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March 05, 2021

RE: FOSTERING PRIVACY FAIRNESS ACT (2020) BACKGROUNDER

What is the Child Welfare PAC Canada?

The Child Welfare PAC is a federal not-for-profit that represents the interests of children raised by the government. This non-partisan organization was founded in 2017 by Jane Kovarikova. Kovarikova is board chair of a regional Children's Aid Society, member of the Premier's Council of Equality of Opportunity, a PhD Candidate, and a former youth-in-care. See full bio [here](#). The vision is: A child welfare system that ensures every youth has a **bright** future. The advisory committee consists of 100+ professionals from academia, law, business, advocacy, and public service who have lived experience in child protection systems. The primary advocacy goals include: 1) data and results driven policy; 2) legislated privacy protection; 3) post-secondary access; and 4) trauma-informed practice. Our philosophy is that smart policies save money. The complete advocacy agenda may be reviewed here: www.childwelfarepac.com.

The Privacy Problem:

The *Child, Youth, and Family Services Act (2017)* (CYFSA) is incomplete regarding the privacy rights of foster children. Though the new *Part X* of the Act seeks to strengthen privacy rights, it fails to protect the basic rights and freedoms of those raised in the foster care system.

- Child welfare files include highly sensitive information about a foster child
- Foster kids may remain under the care of the Children's Aid Societies (CASs) up to age 18 with some extended supports until age 21
- As the minor's guardian, the state grants itself consent to collect data about the minor until age 18, and sometimes even beyond until age 21
- The file accumulates layers of unverified third-party information (i.e. a teacher told a foster parent who told a social worker who then recorded this in the file) about the child's most traumatic and intimate experiences
- The quality of data in the file ranges from potentially accurate to blatantly slanderous or racist
- These child welfare files remain accessible indefinitely to thousands of child welfare workers with access to the provincial software system, the Child Protection Information Network (CPIN)
- Data in these files has been used to disadvantage children from care throughout their adult lives
- Though it may not be ethical, and is potentially in contravention of *Part X* of the Act, these files have been accessed in practice under the following circumstances: in divorce court, when seeking to adopt, when seeking board positions at CAS, when seeking employment at CAS, when reporting violent crimes
- The files also remain permanently vulnerable to increasingly common ransomware attacks at CASs, increasing liability for these organizations
- The files remain permanently vulnerable to leaks by malicious employees (i.e. recall the late Mayor Rob Ford's health records being breached by nurses)

Background:

The legislative oversight discussed above most likely occurred by omission rather than with any particular intent. MPP Bob Bailey and team have collaborated with Child Welfare PAC to develop the *Foster Fairness Privacy Act (2020)* to address these concerns. Both Ministers Todd Smith and Jill Dunlop are briefed and support the bill.

- Foster children enter the system most commonly due to abuse and/or neglect against their person, not because they committed any crime or offence
- **Yet, even juvenile offenders have greater privacy rights than foster children**
- The federal *Youth Criminal Justice Act (2002)*: 1) seals and archives files after a defined access period – age 18; 2) scrubs names from main database searches; 3) permits third-party access to archived files only through the courts
- Prior to *Part X* of the current Act, CASs treated child welfare files as part of their business records as opposed to the property of the law-abiding citizens raised in the care system
- This cultural change embedded in the Act failed to address the question of indefinite access to this data
- In practice, despite *Part X*, there is still the risk of unfettered access to these child welfare files throughout the life course of former youth-in-care and the potential use of these files to undermine life, liberty, and security of person of former youth-in-care
- Note that the proposed bill only applies to child welfare files of adults who experienced foster care; not any adults who were investigated by CASs for allegations of harm to a child

Solution:

The proposed legislation, the *Foster Fairness Privacy Act (2020)*, seeks to remedy this long-standing legislative oversight. This will ensure that the *CYFSA (2017)* is compatible with the *Legal Rights* laid out in the *Canadian Charter of Rights and Freedoms* by ensuring former foster children can enjoy the same civil liberties afforded to all Canadian citizens (including juvenile offenders). Borrowing from the federal *Youth Criminal Justice Act (2002)*, the *Foster Fairness Privacy Act (2020)* amends the *CYFSA (2017)* by:

- Establishing a defined access period to child welfare files of youth-in-care
- The defined access period is age 21, as that is the last possible age for any youth-in-care to receive supports from a CAS in Ontario
- The name of the former youth-in-care will not be searchable in the main CPIN database nor any other such database used by other CASs in lieu of CPIN
- Note this does not apply in the event that same former youth-in-care is reported in adulthood for harm to a child and subsequently investigated — investigation files are permanently available
- Personal content of said former youth-in-care will be redacted in sibling or family files
- Note that former youth-in-care will be able to self-identify to any CAS and be able to request their property (their child welfare files) as set out in *Part X* of the *CYFSA (2017)* at any time
- Any third-party access to historic child welfare files after the defined access period of age 21 will only be permitted through the courts

Media Coverage:

1. The Star - <https://www.thestar.com/politics/provincial/2020/12/02/thousands-can-access-former-foster-childrens-files-this-proposed-law-would-change-that.html>
2. The Star - <https://www.thestar.com/opinion/2018/07/07/protect-privacy-of-foster-children.html>
3. The Globe - <https://www.theglobeandmail.com/opinion/article-as-a-crown-ward-apparently-i-have-no-right-to-my-own-story/>
4. Macleans - <https://www.macleans.ca/society/life-after-foster-care-in-canada/>

Arguments For the *Foster Fairness Privacy Act (2020)*:

The *Foster Fairness Privacy Act (2020)* stands up for kids, enjoys a strong moral and legal case for implementation, and will save money by reducing risk.

