansard, Legislative Assembly of Ontario, March 19, 2007.

The PPAO wholeheartedly supports making the Advocate an officer of the Legislative Assembly, however, we do not believe that Bill 165 truly protects the rights of all children in the province of Ontario nor does the Bill establish the independence and legislative authority necessary for an officer of the legislature to do his/her work effectively.

Definition of Advocacy

The PPAO submits that the definition of advocacy in Bill 165 should be more inclusive and comprehensive by identifying the various types of advocacy that should be provided, including: individual instructed and non-instructed advocacy; systemic advocacy; and support to children, youth and their families to self-advocate. Limiting the scope of the Advocate's practice to non-legal advocacy may erode his/her effectiveness and ability to make systemic change. There may be times when it would be appropriate, as part of a systemic advocacy initiative, to pursue legal advocacy, such as standing at coroner's inquests or intervention in cases that have the potential to impact children services by setting legal precedents. The current definition of "advocacy" should not become a barrier or obstacle for the Advocate in her work with and on behalf of children and youth.

Recommendations:

- The definition of "advocacy" in section 1(1) should be more broadly stated to ensure that it includes the ability of the Advocate to pursue both legal and non-legal advocacy work.

Functions of the Advocate

Section 13 of Bill 165 lists the functions of the Advocate. These four functions are limited to: providing advocacy to children and youth who are seeking or receiving services under the *Child and Family Services Act*; providing advocacy to young persons who are being dealt with under the *Ministry of Correctional Services Act*; promoting the rights under both Part V of the *Child and Family Services Act* and the *Ministry of Correctional Services Act* of children and care and young persons in custody, respectively; and providing any other advocacy as permitted under the proposed legislation.

The PPAO submits that these powers are too narrow and should be expanded to include providing advocacy and rights protection services to all children and youth in Ontario seeking or receiving government services, not just those identified above. Although not statutorily defined, the current mandate of the OCFSA is to provide advocacy services for children and the parents/guardians of children who are in the care of the state, in the youth justice system, the children's mental health system, the child welfare system and provincial schools as well as children with developmental disabilities or other special needs who are living at home.

By narrowing the functions of the Advocate, some of the most vulnerable children will not be afforded the protection of the Advocate. For example, children with mental health problems are prone to stigma and discrimination. The Ontario Child Health Study showed that almost one in five children and youth had at least one diagnosable disorder and two-thirds of this group had two or more psychiatric disorders.⁴ By excluding the mental health system from oversight by the Advocate, the government will be failing a significant number of our children and youth.

While the Advocate has the discretionary power to educate, the PPAO believes the Advocate should be statutorily mandated to provide public education about the existence of its office and the rights of children and youth.

Due to his/her expertise, the Advocate should also be able to review legislation and policies to assess the potential impact on children and youth and children's services, and to make any necessary recommendations. The Advocate must have the legal authority to speak to any issue affecting the rights and entitlements of children and youth in Ontario. The mandate must be both broad and inclusive to ensure that no child is left behind.

Bill 165 is not clear whether parents or guardians will be able to continue to utilize the services of the Advocate. It is also not clear if there will be a mechanism for the Advocate to receive third party complaints, which may be appropriate in some circumstances.

Recommendations:

- Expand section 13 of Bill 165 to give the Advocate jurisdiction over all children and youth seeking or receiving government services, specifically those with developmental disabilities or special needs or in the child protection system, mental health system or youth justice system.
- Permit parents/guardians to utilize the services of the Advocate.
- Amend section 13 to allow for third party complaints, if appropriate, to be considered by the Advocate.
- Amend section 13 to require the Advocate to perform an education function about the work of the office and the rights of children and youth.

Powers of the Advocate

The powers of the Advocate are found in section 14 of the proposed legislation. Of particular interest is section 14(i) which prohibits the Advocate from representing children and youth as legal counsel or agent before a tribunal or court. A corresponding provision is the definition of advocacy in section 1(1) which limits the Advocate from conducting investigations or providing legal advice or legal representation. We are concerned that the Advocate may not be able to intervene in some proceedings, such as

⁴ Reference to D.R. Offord (1989). *Ontario Child Health Study: Children at Risk*, Ontario Ministry of Community and Social Services in Brenda Wattie, *The Importance of Mental Health of Children*, Canadian Mental Health Association, Ontario, March 2003.

inquests or tribunals, despite the knowledge and expertise she could bring to the proceedings.

