Office of the Child and Youth Advocate
PROVINCE OF NEWFOUNDLAND AND LABRADOR

March 12, 2007

Delivered by Hand
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The Honourable Tom Osborne, M.H.A.
Minister of Justice
Confederation Building
4th Floor, East Block
St. John's, NL

Dear Minister Osborne:

The following is provided in response to the invitation of your Deputy Minister, Chris Curran, to put forward proposed amendments to the *Child and Youth Advocate Act* (the "*Act*") which was communicated to me by Senior Legal Advisor, Civil Division, Thomas G. Mills, in written correspondence dated January 4, 2007.

I also wish to take this opportunity to identify the Justice related Recommendations contained in the Turner Report which the Office of the Child and Youth Advocate ("OCYA") supports for implementation.

Those Recommendations contained in the Turner Report related to amendments to the *Act* which provide the Advocate with subpoena powers, authorization to receive verbal or written information under oath or affirmation, and the power to require a response by written interview, in my view, are key changes which are required to the *Act* to enable the OCYA to fulfill its mandate.

The Recommendation that the Chief Medical Examiner establish and chair a multi-disciplinary Child Death Review Committee with the Child and Youth Advocate as a member is also fully supported by the OCYA.

The Turner Report contained a total of fifty-eight Recommendations. Thirty of these Recommendations relate to Child, Youth and Family Services, including proposed amendments to the *Child, Youth and Family Services Act* (the "*CYFS Act*"). At this time, the OCYA intends to consider the External Operational Review Report of Child, Youth and Family Services programs within the four Regional Health Authorities

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before putting forward its recommendations regarding any proposed changes to this legislation or related policies.

The following will provide an overview of the position of the OCYA with respect to the remaining Turner Report Recommendations.

Recommendations 6.1 and 6.2 relate to sureties and have been addressed by the Province.

Recommendation 6.3 states:

> "THAT the Child and Youth Advocate, after having determined who is legally entitled to conduct a Judicial Review (acting along with the authority of the Federal Government), do so in order to fully examine how the justice system functioned in relation to Dr. Shirley Turner and hence affected the rights and interests of Zachary Turner."

In my view, this Recommendation falls outside my mandate. In communication to the Honourable Tom Marshall, Q.C., former Minister of Justice, on October 2, 2006 (a copy of which is attached) and during my attendance at the October 31, 2006 meeting of the Ministerial Committee, I outlined the reasoning behind this decision. I provided Minister Marshall with a copy of the Turner Report to provide to the Federal Minister of Justice and also provided 10 additional copies of the Report directly to the Federal Justice Department.

Recommendation 6.4 recommended that the Report be tabled in the House of Assembly and released to the public, both of which occurred on October 4, 2006.

Recommendations 8.1 to 8.3 relate to training of psychologists, psychiatrists and physicians. The OCYA takes no position with respect to Recommendations 8.1 and 8.2, however, does support Recommendation 8.3 which recommends the inclusion of child protection issues in lectures on "Physicians and the Law" offered by Memorial University Faculty of Medicine.

The Turner Report also contained a number of Recommendations regarding the Office of the Chief Medical Examiner. Recommendation 10.6 states:

> "THAT the Medical Examiner's Office establish and conduct Child Death Reviews, chaired by the Chief Medical Examiner, with multi-disciplinary membership including the Child and Youth Advocate."

This amendment is requested.

The OCYA supports this recommendation as the most appropriate manner to conduct Child Death Reviews. This approach is employed by other provinces and

would eliminate the potential conflict of the OCYA in the event the Office had prior involvement with the child and would, therefore, be unable to investigate itself.

The *Act* does not authorize the OCYA to conduct Child Death Reviews, despite the fact the former Advocate undertook to do so in the Turner case which eventually was contracted to Dr. Peter Markesteyn to complete. In my view, the OCYA is not the appropriate Office to conduct Child Death Reviews. I wish to clearly state that a legislative amendment to authorize the OCYA to conduct such Reviews is neither supported nor requested.

