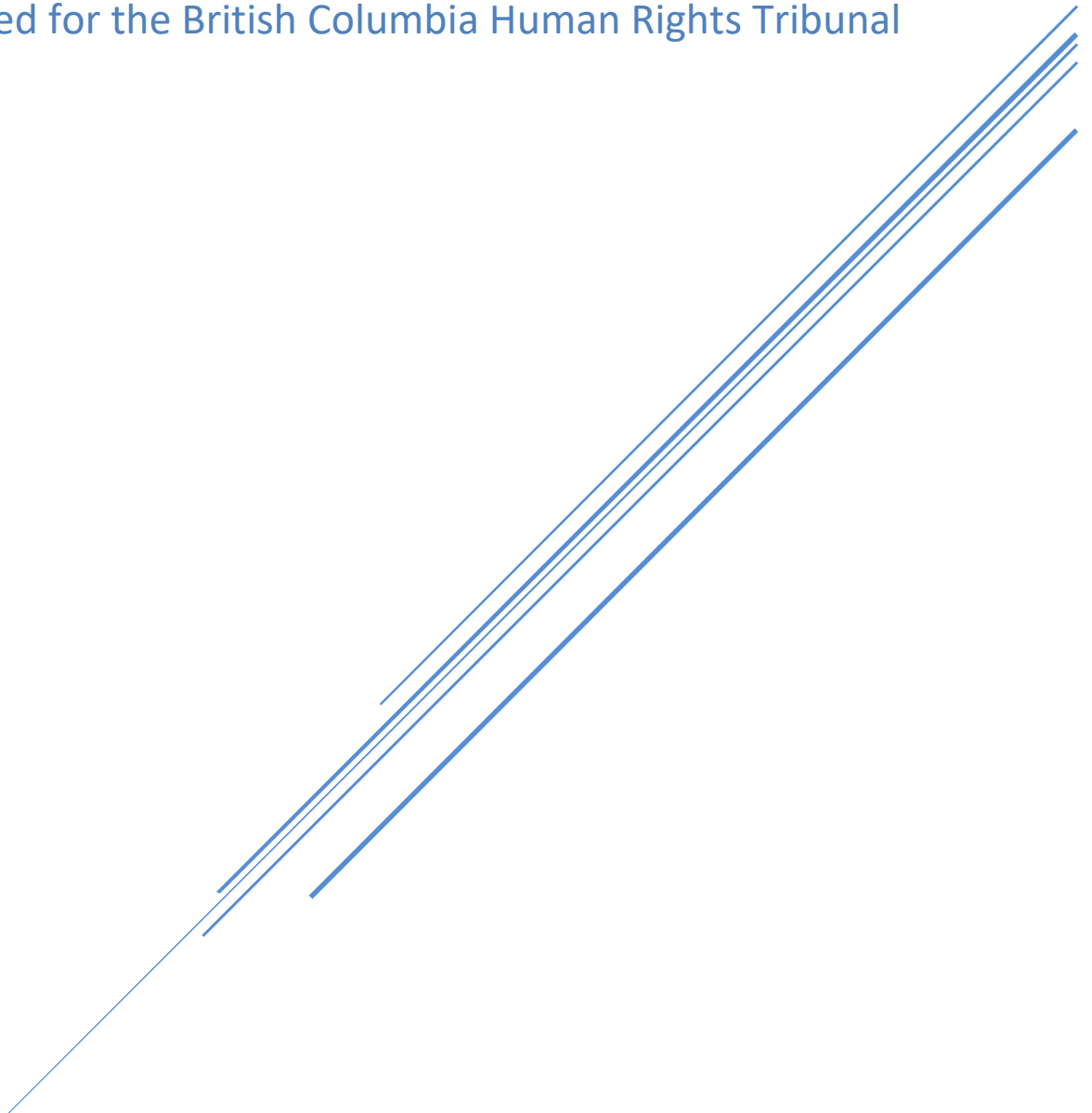


# REPORT OF THE WORKING GROUP ON STRENGTHENING TRIBUNAL PROCESSES FOR REPRESENTATIVE COMPLAINTS

Prepared for the British Columbia Human Rights Tribunal



May 31, 2019

i. Table of Contents

- I. INTRODUCTION ..... 1
- II. EXECUTIVE SUMMARY ..... 2
  - A. Overview ..... 2
  - B. Definitions ..... 4
  - C. Recommendations ..... 5
- III. REPRESENTATIVE COMPLAINTS BEFORE THE TRIBUNAL..... 11
  - A. Guiding Principles..... 11
  - B. Obligations of a Representative Complainant ..... 22
  - C. Minors Making Complaints in their Own Name ..... 25
  - D. Practical Application of the Principles in the Complaint Process ..... 31
- ii. Direct participation, with accommodations..... 46
- iii. Recorded Statements ..... 47
- iv. Assessment and Reports..... 48
- v. Judicial Interviews ..... 49
- vi. Hearsay ..... 50
- IV. appendix A – Working group terms of reference ..... 51

## I. INTRODUCTION

In April 2018, the British Columbia Human Rights Tribunal [**Tribunal**] convened a Working Group on Strengthening Tribunal Processes for Representative Complaints [**Working Group**]. The Working Group's mandate was to develop recommendations to the Tribunal to improve its process for complaints brought on behalf of persons without legal capacity [**Representative Complaints**]. Specifically, the Tribunal sought recommendations from the Working Group:

- i. to identify and fill gaps in the Tribunal's current process, as necessary; and
- ii. with specific regard to Representative Complaints brought on behalf of children, on building a child-centred approach that is consistent with the United Nations Convention on the Rights of the Child.

The Tribunal Chair, Diana Juricevic, designated Tribunal Legal Counsel, Katherine Hardie, and Tribunal Member, Emily Ohler, as Co-Chairs of the Working Group. After circulating a call for candidates and reviewing the applications, the Co-Chairs convened the Working Group comprised of the following members:

- Shauna Gersbach, Lawyer
- Sarah Rauch, Lawyer
- Sonya Pighin, Lawyer♦
- Laura Track, Lawyer
- Lindsay Waddell, Lawyer
- Harvey Wolfson, Retired Lawyer♦

The Working Group began its work in May, 2018.<sup>1</sup> This Report is the outcome of the various meetings, research and discussions undertaken in the intervening period.

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♦ Participated for a partial year

♦ Participated for a partial year

<sup>1</sup> The Working Group convened under Terms of Reference attached as Appendix A to this Report.

