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Submissions on Bill 251 - *Combating Human Trafficking Act, 2021*

Legislative Assembly of Ontario – Standing Committee on Justice Policy
By email to: comm-justicepolicy@ola.org

Please accept the following submissions by Justice for Children and Youth, regarding Bill 251 – *Combating Human Trafficking Act, 2021*. We thank the Standing Committee for the opportunity to provide our submissions, both orally and in writing.

Outline

JFCY's submissions will focus on Schedule 3 of Bill 251, which concerns proposed amendments to the *Child, Youth and Family Services Act*. Specifically, we commend the Government's commitment to addressing the harms of sexual exploitation and sex trafficking of children and youth, but have serious concerns regarding the expanded apprehension and detention power, its impact on children's rights to liberty and equality, and its efficacy as a measure to assist victims of exploitation and trafficking.

These submissions are presented in four parts:

A – An introduction to our organization and expertise;

B – Commentary on the purpose *Child, Youth and Family Services Act*;

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C – Discussion on the impact of the proposed amendments on the rights of 16- and 17-year-olds;

D – Summary comments on key recommendations.

A – Who We Are: Justice for Children and Youth (“JFCY”)

JFCY is a specialty legal clinic funded by Legal Aid Ontario. We are a child rights organization. For over 40 years, our practice has focused exclusively on the legal issues facing children and youth. We are the only such organization in Canada. We provide legal services, including legal information, advice, and representation to low-income children and youth across Ontario in a variety of legal areas: child welfare, youth criminal justice, education, child support, social assistance, privacy, health, mental health, income maintenance, immigration, policing and correctional issues, victimization, criminal injuries compensation, housing and homelessness, and human trafficking.

JFCY also operates a unique legal service that is specifically directed at homeless, street-involved, and unstably housed young people – Street Youth Legal Services (“SYLS”). For over 20 years, SYLS has provided legal services to street involved young people, 16–24 years old, on a wide range of legal matters. SYLS provides legal education to street youth and street youth-serving agency staff, and has taken part in research, advocacy and litigation on issues affecting street-involved young people. A key component of the SYLS program is providing legal options to unstably housed young people to help them find the support necessary to stabilize their lives. Many of these young people, although involved in the child protection / welfare system, still find themselves homeless, and vulnerable to victimization and violence, including sexual exploitation.

JFCY also provides public legal education for young people and the adults who work with and support them, and engages in law reform initiatives regarding child and youth rights. JFCY is regularly consulted by government, youth-serving agencies, lawyers and other professionals, and academics from across the country with respect to child and youth rights issues.

In addition to direct client services to individual youth, JFCY acts in ‘test case’ litigation to assist courts in addressing child and youth rights issues, including acting as *amicus curiae*, and intervening in litigation at Courts of Appeal and the Supreme Court of Canada.

While JFCY assists young people in a variety of legal areas, a significant part of the clinic’s practice is providing legal services to young people who are facing legal issues that span multiple areas of the law. This includes the interaction between young people’s legal, social, and cultural vulnerabilities and the broader legal and social systems which compound and magnify those vulnerabilities. JFCY is regularly called upon to address the inherent vulnerability of and systemic discrimination experienced by children and youth, including our young clients. JFCY and the SYLS program provide trauma-informed, anti-oppressive, and developmentally appropriate legal services, and a multi-disciplinary approach to addressing legal issues.

JFCY frequently provides services to young people who are involved in sex work or who are victims of violence, including sexual exploitation, and has developed significant expertise in the particular legal issues and barriers to obtaining support and services faced by this group of young people. Over the years we have routinely had and continue to have clients who experience sexual violence, sexual exploitation, and sex trafficking, and who regularly seek to access services and supports to address the complex issues they are facing.

Our submissions and recommendations are based on our unique perspective and extensive experience providing services, education, and advocacy for children and youth, in

particular those experiencing sexual exploitation and sex trafficking, and our concern for promoting and advancing children and young people's rights in many legal contexts.

B – Bill 251 in the Context of the *Child, Youth and Family Services Act*

The *Child, Youth and Family Services Act* (“CYFSA”, the “Act”), enacted in 2017, is intended to effect a sea change in the provision of child protection services in Ontario. The CYFSA acknowledges that children are individuals with rights to be respected and voices to be heard, and that services provided to children under the Act are to be child-centred.¹ The CYFSA incorporates by reference the United Nations *Convention on the Rights of the Child* (“UNCRC”)², to which Canada is a signatory and which is recognized by the Supreme Court of Canada as being the most universally accepted human rights instrument in history.³ As the UN Committee on the Rights of the Child has noted, children's rights cannot be compromised in the name of their “best interests”. Rather, a child's full enjoyment of all the rights articulated in the UNCRC is in the child's best interests.⁴

The rights articulated in the UNCRC, and Canada's commitment to protection and promoting children's rights, animate and inform the CYFSA. Any amendments to the Act must similarly recognize children as individual rights holders, promote respect for children's evolving capacities, and seek to give effect to their rights, voice, autonomy, agency, and dignity in all contexts.