The OCYA requests that a section be added to the *Act* to state the Child and Youth Advocate will sit on the multi-disciplinary Child Death Review Committee, established and chaired by the Chief Medical Examiner.

The OCYA takes no position regarding the remaining seven Recommendations related specifically to the Office of the Chief Medical Examiner.

The remaining 13 Recommendations (12.1 – 12.13) contained in the Turner Report relate directly to amendments to the *Act* and are addressed below:

Recommendation 12.1 states:

> "THAT the four regional integrated health authorities created by the *Regional Integrated Health Authorities Order* be specifically listed in the Schedule to the *Act*."

This amendment is requested.

Recommendation 12.2 states:

> "THAT an amendment of the Schedule to the *Act* include the Chief Medical Examiner and any other agency of the Provincial Government likely to possess information relevant to the Advocate's responsibilities under the *Act*."

This amendment is requested.

The *Act* applies to "departments" and "agencies of government" and the proposed amendment would provide greater clarity and ensure inclusion of all departments and agencies of government, consistent with the intent of the legislation.

Recommendation 12.3 states:

> "THAT an amendment of the *Act* provide that the Chief Medical Examiner be obligated to perform, or cause to be performed, any

feasible medical or laboratory analysis or other scientific procedure requested by the Advocate which the Advocate determines to be relevant to the Advocate's mandate under the *Act*."

This amendment is not requested.

Such an amendment, in my view, falls outside the mandate of the OCYA, not to mention the lack of medical/scientific expertise of the Advocate to make such a request.

Recommendation 12.4 states:

"THAT section 21 of the *Act* be amended to authorize the Advocate to require information by written interview instead of depending on voluntary participation."

Section 21 of the *Act* requires clarification. The current section 21 states:

21. (1) The advocate has the right to information respecting children and youth that is

(a) in the custody or control of a department or agency of the government; and

(b) necessary to enable the advocate to perform his or her duties or exercise his or her powers under the *Act*,

except

(c) information that could reasonably be expected to reveal the identity of a person who has made a report under section 15 of the *Child, Youth and Family Services Act*; and

(d) information that is not permitted to be made public by section 26 of the *Adoption of Children Act*.

(2) A person who has custody or control of information to which the advocate is entitled under subsection (1) shall disclose the information to the advocate.

(3) This section applies despite another act or a claim of privilege, except a claim based on a solicitor-client relationship.

The following amendments to the *Act* are requested:

21. (1) The advocate has the right to <u>all</u> information<u>, including documentation,</u> respecting children and youth that is

(a) within the knowledge, custody or control of a department or agency of the government; and

(b) necessary to enable the advocate to perform his or her duties or exercise his or her powers under the Act,

except

(c) information that could reasonably be expected to reveal the identity of a person who has made a report under section 15 of the *Child, Youth and Family Services Act*; and

(d) information that is not permitted to be made public by section 26 of the *Adoption of Children Act*.

(2) A person who has custody or control of information to which the advocate is entitled under subsection (1) shall disclose the information to the advocate.

(2)(1) The Advocate may require a department or agency of government to provide information by written interview and if the Advocate requests that information be provided by written interview, the department or agency of government shall provide the requested information in a written response.

(3) This section applies despite another act or a claim of privilege, except a claim based on a solicitor-client relationship.

The OCYA supports Recommendation 12.4 and proposes the amendments as outlined above. It is my understanding that the individuals who were interviewed for the Turner Report were appreciative of being provided written questions in advance of the interview. In my view, the addition to the *Act* of a section requiring response by participation in a written interview would also assist the Advocate in obtaining information which is within the knowledge of officials of government but has not been reduced to writing. In cases where the Advocate determines that a written interview is the most appropriate manner to obtain the information, it would have the advantage of reducing the overall time required by the Advocate to complete Reviews/ Investigations of government services and programs.

Recommendation 12.5 states:

"THAT the *Act* be amended to provide for addition of the following section:

(1) For the purposes of a review or an investigation, or a review and investigation, subject to subsection (4), the Child and Youth Advocate may

(a) summon by subpoena and enforce attendance of any witness;

(b) summon by subpoena and enforce production by witnesses of any records and other things, and provisions of answers to written questions.