## II. EXECUTIVE SUMMARY

### A. Overview

As a signatory to the United Nations Convention on the Rights of the Child [UNCRC] and the United Nations Convention on the Rights of Persons with Disabilities [UNCRPD], Canada is obligated to, among other things, take all appropriate legislative, administrative and other measures to implement the rights recognized in the conventions. Ensuring consistency with the principles of the UNCRC and UNCRPD is particularly important in the context of the purposes of the *Human Rights Code* [Code], which run in parallel with the purposes of those Conventions.

In the context of complaints made on behalf of a child or youth, the complaint process must align with the rights set out in the UNCRC, and must account for the quickly evolving nature of childhood, the ongoing relationships at play in the child's every day life, and the often time-sensitive need to address the rights of the child under the *Code*. As set out in more detail in our report, the following principles apply: the best interests of the child shall be a primary consideration; a child has the right to participate in the process, and in particular, a child capable of forming their own views has the right to express those views and to have those views be given due weight in accordance with their age and maturity; and, for this purpose, the Tribunal must provide the child the opportunity to be heard, either directly or through a representative, in any complaint affecting the child. This approach must account for the child's individual needs, age, maturity, language, and culture. In particular, it must account for the rights of Indigenous children under the United Nations Declaration on the Rights of Indigenous Persons [UNDRIP].

In this report, we also consider issues regarding a minor filing a complaint in their own name. In various contexts, the law treats minors as lacking legal capacity to make decisions about their rights,<sup>2</sup> but there are compelling reasons to recognize the capacity of children and youth to make their own human rights complaint. We make recommendations for legislative amendment to address these issues.

In respect of the UNCRPD, persons with disabilities have the right to effective access to justice on an equal basis with others, including procedural and age-appropriate accommodations.

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<sup>2</sup> In *R. v. Hill*, [1986] 1 SCR 313, Wilson J in dissent said, "in a variety of different contexts, the law has recognized a general incapacity in children to act in a fully rational and responsible manner...". For an example of the law's recognition of a minor's capacity, see *Infants Act*, RSBC 1996, c. 223, s. 17, regarding consent to medical treatment.