The CYFSA is also intended to implement the important recommendations of the Inquests into the deaths of Katelynn Sampson and Jeffrey Baldwin, which recognize the need for

¹ *Child, Youth and Family Services Act, 2017*, SO 2017, c.14, Sched. 1 at Preamble.

² *Convention on the Rights of the Child, 1989*, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25.

³ *R. v. Sharpe*, [2001] 1 S.C.R. at para 177.

⁴ UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013 CRC/C/GC/14 at para 4.

children's voices to be heard, for services provided to children to be child-centred, and for children to be recognized as individuals with rights.

The *CYFSA* provides that children who are 16- or 17-years-old may receive services on a voluntary basis, recognizing the adolescents' needs for protective services, while respecting their individual agency and their capacity for independent judgment, decision-making, and autonomy. Again, it is significant and important that services offered to adolescents are consistent with the *UNCRC* and a child rights approach that recognizes the need for protective services that appreciate the unique needs of adolescents and the unique approaches that are required during adolescence. The UN Committee on the Rights of the Child highlights the "importance of a human rights-based approach that includes recognition and respect for the dignity and agency of adolescents; their empowerment, citizenship and active participation in their own lives; the promotion of optimum health, well-being and development; and a commitment to the promotion, protection and fulfilment of their human rights, without discrimination." And further, "[t]he Committee highlights the need to involve adolescents in the development of prevention strategies and protective responses to victims of violence."⁵

The *CYFSA* is, in part, intended to remedy a paternalistic approach to child welfare services, which historically treated children like property or mere objects of protection, and failed to promote a rights-respecting approach to their care. The ills of the child welfare system continue to burn brightly in our collective conscience and to impact the lives of those involved in the system: residential schools, the 60s scoop, and policies of assimilation and purposeful destruction of the bonds of community, culture, and language; the deaths of children while in the care of protective services; and the over-representation of Indigenous, racialized, socially and

⁵ UN Committee on the Rights of the Child, General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20 at para 4, 49.

economically disadvantaged and isolated children and families in the care system; the over-representation of children with previous involvement in child welfare among homeless youth; the over-representation of LGBTQI2S+ youth in the child welfare system; the lower levels of educational attainment, and greater risk of health problems for people who have come through the child welfare system; and, the overrepresentation of children involved with child welfare in the youth and adult criminal justice systems, including incarcerated young people.

Experience shows that the child welfare system disregards children's rights at their peril, and to the tremendous detriment of the children it is intended to protect.

A child-rights approach to assisting young people who are victims of violence in the form of sexual exploitation and sex trafficking is one whereby the child is respected as a rights holder and decisions are made together with the child. Neither a welfare approach (one that seeks to “rescue” a child, perceived to be a mere object of protection, and make decisions on their behalf without serious consideration for her or his views), nor a repressive approach (one that forcibly removes a child and therefore further violates their rights), is an appropriate response to the problem of sexual exploitation and sex trafficking. Insisting that a proposed approach is in their best interests does not make it so if a child's rights are not also respected and promoted.⁶ To apply the *UNCRC* and make meaningful the rights protections of the *CYFSA*, a child rights approach must be applied. A child rights approach to 16- and 17-year olds in this context requires voluntary access to and involvement with protection and support services.

Bill 251 must be viewed through this lens and we must be cautious that, in seeking to alleviate and remedy harm, the Government does not support an approach that does violence to

⁶ UN Committee on the Rights of the Child, General comment No. 21 (2017) on children in street situations, 21 June 2017 CRC/C/GC/21 at para 5.

children's status as rights-holders, and individuals worthy of dignity and respect, and ultimately causes them greater harm.

C – Impact of Bill 251 on the Rights of 16- and 17-year-olds

a) Proposed Amendment to section 74(2) of the *CYFSA* (Bill 251, Schedule 3, s 1(2))

We commend the Government for proposing amendments to the *CYFSA* to include sexual exploitation as a result of sex trafficking – and the risk of such exploitation - as grounds of protection (Schedule 3, s 1(1)). Research suggests that the majority of victims of sex trafficking are between 15 and 24 years old, with individuals 17 years old being the most prevalent in this age group.⁷ Young people under the age of 18 years are over-represented among victims⁸ and upwards of 90% of victims are girls and women.⁹ The problem of child sex trafficking is substantial and urgent, and this amendment empowers child welfare agencies to treat it as such.