Without the ability to investigate complaints or systemic issues, the effectiveness of the Advocate is diminished. The Advocate must have more than just moral authority or powers of persuasion; she must have the legal authority to monitor and enforce compliance.

Section 14(3) presently states that “nothing in this Act permits the Advocate to summon and enforce the attendance of witnesses, to compel testimony under oath or to compel witnesses to produce records or things.” This section should be amended to allow the Advocate to issue summons, to compel testimony under oath and compel witnesses to produce records. Although these powers would not be utilized frequently, they are necessary to ensure cooperation by all parties with the Advocate and heighten accountability.

Section 14(4) requires the Advocate to “give reasonable notice” to the person in charge of the place that has custody or control of the child or youth should they wish to communicate with or enter the place where they are residing. In some circumstances, this may undermine the integrity of an investigation, the ability to collect evidence or to simply have reasonable access to children and youth. No such restrictions should be placed on an independent Advocate. The Advocate should have free, immediate and unimpeded access to the child in person, by phone or electronic communication.

Section 14(6) requires the Advocate to give the complainant notice in writing of the Advocate’s decision and reasons for the decision not to act on a complaint. This section should be amended to provide an appeal mechanism whereby the Advocate has the power of reconsideration. Such a procedure would better protect the rights of children and youth.

Recommendations:

- Amend both section 14(i) and the definition of advocacy in section 1(1) to permit the Advocate to conduct investigations and to have a limited role in legal proceedings (e.g., intervener status, standing at inquests).
- Amend section 14(3) to allow the Advocate to issue summonses, enforce the attendance of witnesses, compel testimony under oath and to compel witnesses to produce records.
- Amend section 14(4) to remove the stipulation that the Advocate must give reasonable notice to service providers should they wish to visit or communicate with a child.
- Amend section 14(6) to grant the power of reconsideration to the Advocate for children and youth who wish to appeal a decision by the Advocate not to investigate their complaint.

Notice of Review

Section 15(1) of Bill 165 requires the Advocate to advise the Minister or the appropriate administrative head of the affected entity of the intention to conduct a systemic review. This may leave the impression that the Advocate is subject to undue influence or pressure from either the Minister or the head of the organization. The Advocate should not be required to disclose to any party “how” he or she will carry out her duties and responsibilities. The Advocate will advise the Minister or administrative head of the review and its outcome as he or she deems appropriate.

Section 15(2) goes on to say that the Advocate shall consult with the Minister or administrative head after carrying out the systemic review and before forming a final opinion on the subject matter of the review. Again, the Advocate should consult with those individuals as is fit in formulating recommendations and determining the course of action required to address the rights violation. Any other approach will undermine the integrity of his/her work and independence, as well as the confidence of the general public.

The PPAO believes that this requirement unduly fetters the ability of the Advocate to act independently and is in direct odds with the intent of Bill 165 and the work of the Advocate as an officer of the legislature.

Recommendation:

- Remove section 15 from the proposed legislation.

Obligations on Others

An agency or service provider, according to section 16(1), shall inform a child in care or a young person in custody of the existence and role of the Advocate and of how the Advocate may be contacted. A child’s or youth’s ability to access the Advocate is crucial and this principle should be articulated in the law. Although the onus is on the agency to advise their client, such information must be made available verbally, in different languages and in various formats to ensure that children and youth have the best opportunity possible to understand their rights. Further, all agencies, service providers and relevant government offices should have prominently placed signs reminding children and youth about the existence of the Advocate, contact information and an affirmation of their right to contact the Advocate. The Advocate must also have a duty to ensure that services are accessible and available to all children and youth, in all settings, when and where they are needed.

Section 16(2) says the Advocate shall be provided with reasonable private access to meet with the child or youth. It does not appear that the Advocate can visit or communicate freely with children and youth on his/her own motion or initiative. This section should be clarified so that the Advocate has full and unfettered access to all children and youth. The Advocate must not be restricted in his/her access to children and youth and the facilities where they reside or receive services.