## Working Draft: Report

Persons with disabilities enjoy legal capacity on an equal basis with others and may require supports to exercise their legal capacity. Supportive measures must, among other things, respect the rights, will, and preferences of the person, and be free of conflict of interest.

The guiding principles must inform every aspect of the Tribunal's process. In this report we address the obligations placed on persons who make representative complaints and who may file a representative complaint. Our recommendations cover all stages of the Tribunal's process from the complaint form through mediation and decision-making. We address the need for public information, age-appropriate information for represented persons about the Tribunal's process and the ways in which they can participate, and the need for training for Tribunal, staff and mediators. Importantly, we recommend consultation with affected groups before final implementation of the recommendations in the report.

In light of our mandate, we did not consider complaints on behalf of a person who consents to another person filing a complaint on their behalf. However, the Tribunal may also wish to consider imposing duties on a Representative Complainant in these circumstances, the nature of the consent required, and the scope of the Representative Complainant's duties to the represented person.

We begin by defining terms frequently used in this report, and setting out a summary of the Working Group recommendations. We then turn to the recommendations in more detail and discuss the rationale for each recommendation.

## B. Definitions

In this Report, we use the following definitions:

**Adult:** In BC, an adult is a person 19 years of age or older.<sup>3</sup>

**Children and youth:** Persons under 19 years of age.

**Code:** *Human Rights Code*, RSBC 1996, c. 210

**CRC:** United Nations Human Rights Office of the High Commissioner, Committee on the Rights of the Child

**Legal Capacity:** The legal ability to hold and exercise rights and duties.

**Minor:** In BC, a minor is person under 19 years of age.

**Representative Complainant:** A person who makes a complaint on behalf of another person and makes the decisions about advancing or resolving the complaint.

**Representative complaint:** A complaint made on behalf of a child or youth or a person without legal capacity.

**Represented person:** A person on whose behalf a Representative Complaint is made.

**SJTO:** Social Justice Tribunals Ontario.

**UNCRC:** United Nations Convention on the Rights of the Child

**UNCRPD:** United Nations Convention on the Rights of Persons with Disabilities.

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<sup>3</sup> *Age of Majority Act*, RSBC 1996, c. 7

## C. Recommendations

### 1. Policy Amendments

#### **Child-Centred Approach**

That the Tribunal adopt a child-centred approach to complaints about the rights of a child under the *Code*, as follows:

In dealing with a complaint about the rights of a child under the *Code*, at every stage of the process, the primary consideration is the best interests of the child, including in supporting a child's fullest participation in the complaint process, and by giving effect to the requirements to:

- Respect a child as an individual with their own interests, preferences, and abilities
- Respect a child's competence and developing ability to form and express their own views and make decisions
- Ensure the child has the opportunity to be heard and consulted, either directly or through a representative, in all matters of process and substance affecting the child in light of such factors as their age, maturity, culture, language, or any individual need
- Ensure the timeliness of the process from the child's perspective
- Give due weight to a child's views in accordance with their age and maturity

#### **Representative Complaints on behalf of Adults: Guiding Principles**

That the Tribunal adopt the following principles in respect of complaints brought on behalf of an adult:

- There is a strong presumption that an adult has the legal capacity to make a complaint in their own name
- The Tribunal should support a person bringing a complaint in their own name with appropriate accommodations and supports for their decision-making
- Where there is a representative complaint, the Tribunal must ensure the person's fullest participation in the complaint process, by:
  - Recognizing that capacity may change over time and context and the Representative Complainant is bound to withdraw if the represented person becomes capable of pursuing the complaint in their name with appropriate

supports and accommodations and does not consent to the Representative Complainant continuing

- Respecting a person's ability to understand information, and to form and express their preferences and will, recognizing that it may change over time
- Respecting the rights, will and preferences of the represented person
- Providing an opportunity to hear and consider the preferences and will of a person without mental capacity, directly or indirectly

### **Obligations of a Representative Complainant**

That the Tribunal set out obligations on a Representative Complainant, including a requirement that the Representative Complainant sign a declaration that they will comply with the obligations. The obligations should include that a Representative Complainant must:

- Act in good faith
- Focus on the represented person's rights to protection against discrimination under the *Code*
- Give the represented person information appropriate to their individual circumstances about the role of the Representative Complainant, the Tribunal processes and timelines, and possible outcomes of the Tribunal process
- In the case of a child, give primary consideration to the best interests of the child in all decisions and actions concerning them, including the impact of the proceeding on the best interests of the child and the benefits and risks of the proceedings on their interests
- In the case of an adult, respect the rights, will and preferences of the represented person
- Give the represented person an opportunity to express their views to the Tribunal about the complaint and to participate in the complaint, at each stage of the Tribunal process, in a manner that is appropriate for them
- Give the represented person regular follow-up, appropriate to their circumstances, about the steps taken on their behalf, where the complaint is at in the process, and what to expect next in the process
- Be accessible to the represented person throughout the processes



- Fulfil the functions of a Representative Complainant, including:
  - learn about the complaint process
  - advocate for the provision of procedural and age-appropriate accommodations to enable the represented person to have an effective role as a direct or indirect participant in all BCHRT proceedings
  - decide whether to retain a lawyer or legal advocate and provide instructions to that person, and
  - assist in gathering evidence to support the proceeding and putting forward the best possible case to the tribunal.

## 2. Legislative Amendments

That the definition of age in the *Code* be repealed.

That the *Code* be amended to provide that a minor may make a complaint in their own name.

That the *Code* be amended so that any agreement reached to resolve a complaint between a minor and another person is enforceable by and against that person despite section 19 of the *Infants Act*, RSBC 1996, c. 223.

That s. 22(3)(a) of the *Code* be amended to include consideration of whether the person filing the complaint was reasonably capable of making the complaint within the one-year time limit, for example, by specifying that considerations relevant to the public interest include the vulnerability of the person, including vulnerability due to age or disability, during the time limit for filing the complaint.

That the *Code* be amended to provide a right to counsel for children, youth, and persons who require legal representation to advance their own complaint.

That the *Code* be amended to specify that the Tribunal has authority to order an independent assessment of the child's views in relation to a complaint.

## 3. Rules amendments

That the Rules be amended to provide that the Tribunal may remove a Representative Complainant, either on application or on its own motion, and may stay the complaint proceeding pending the appointment of a new Representative Complainant.

#### 4. Forms Amendments

That Form 1.2 be amended to require the Representative Complainant to:

- Confirm the nature of their relationship to the represented person
- Explain why they are bringing the complaint if they are not a person with decision-making authority
- Give any person with decision-making authority a copy of the complaint and information on how to object to the Representative Complainant, and tell the Tribunal how and when that information was provided
- In the case of a child, set out the child's age
- In the case of an adult, set out why they believe that the person lacks the legal capacity to make decisions in the proceeding and provide supporting
- Identify whether they are an adult, and
- Declare that:
  - They understand the nature of the proceeding
  - They have no interest that conflicts with those of the represented person
  - They will remain free conflict of interest, and that where a conflict of interest arises, they will resign from their position as that person's Representative Complainant
  - They will comply with their obligations as a Representative Complainant.

That the Tribunal amend its regular complaint form to include a box for complainants to identify whether they are under the age of 19.

That Form 1.2 be amended so that, in the case of a guardian filing a complaint on behalf of a child, it requires the basis for the person's authority but does not require supporting documentation where none is available.

## 5. Practice

### **Name of complaint**

That representative complaints be named according to the represented person, followed by the identification of the Representative Complainant (e.g. Child (as represented by Parent A) v. Respondent).

### **Screening**

That, as part of its screening process, the Tribunal identify complaints filed by or on behalf of children or youth with potentially time-sensitive issues. In those cases, where the complaint sets out a possible contravention of the *Code*, the Tribunal should immediately assign the complaint to a Tribunal Member to manage the complaint [**Member manager**].

### **Member management**

That, on assignment, the Member manager review the complaint to assess the urgency with which the Tribunal should proceed and identify any issues arising regarding the timeliness of the complaint or the Representative Complainant's declaration, and should thereafter schedule case conferences with the parties, as necessary, to re-evaluate the urgency of the complaint and represented person's participation.

### **Mediation**

That a mediator contact the parties sufficiently in advance of the mediation to discuss the participation of the represented person.

That the Tribunal develop accommodation options to support the participation of children and youth in its mediation processes.

### **Decision-making**

That the Tribunal develop accommodation options to support the participation of children and youth in its decision-making processes.