1. All related sectoral stakeholders have been consulted and the change enjoys broad-based support across parties, media, privacy watch dogs, CASs, and former youth-in-care
2. The bill elevates former foster children to the status of human in society and affords them the same civil liberties enjoyed by other Canadian citizens
3. As such, the bill remedies a long-standing legislative oversight that is in contravention with the Canadian Charter of Rights and Freedoms – Sections 7, 11, and 12
4. The bill does not re-invent the wheel and borrows from long established related legislation — the federal *Youth Criminal Justice Act (2002)*
5. Though provincial in jurisdiction, the bill will set a national precedent
6. A cross-country analysis of privacy legislation shows that this bill can be a model for the rest of the country — other provinces are already requesting the draft legislation
7. The bill will reduce risk for the Ministry by removing grounds for future class actions
8. The bill will reduce risk for CASs by locking irrelevant historic data out of access in the event of increasingly common ransomware attacks

Arguments Against the *Foster Fairness Privacy Act (2020)*:

Though the *Foster Fairness Privacy Act (2020)* enjoys broad-based stakeholder support, the occasional individual flags two key areas of concern. These are detailed here with a response.

1. CPIN and related software solutions do not support these changes.

This is a bureaucratic point occasionally raised by administrators. It may be the case that given the way current child welfare files are built, a new work-around will be required to ensure that names of former youth-in-care do not pop in searches (in the same way officers will not see a juvenile criminal record when they pull over an adult during a traffic stop). Solutions addressing this concern need not be costly. Indeed, it is also possible that not implementing this change will be far costlier. The potential for class actions citing the Charter of Rights and Freedoms by former youth-in-care whose files were used to disadvantage them in career, volunteer, marital, and family situations exists as long as this legislative oversight is not remedied. Furthermore, significant redacting of names within child welfare files is a matter of routine business at CASs. Limitations of software solutions managed by the Ministry of Children, Community, and Social Services cannot dictate the level of civil liberties afforded to certain citizens over others.

2. The CAS deserves to know who was a foster child and their recorded history in case they harm kids.

This regrettable viewpoint is raised by the occasional practitioner. It is based in the prejudicial view that those raised in care will harm their kids. While this scenario is not an impossible one, there is little to no *credible or rigorous* academic research to support this assertion as a matter of fact. Human rights are afforded to any human. There are no mitigating circumstances under which it is acceptable to treat an entire group as less than human and justify the removal of human rights pre-emptively (or at all) based on precarious research and prejudice. This is the same conclusion recently reached by Minister Todd Smith and Associate Minister Jill Dunlop when they eliminated the use of birth alerts in Ontario. In the regrettable event that a former youth-in-care does harm a child, a thorough investigation ought to turn up their personal history and the corresponding legal authorities may lobby the courts for third party access to the historic child welfare file.

Stakeholder Consultations:

Child Welfare PAC has been advocating for the *Foster Fairness Privacy Act (2020)* since 2017. The issue and the proposed bill are known across media, parties, and sectoral stakeholders. Many champions exist within organizations. Indeed, many attend our annual advocacy day at the Ontario Legislative Assembly: 300 participants in fall 2019. Below is a sample of some groups. We are happy to provide a list of specific names upon request.

- Government – Minister Todd Smith, Associate Minister Jill Dunlop, MPP Bob Bailey, and many colleagues
- Opposition – MPP Monique Taylor (and many colleagues), MPP John Fraser (and colleagues)
- Canadian Senators
- [Hundreds of former youth-in-care and allies](#) mobilized by Child Welfare PAC
- [Media stakeholders](#) at Globe, Star, CBC, CTV, TVO, Macleans, etc.
- Ontario Association of Children’s Aid Societies (OACAS)
- Practice and Research Together (PART)
- Information and Privacy Commissioner of Ontario
- Justice for Children and Youth
- Adopt4Life
- Children’s Aid Foundation
- Children in Limbo Task Force
- Child Welfare League of Canada
- Laidlaw Foundation
- Many CASs
- Individual social workers, youth advocates, childcare practitioners
- Many doctors, lawyers, and mental health providers
- Several Ontario post-secondary schools and advocate academics
- Law firms
- Research institutions

Next Steps:

1. MPP Bailey presents to PMB Committee — November 2020
2. MPP Bailey presents to caucus — November 2020
3. MPP Bailey introduces bill — December 3rd, 2020
4. Child Welfare PAC implements communications plan surrounding the introduction
5. Child Welfare PAC connects to stakeholders for letters of support
6. Bill goes to second reading — spring 2021
7. Child Welfare PAC raises awareness about public hearings — TBD
8. Bill goes to third reading — TBD
9. Ratification — TBD
10. Implementation — TBD
11. Repeat across country