Section 16(2) also does not guarantee privacy for the child or youth who makes the initial call to the Advocate but later withdraws it. Bill 165 should be amended to ensure that the child or youth is not subject to coercion or pressure to “drop their complaint.” It can be intimidating to complain about those who provide you with care and treatment, especially when you are in custody or unable to leave the premises. Complaining about caregivers can in fact cause undue stress and anxiety, especially for vulnerable children who are in the custody of adults that often make decisions about when they will leave a program or service. Power imbalances, control and authority by adult caregivers may silence some children and youth who would otherwise have very legitimate and real complaints that require investigation by the Advocate.

Recommendations:

- Strengthen section 16(1) of Bill 165 by obliging agencies, service providers and relevant government offices to provide information about the existence and role of the Advocate and how to contact the Advocate to all children and youth verbally, in different languages and in various formats. Visible signs must also be posted to remind children and youth of the Advocate and their right to contact the Advocate.
- Amend section 16(2) to state that the Advocate shall be given unrestricted access to children and youth and the facilities where they reside or receive services.
- Amend section 16(2) to ensure that children and youth are not subject to coercion or pressure to withdraw complaints by giving the Advocate the authority to review withdrawal patterns as part of his/her own motion investigations.

Protection of Privacy

Section 18 addresses issues related to the protection of privacy and access to information. If the child or youth is unable to consent to the release of information, the person who is authorized to consent on behalf of the individual will be asked for such consent. In some cases, this may be the very individual with whom the child has the conflict. Consequently, the person who is authorized to consent to the release of information may choose not to do so as a way to silence a complaint. Thus, the Advocate must be empowered to have access to all information required to do his/her job and protect the rights of children and youth. Section 18 should be amended to grant the Advocate the authority to access any provincial government information required to do his/her job and to exempt the Advocate from statutes that set the rules respecting the privacy of information.

Recommendation:

- Amend section 18 to allow the Advocate the legal authority to access information related to a complaint respecting children and youth.

Minister's Copy

Section 19(4) requires the Advocate to deliver a copy of the report to the “Minister of any Ministry to which it is relevant at least 30 days before delivering it to the Speaker.” It is our opinion that this undermines the authority of the Advocate and creates a perception that the Advocate is not truly independent as an officer of the legislature.

Recommendation:

- Remove section 19(4) from Bill 165.

Participation of Children and Youth

Although Bill 165 concerns the protection and empowerment of children and youth by giving them a voice, it is silent about their participation. The PPAO suggests that the Advocate be required to create an advisory committee, comprised of children and youth, families and service providers. The Advocate must also have the authority to establish sub-committees or expert panels to address specific rights and entitlement issues facing children and youth.

Recommendation:

- Create an advisory committee comprised of children, youth, families and service providers to offer advice and critique the work of the Advocate.
- Ensure the advocate has sufficient authority to establish sub-committees or expert panels to address specific rights and entitlement issues facing children and youth.

Penalties for Non-Compliance

Bill 165 does not stipulate any penalty provisions for non-compliance. To prevent circumvention of the proposed legislation and ensure accountability, the PPAO submits that a section pertaining to penalties be added, similar to section 27 of the *Ombudsman Act*. This section makes it an offence to wilfully obstruct, resist, make false statements or refuse to comply with a lawful requirement of the Ombudsman. These offences permit a fine of not more than \$500 or to imprisonment for a term of not more than three months, or both. Without such a provision, Bill 165 will be a “toothless tiger,” resulting in some individuals flaunting or ignoring the law as they are cognizant that there are no consequences or penalties for doing so. Without establishing penalties for non-compliance, children and youth may well be subject to continued abuse, neglect or rights violations, despite the work of the Advocate.

Recommendation:

- Add a provision respecting penalties for non-compliance with the proposed legislation that meets the standard established in section 27 of the *Ombudsman Act*.

Funding

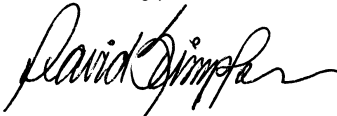
A review of child advocacy programs in Canada indicates that the OCFSA has the lowest budget per capita of any child advocacy program across the country.⁵ In order to do his/her job properly, the Advocate must be given sufficient resources and funding pursuant to section 8 of Bill 165.

Recommendation:

- Provide additional money to the Advocate to permit the execution of his/her statutory functions.

Thank you for your time and consideration.

Sincerely,



David Simpson
Director (A)

c.c. Dawn Ogram, Assistant Deputy Minister, Corporate and Direct Services, MOHLTC

⁵ *A New Model for Child and Youth Advocacy in Ontario*, page 26.