That the Tribunal develop criteria for when Member interviews of children may be appropriate, and obtain specialized training for conducting those interviews.

## 6. Public Information

That the Tribunal have appropriate and accessible information available to represented persons about the ways in which they can participate in all stages of the complaint process.

That the Tribunal make public that a minor may make a complaint in their own name.

## **7. Training**

That the Tribunal provide training to staff, mediators, and members to ensure compliance with a child-centred approach and the guiding principles set out in this report.

## **8. Service Standards and Statistics**

That the Tribunal maintain statistics regarding the number of complaints filed (a) by children or youth; (b) on behalf of children and youth; and (c) on behalf of adults without legal capacity.

That the Tribunal establish modified time frames, as necessary, for the stages of a complaint made by or on behalf of children and youth and report on whether it has met those service standards.

## **9. Further work and consultation**

That the Tribunal consult with children and youth, and relevant organizations before finalizing any of the recommendations in this report.

That the Tribunal or Human Rights Commission conduct further research and consultations with children and youth and relevant organizations concerning barriers to accessing the Tribunal.

That the Tribunal consult with persons with disabilities and relevant disability rights and elder advocacy organizations before finalizing any of the recommendations in this report and, in particular, to develop policies and practices that support legal capacity, including through assisted decision-making, and that identify the circumstances in which the Tribunal should permit someone to bring a complaint on behalf of another person, absent that person's consent, including who may do so.

That the Tribunal conduct research and consultations about the settlement of representative complaints, including whether it should recommend that the *Code* be amended to give the Tribunal the authority to review and approve settlements of representative complaints.

### III. REPRESENTATIVE COMPLAINTS BEFORE THE TRIBUNAL

#### A. Guiding Principles

The Working Group recommends that the Tribunal adopt principles to guide its process for representative complaints. These principles depend on whether the complaint is on behalf of a child or youth, or on behalf of an adult.

##### 1. CHILD-CENTRED APPROACH

###### a) Recommendation

That the Tribunal adopt a child-centred approach to complaints about the rights of a child under the *Code*, as follows:

In dealing with a complaint about the rights of a child under the *Code*, at every stage of the process, the primary consideration is the best interests of the child, including in supporting a child's fullest participation in the complaint process, and by giving effect to the requirements to:

- Respect a child as an individual with their own interests, preferences, and abilities
- Respect a child's competence and developing ability to form and express their own views and make decisions
- Ensure the child has the opportunity to be heard and consulted, either directly or through a representative, in all matters of process and substance affecting the child in light of such factors as their age, maturity, culture, language, or any individual need
- Ensure the timeliness of the process from the child's perspective
- Give due weight to a child's views in accordance with their age and maturity

###### b) Discussion

This recommendation flows from the UNCRC, which provides as follows regarding legal proceedings:

Article 3 – In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

Article 12 – States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Committee on the Rights of the Child [CRC] monitors implementation of the UNCRC.<sup>4</sup> It has identified the four general principles in the UNCRC as Article 12, the right to non-discrimination, the right to life and development, and the primary consideration of the child’s best interests.<sup>5</sup> It has said that the phrase “capable of forming her or his views” “should not be seen as a limitation, but rather as an obligation for States Parties to assess the capacity of a child to form an autonomous opinion to the greatest extent possible.” Capacity must be presumed.<sup>6</sup> Further, age does not determine capacity:

... article 12 imposes no age limit on the right of the child to express her or his views, and discourages States Parties from introducing age limits either in law or in practice which would restrict the child’s right to be heard <sup>7</sup>

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<sup>4</sup> [United Nations Human Rights Office of the High Commissioner, Committee on the Rights of the Child](#)

<sup>5</sup> CRC [General Comment No. 12 \(2009\)](#): The right of the child to be heard [**General Comment No. 12**], para. 2

<sup>6</sup> General Comment No. 12, para. 20

<sup>7</sup> General Comment No. 12, para. 21; See also Eveline van Hooijdonk, “Children’s best interests: a discussion of commonly encountered tensions” in [The best interests of the child – A dialogue between theory and practice](#) (Council of Europe, March 2016) [**van Hooijdonk**] at p. 42: “... in practice the capability, age and maturity of the child remain too strongly a point of reference in deciding if and how a child can participate in determining his or her best interests. Capability and maturity cannot be defined in general terms, a case-by-case assessment is always necessary.”