(2) Where the Advocate exercises a subpoena power under subsection (1), a person or other legal entity who fails or refuses to

(a) attend;

(b) answer questions;

(c) produce the records or other things in the person's custody or possession, or provide answers to written questions requested by subpoena;

is liable, on application by the Advocate or his or her Delegate to a Judge of the Trial Division of the Supreme Court of Newfoundland and Labrador, to be committed for contempt as if in breach of an order, judgement or other process of the Supreme Court of Newfoundland and Labrador.

(3) The Advocate shall issue a subpoena provided for in subsection (1) in the manner authorized by the *Public Investigations Evidence Act*.

(4) The Advocate shall not exercise the powers prescribed by subsection (1) unless the Advocate is unable, under section 21 or voluntarily, to obtain evidence, records and other things that the Advocate determines to be necessary to a review or investigation.

This amendment is requested.

The OCYA requests that the *Act* be amended to provide subpoena powers to the Child and Youth Advocate. As you may be aware, Dr. Markesteyn requested that the *Act* be amended while he was conducting the Turner Review, however, this November 16, 2005 request, a copy of which is attached, was not granted.

The addition of Section 4 (added to Dr. Markesteyn's November 16, 2005 request) limits the exercise of subpoena powers to situations where the Advocate is unable under Section 21 or voluntarily to obtain the evidence and records. In my view, this is a more moderate approach which would ensure that prior to the issuance of a subpoena, the Advocate must utilize the existing legislation or attempt to obtain the information voluntarily.

Based upon my experience to date (August 2005 to present), in order to fulfill my mandate and, in particular, conduct Section 15.(1)(a) Reviews, subpoena powers are not only desirable but essential. The power to subpoena witnesses who are not

working in a government department or agency of government is required if all the necessary information regarding the provision of government services and programs is to be provided. Family members and neighbours, for example, are not covered by the definition of government departments or agencies of government, however they frequently possess essential information necessary to reach conclusions and make appropriate recommendations. Also, the information provided by such witnesses in cases where not all documentation is in the possession of a government department or agency of government is crucial, i.e., documentation has been lost or cannot be located. This is currently the situation in one Review underway where two years of a social worker's notes are missing.

It should be noted that the Citizens' Representative, pursuant to Section 31 of the *Citizens' Representative Act*, has statutory power to require a person to provide information and produce documents, etc., that are related to the matter being investigated by the Citizens' Representative and to summon before him/her and examine on oath or affirmation any person who, in the opinion of the Citizens' Representative, has information relating to a matter being investigated by him or her, regardless of whether or not the person is an officer, employee or member of a department or agency of the government.

While subpoena powers, by custom, have been reserved by law to Courts, these powers have been granted to the Citizens' Representative, who is similar to the Advocate in that his Findings are advisory rather than binding.

As stated in Turner at 420-421, Volume II of his Findings "... the Advocate has been entrusted with the formidable onus of advocating for society's most vulnerable constituency – our children – who comprise 21.5 percent of the Province's population (2004 census data)".

Simply put, subpoena powers would ensure that the Advocate receives all relevant information.

Recommendation 12.6 states:

> "THAT amendment of section 21 of the *Act* provide that, should the Advocate encounter any refusal or delay in response to an information request for documents or other things, verbal testimony or written answers, the Advocate may apply for an information disclosure order from a Judge of the Provincial Court of Newfoundland on not less than seven days written notice of the application to the information source. And, that the Judge be given discretion to order payment by respondents to an application of some or all of the actual fees and disbursements incurred by the Advocate in making the application (depending on the outcome of the application)."

This amendment is requested.

The issue of timeliness of the response to requests for information has, on occasion, posed difficulties with respect to the ongoing operations of the OCYA. An amendment to the *Act* which outlines the process in the event of unreasonable delay in receiving information would assist the OCYA to conduct its operations more efficiently.