The inclusion of a risk of sexual exploitation by sex trafficking introduces a ground of protection that is independent of the conduct of a caregiver and expands the ability of a child welfare agency to intervene and provide services to children vulnerable to sexual exploitation. This is of particular significance to children who are 16- and 17-years-old. Children in this age group are entitled under the *CYFSA* to seek the services of a child welfare agency, and frequently do so when they have left home and are consequently homeless or unstably housed, a significant risk factor for victimization and sexual exploitation. Yet, notwithstanding the provisions of the *CYFSA* that empower child welfare agencies to offer services to young people who are 16- and

⁷ Felicia Gabriele, et al, Ontario Coalition Research Initiative, “The Incidence of Human Trafficking in Ontario” (2014), online at: <http://violencepreventiongreybruce.com/wp-content/uploads/2018/09/AAMS-HT.pdf> at p 16.

⁸ Ibid.

⁹ Statistics Canada, “Trafficking in persons in Canada, 2018”, 23 June 2020: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00006-eng.htm>.

17-years-old on a voluntary basis, they often struggle to understand define the protection needs of young people living independently of their parent or caregiver.

We have seen instances where a 16- or 17-year-old reaches out to a child welfare agency seeking services and protection, and instead the agency defers to a parent or caregiver's statement of willingness to provide care as the metric of the child's need for services, and declines to intervene. In other cases, child welfare agencies have concluded that if a child is housed, even temporarily in a shelter, they are no longer in need of protection, and decline to offer services.

The proposed amendment to section 74(2) of the *CYFSA* clearly signals a mandate for child welfare agencies to provide services to young people at risk of sexual exploitation, independent of their parent or caregiver, and may therefore expand access to child protection services for young people in the 16- and 17-year-old age group who are vulnerable to exploitation and in need of services and supports.

b) Proposed Addition of Section 77.1 to the *CYFSA* (Bill 251, Schedule 3, s 2)

The proposed addition of section 77.1 to the *CYFSA* creates an extraordinary power to apprehend and detain victims of sex trafficking and sexual exploitation that is unprecedented in law. No other legislation in Ontario permits the detention of victims of crime. The proposed provision stands in stark contrast to the current provisions related to 16- and 17-year-olds, which require the consent of the young person in order for a child welfare agencies to provide services. This power of detention is a deprivation of liberty and is a punitive response to – in other words, blames - the victim of sex trafficking, and has the substantial risk of alienating the very person the legislation purports to assist. We are gravely concerned with the substantial harm that may be occasioned, and we see little if any possible benefit.

We are also gravely concerned that this proposed provision is unconstitutional – violating sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, is contrary to a child rights-respecting approach, and ultimately will do more harm than good for victims of sex trafficking.

Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The proposed provision implicates the liberty interest by not only depriving a young person of their physical liberty by subjecting them to detention, but by imposing limitations on their personal autonomy and integrity, privacy, and fundamental personal choices¹⁰, including whether to engage with the state or not, whether to access services or not, and whether to reveal deeply personal information to authorities or not. The section 7 right to liberty may only be limited where it is in accordance with the principles of fundamental justice, that is, the legal principles that reflect significant societal consensus concerning the fair operation of the legal system. The proposed provision fails to meet this standard.

While there is a societal interest in protecting vulnerable young people from harm, this must be done in a way that appropriately takes account of the capacities of young people and their status as rights-holders. Their fundamental rights cannot be violated in the name of their “best interests” or their own protection. Subjecting young people to coercive measures not only flies in the face of the underlying principles of the *CYFSA* and fails to respect their dignity as individuals, it is unlikely to be effective.

A vulnerable young person is unlikely to differentiate between detention that is intended to assist them and detention that is punitive. Holding them against their will does not support the development of a trusting relationship with service providers – a prerequisite to accepting

assistive services – and may well be a traumatizing experience on its own. In this context, we suggest that a young person is unlikely to be receptive to supports and services that are offered in this punitive and coercive manner. Young people must be ready and willing to engage in services for those services to be effective.

Many young people engaged in sex work are already criminalized and subject to over-policing. The use of coercive measures risks driving victims further underground, where they are beyond the reach of service providers and outside the protection of law enforcement, increasing their vulnerability and exposure to a risk of harm.

A measure that impinges upon a young person's liberty, personal autonomy, and personal integrity, while providing no appreciable benefit and in fact risking further harm, is not in accordance with the principles of fundamental justice and therefore violates section 7.