In particular, the CRC underlined research showing that children can form views from the youngest age, even when not able to express them verbally.<sup>8</sup> Article 12 conceives of children as “active agents”.<sup>9</sup> The CRC has also provided a comment on Article 5 regarding a child’s right to have their best interests taken as a primary consideration.<sup>10</sup>

The child-centred approach must recognize the individual and cultural needs of each child, consistent with, for example, Article 7 of the UNCRPD which provides that children with disabilities have rights on an equal basis with other children, and Article 30 of the UNCRC which provides that Indigenous children must not be denied the right to enjoy their own culture in their community. Similarly, it must account for the UNDRIP which recognizes, among other things, “the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.”

The CRC has recognized that younger children and children belonging to marginalized and disadvantaged groups face particular barriers in realizing the rights under Article 12.<sup>11</sup>

A child-centred approach must recognize the unique vulnerabilities of children and youth and tackle the paternalistic view that children and youth are not capable until they reach adulthood:

Children do not have the same ability as adults to know their rights; to access remedies through a lawyer or otherwise; or to have a say in matters that affect them individually, as part of a particular group, or as children generally. They cannot vote and their rights can conflict with adult rights, even those adults meant to protect them. The greatest challenges are faced by the most vulnerable children: indigenous and racialized children, children with special needs, LGBTI2S children, immigrant and refugee children, and children living in poverty. It is also common for adults to view children paternalistically,

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<sup>8</sup> General Comment No. 12, para. 21; See also CRC [General Comment No. 7 \(2005\)](#): Implementing child rights in early childhood

<sup>9</sup> Emily Logan, Ombudsman for the Children in Ireland, [2008 Janusz Korczak Lecture](#), “The child's best interests: a generally applicable principle”.

<sup>10</sup> CRC [General Comment No. 14 \(2013\)](#) on the right of the child to have his or her best interests taken as a primary consideration

<sup>11</sup> General Comment No., paras. X and 21

to see them as non-competent people on their way to adulthood, about whom protective decisions must be made.<sup>12</sup>

Recognition and respect for the “voice of the child” has evolved not merely as a value-added phenomenon, but from a social recognition of children as “rights-bearing individuals rather than as merely objects of concern or subjects of decisions.”<sup>13</sup>

Various judicial and administrative contexts have grappled with how to translate the UNCRC into policy and practice. We point to three.

In their joint report *Hearing the Voices of Children and Youth: A Child-Centred Approach to Complaint Resolution*,<sup>14</sup> the Representative for Children and Youth and Ombudsperson define a child-centred approach.<sup>15</sup> The report also highlights the research showing that involving youth in decisions improves their development, promotes their participation in society, improves services, and enhances protection for vulnerable children and youth.<sup>16</sup> Further, it recognizes that, while all complaints should be addressed in a timely way, some are more urgent, and timely resolution is crucial for young people in care. A complaint resolution process should set

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<sup>12</sup> The Honourable Donna J. Martinson and Caterina E. Tempesta, “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation”, (2018) 31 *Can. J. Fam. L.* 151 – 195 [**Young People as Humans**] at para. 20 (QL)

<sup>13</sup> Rachel Birnbaum and Nicholas Bala, “The Child’s Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers”, (2009) 25 *Can. J. Fam. L.* 11 at para. 5 [**The Child’s Perspective**]

<sup>14</sup> Representative for Children and Youth and Ombudsperson, Joint Special Report, [\*Hearing the Voices of Children and Youth: A Child-Centred Approach to Complaint Resolution\*](#) (January 2010) [**Hearing the Voices of Children and Youth**] at p. 5

<sup>15</sup> In a child-centred approach, the views and interests of the child or youth are considered, they participate in decisions affecting them and they are supported in reaching their full potential. A child-centred approach is demonstrated by:

- respecting and valuing children as individuals
- seeing children as individuals with their own interests and abilities
- focusing on children’s needs and interests, now and in the future
- respecting the competence of children and their developing ability to make decisions

<sup>16</sup> *Hearing the Voices of Children and Youth* at p. 7; see also Young People as Humans at para. 24; Birnbaum and Bala; McIntosh, J., Wells, Y., Smyth, B., & Long, C. (2008), “Child-focused And Child-inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Post-Separation Adjustment” *Family Court Review*, 46(1), 105-124; Birnbaum, R. & Saini, R. (2012). A scoping review of qualitative studies on the voice of the child in child custody disputes. *Childhood*, 20(2), 260-282



and meet time limits, and should have established, reasonable time frames for each stage in the process, considering the young person's perspective on time.<sup>17</sup>