Recommendation 12.7 states:

> "THAT amendment of the *Act* provide that during a review or investigation by the Advocate, all information (oral and written) on which the Advocate relies for reports the Advocate may or must make under the *Act* to any department or scheduled agency of the Provincial Government or a community or community member, be received under oath or on affirmation."

This amendment is requested.

As you may recall from our previous meetings while you were Minister of Health and Community Services, some of the facts relied upon by Dr. Markesteyn in making his Findings were disputed by staff at the Board level. The ability to ensure evidence is gathered in the best manner which ensures its reliability is essential to the integrity of the Reviews/Investigations conducted by the Office of the Child and Youth Advocate.

The position of the OCYA mirrors that of Dr. Markesteyn in Turner. The OCYA supports the proposed amendment to the *Act* which would provide for verbal interviews to be conducted under oath or affirmation and written interviews to be accompanied by a sworn or affirmed statement from the document provider.

Recommendation 12.8 states:

> "THAT regulations be enacted under the *Act* which prescribe forms to be employed by the Advocate in requesting and receiving information, e.g., documents and written interview answers."

This amendment is requested.

This amendment would facilitate the process of requesting and receiving information and would help to ensure that information is provided within a reasonable period of time.

Recommendation 12.9 states:

> "THAT the *Act* be amended throughout to express the mandate, powers and duties of the Advocate in terms of children, youth and families, including parents and other caregivers."

This Recommendation is not supported nor is the amendment requested.

The current language of the *Act* is clear in that it expresses the mandate and powers and duties of the Advocate in terms of children and youth. The *Child and Youth Advocate Act* applies to the rights and interests of children and youth. While recognizing that children are part of families and have relationships with their parents and caregivers, it is often the case that there is a conflict between the rights of children and youth and those of their caregivers, parents and families. Therefore, it would be contrary to the intention of the legislation to enact this amendment. The most obvious example of child and youth conflict of interest with parents arises under the *CYFS Act* when children are removed from their parents' care.

Recommendation 12.10 states:

> "THAT the *Act* be amended to provide that any question respecting the Advocate's jurisdiction to review or investigate any matter under the *Act* may be resolved by the Advocate's application to a Judge of the Provincial Court of Newfoundland for a declaratory order determining the question of jurisdiction."

This amendment is not sought as the jurisdiction of the OCYA to conduct Reviews or Investigations has not been challenged and it would, therefore, appear to be unnecessary at this time.

Recommendation 12.11 states:

> "THAT section 15(T)(c) of the *Act* be amended to enable the Advocate to dispense with advocacy, mediation or other dispute resolution process, and any other precursor to investigating a matter where, in the Advocate's opinion, those mechanisms are impracticable."

This Recommendation is not supported nor is the amendment requested.

The legislation as it currently reads allows the Advocate, without a prior requirement of mediation, pursuant to Section 15.(1)(a) of the *Act* to "receive and review a matter relating to a child or youth or a group of them, whether or not a request or complaint is made to the advocate".

The four matters presently under Review by the OCYA have been declared pursuant to Section 15.(1)(a) of the *Act*. With respect to the conduct of an Investigation pursuant to Section 15.(1)(c), in my view, the spirit and intent of the *Act* requires an attempt to mediate or to use other alternative dispute resolution processes on behalf of the child prior to commencing an Investigation. It would, therefore, be contrary to the legislation to remove this prerequisite.

Recommendation 12.12 states:

"THAT section 24 of the *Act* be amended to state that the types of steps the Advocate may propose include, although not be confined to:

(a) enactment of new legislation and amendment of existing legislation;

(b) development of policies, standards and practices, and alterations to existing policies, standards and practices;

(c) development of new programs and reform of existing programs;

(d) review, modification and reversal of particular program services delivery decisions;

(e) rectification of omissions in program services delivery;

(f) provision of reasons for decisions;

(g) allocation and reallocation of program service centres and providers;

(h) development of professional and non-professional employee training, and modification of existing training;

(i) conduct of additional investigations;

(j) "no name/no blame" monitoring and auditing of professional and non-professional program services delivery personnel; and

(k) resolution of circumstances which are unreasonable, unjust, oppressive or discriminatory."

This amendment is not requested.