The proposed provision similarly runs afoul of section 15 of the *Charter*. Section 15 of the *Charter* provides:

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

A law will be discriminatory and violate section 15 where it creates a distinction on the basis of an enumerated ground, like age, and imposes burdens or denies a benefit in manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.¹¹

The proposed provision imposes a burden on 16- and 17-year-olds not imposed on similarly situated others. Children are recognized as a vulnerable group in Canadian society and

¹⁰ *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49, [2000] 2 SCR 307; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64, [2015] 1 SCR 331.

¹¹ *Fraser v Canada (Attorney General)*, 2020 SCC 28 at para 27.

as experiencing pre-existing disadvantage.¹² Young people who are victims of sexual exploitation are a particularly vulnerable group within this age group, and are likely to be experiencing multiple intersecting grounds of disadvantage: homelessness, poverty, racialization, struggles with mental health and substance use, poor educational attainment, experiences of abuse and neglect at home, engagement in the child welfare system, and discrimination on the basis of gender or LGBTQI2S+ identity.¹³ Engagement in sex work may well be a survival act.

Sexual exploitation and sex trafficking are furthermore primarily a form of violence against women and girls. The proposed detention measures are contrary to the promotion of the empowerment of women and girls.

By exposing young people to the traumatizing impact of apprehension and detention, in a context where they are unlikely to accept or benefit from services, as described above, not only does the proposed provision fail to protect or assist young people, it perpetuates harm against this group, both to their dignity as individuals, and by exposing them to further risks of exploitation. By undermining their dignity, personal autonomy, integrity, and agency, young people may be made more psychologically vulnerable to exploitation and violence, and the measures create confusion as to who they can trust to help them, and who can be trusted to advance their security and dignity.

The proposed provisions are therefore unconstitutional, and present a real risk of harm to an already vulnerable group. Ensuring that the rights of young people – to safety, personal integrity, autonomy, agency, dignity, and liberty - are rigorously safeguarded is an important

¹² *Canadian Foundation for Children, Youth and the Law*, 2004 SCC 4, [2004] 1 SCR 76 at para 225 per Deschamps, J., dissenting on other grounds; *R v Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 at para 170-178.

¹³ Lisa Pilnik, National Network for Youth “Responding to Youth Homelessness: A Key Strategy for Preventing Human Trafficking” (2018) <https://nn4youth.org/wp-content/uploads/NN4Y-2018-white-paper-human-trafficking-WEB-1.pdf>.

protective measure, and undermining these rights is not only harmful in itself, but discourages young people from engaging in protective services and risks placing them further in harm's way.

The *CYFSA* already contains provisions that allow service providers to engage with 16- and 17-year-olds in order to provide them supports and services in a manner that respects their rights and their dignity as individuals. The proposed provision is an unnecessary and harmful addition and we urge the Government to abandon this amendment.

c) A Pathway to Preventing Sexual Exploitation

Providing services to young people who have been victimized by sex trafficking is without question a daunting task and a policy challenge. However, the tools to both prevent sexual exploitation and to assist victims to exit situations of exploitation are well-recognized by service providers and organizations who work on the frontlines with these young people every day: services that assist young people to meet their basic needs, such as mental health services, crisis intervention, housing, and employment assistance; educational supports; non-judgmental, low-barrier and confidential services that can be accessed without law enforcement or system involvement; trauma-informed and non-traumatizing child welfare services; family-based interventions; protective, rather than punitive, interactions with law enforcement that ensure that young people are not criminalized or punished; and due attention to the lived experiences and voice of children with respect to their own needs and preferences.¹⁴ Dedication of government resources to this array of services, offered in a child rights-respecting manner and in ways that ensure their accessibility, will create meaningful progress in terms of preventing and reducing sexual exploitation and sex trafficking.

¹⁴ Ibid.

Providing resources, and ensuring straightforward and timely access to these resources is what is required by vulnerable young people. Offering services in the context of coercion and detention will not encourage young people to access these services. A 12-hour period of detention of young people will not assist in creating or providing access to these necessary wraparound services, which often require complex service coordination, and which simply cannot be arranged or accessed in this way.

D – Summary of Key Recommendations

We urge the Government to abandon the repressive and restrictive approach proposed in Bill 251, which employs coercive measures like forcible removal and detention, and instead adopt a child rights-based approach to assisting child victims of violence, sex trafficking, and sexual exploitation. A rights-based approach recognizes and respects the dignity and agency of the young person, and favours holistic, long-term strategies, services, and supports.¹⁵

The profound harms of sex trafficking and sexual exploitation require greater commitment to the rights of children, not less. The response of the state, intended to assist victims, cannot be seen to mimic the approach of the exploiter: to promise assistance, but at the cost of a child's agency, autonomy, and personal integrity.

We thank the Standing Committee for its consideration of these submissions.



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JUSTICE FOR CHILDREN AND YOUTH

¹⁵ General Comment No. 21, *supra* note 6.