At the international level, the UN Office on Drugs and Crime Model Law and the International Criminal Court have translated the core principles of the UNCRC into a "child-sensitive approach" that "gives primary consideration to a child's right to protection and that takes into account a child's individual needs and views". It appreciates the child as an individual person who, in any given context, may be vulnerable, capable, or both, and recognizes there are challenges children may face in exercising their legal rights due to their age and status in society. In practice, it also recognizes that a child's capacity and vulnerabilities are always evolving given they are in a stage of rapid development as people.<sup>18</sup>

In the context of a family proceeding, *B.J.G. v. D.L.G.*, 2010 YKSC 44 [**B.J.G.**], Justice Martinson said:

... The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict .... It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation. (para. 3)

Further, "Many children want to be heard and they understand the difference between having a say and making the decision" (para. 4).<sup>19</sup> In academic writing, Judge Martinson and Caterina Tempesta state that giving children and youth the opportunity to participate in family court proceedings, if sensitive to the particular circumstances such as their age, maturity and social context, will benefit rather than harm them.<sup>20</sup> For a child to have a meaningful ability to participate, the child should be informed, at the beginning of the process, of their legal rights to

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<sup>17</sup> *Hearing the Voices of Children and Youth* at pp. 20, 27

<sup>18</sup> United Nations Office on Drugs and Crime. [Justice in Matters involving Child Victims and Witnesses of Crime: Model Law and Related Commentary](#) (2009)

<sup>19</sup> See also *J.E.S.D. v. Y.E.P.*, [2018 BCCA 286](#) for a discussion of the UNCRC

<sup>20</sup> *Young People as Humans* at para 28

be heard.<sup>21</sup> Such information “should be in their own language and adapted to their level of understanding.”<sup>22</sup>

## 2. GUIDING PRINCIPLES REGARDING COMPLAINTS ON BEHALF OF ADULTS

### a) Recommendation

That the Tribunal adopt the following principles in respect of complaints brought on behalf of an adult:

- There is a strong presumption that an adult has the legal capacity to make a complaint in their own name
- The Tribunal should support a person bringing a complaint in their own name with appropriate accommodations and supports for their decision-making
- Where there is a representative complaint, the Tribunal must ensure the person’s fullest participation in the complaint process, by:
  - Recognizing that capacity may change over time and context and the Representative Complainant is bound to withdraw if the represented person becomes capable of pursuing the complaint in their name with appropriate supports and accommodations and does not consent to the Representative Complainant continuing
  - Respecting a person’s ability to understand information, and to form and express their preferences and will, recognizing that it may change over time
  - Respecting the rights, will and preferences of the represented person
  - Providing an opportunity to hear and consider the preferences and will of a person without mental capacity, directly or indirectly

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<sup>21</sup> *B.K.G. v. D.L.G.*, 2010 YKSC 44; note some legislation provides for an express ability for a child to be notified of a hearing. In BC, for example, the *Child, Family and Community Services Act* requires that a child of the age of 12 be served with notice of a child protection hearing. However, unlike the other parties who receive notice of the hearing, the Act does not expressly grant the child any opportunity to be heard at the protection hearing.

<sup>22</sup> van Hooijdonk at p. 42

b) Discussion

These principles flow from the UNCRPD rights of persons with disabilities in respect of legal recognition and access to justice. Among other things, Article 12<sup>23</sup> provides that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Legal capacity is the right to make decisions for oneself. It is a basic human right that recognizes our autonomy.<sup>24</sup> Legal capacity is also understood as a “socio-legal concept that determines whether a person is entitled to make decisions for her or himself and be held responsible for the consequences.”<sup>25</sup> In other words, legal capacity is a right that the law defines and restricts.

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<sup>23</sup> Article 12 – Equal recognition before the law – 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity. 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests. 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

<sup>24</sup> The Canadian Association for Community Living in [What is Legal Capacity?](#) describes the concept this way:

Legal capacity is a human right for all persons – all persons should enjoy legal capacity on an equal basis with others in all aspects of life. The term recognizes two things: the capacity to have rights and the capacity to act upon those rights. In practice, legal capacity ensures that a person is recognized before the law and can make decisions about his or her own life, exercise rights, access the civil and court systems, enter contracts, and speak on his or her own behalf.

<sup>25</sup> Law Commission of Ontario, [Legal Capacity, Decision-Making and Guardianship, Final Report](#) (March 2017) defines “legal capacity” as follows:

Legal capacity: Legal capacity is a socio-legal concept that determines whether a person is entitled to make decisions for her or himself and be held responsible for the consequences. In Ontario, where an individual lacks legal capacity and a decision must be made, a substitute decision-maker will be appointed to do so in his or her place. “Legal capacity” should be distinguished from “mental capacity”: the former references the ability to hold and exercise certain legal rights, while the latter describes specific mental or cognitive abilities that have been identified as pre-requisites to the exercise of legal capacity.

The Committee on the Rights of Persons with Disabilities<sup>26</sup> notes that legal capacity and mental capacity are distinct concepts. Legal capacity is the ability to hold and exercise rights and duties, while mental capacity is about decision-making skills. It says that perceived or actual deficits in mental capacity must not be used to justify denying legal capacity.<sup>27</sup>

Adults are presumed to have legal capacity. This presumption is articulated in legislation, as well as in the rules of procedure for other administrative tribunals. For example, both s. 3(1) of the *Representation Agreement Act*, RSBC 1996, c. 405 and s. 11 of *Power of Attorney Act*, RSBC 1996, c. 370, contain presumptions of capacity. Rule A10.2 of the SJTO Common Rules presumes capacity for all persons. The SJTO Practice Direction recognizes the reality that capacity changes and that persons with capacity issues may be able to participate in a tribunal proceeding by themselves with appropriate accommodations.

When Canada ratified the UNCRPD, it issued a declaration and reservation that sets out Canada's understanding that Article 12 permits supported and substitute decision-making.<sup>28</sup> The declaration and reservation has been criticized as allowing Canada to avoid ensuring that its domestic laws recognize supported decision-making as the dominant approach to helping people with disabilities to make decisions, with substituted decision-making used only in rare cases.<sup>29</sup>

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<sup>26</sup> [United Nations Human Rights Office of the High Commissioner Committee on the Rights of Persons with Disabilities](#)

<sup>27</sup> Committee on the Rights of Persons with Disabilities, [General Comment No. 1 \(2014\)](#): Article 12: Equal recognition before the law[**General Comment No. 1**], para. 13

<sup>28</sup> The declaration and reservation provides: Canada recognizes that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal. Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones. ([https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&clang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=en#EndDec))

<sup>29</sup> Nicholas Caivano, *Conceptualizing Capacity: Interpreting Canada's Qualified Ratification of Article 12 of the UN Disability Rights Convention*, 2014 CanLIIDocs 208 [Caivano] at p. 23

A restrictive approach toward substitute decision-making recognizes that “[u]nwarranted findings of incapacity severely infringe upon a person’s right to self-determination.”<sup>30</sup> Substitute decision-making intrudes into an adult’s autonomous decision-making and liberty.<sup>31</sup> Accordingly, substitute decision-making should only be permitted on consent or on an exceptional basis once supported decision-making has already been explored. In this regard, Article 12 also requires States Parties to take measures to ensure persons with disabilities have the support they may need in exercising their legal capacity.

Generally, the law restricts an adult’s right to make their own decisions – holding that they do not have legal capacity – based on mental impairment or where the adult is judged not to have the mental ability to understand the information needed to make a decision or to understand the consequences of the decision. The CRC says that these approaches are flawed and discriminatory and that Article 12 requires supports for the exercise of legal capacity.<sup>32</sup> We are persuaded that the Tribunal should adopt measures to support legal capacity, including through assisted decision-making. Most importantly, we recommend further consultation and work in this area regarding the circumstances in which the Tribunal should permit someone to bring a complaint on behalf of an adult, absent that person’s informed consent.

Under Article 12 of the UNCRPD, States Parties must safeguard against abuse in any measures relating to the exercise of legal capacity. Safeguards must ensure that the measures:

- a) respect the rights, will and preferences of the person
- b) are free of conflict of interest and undue influence
- c) are proportional and tailored to the person’s circumstances
- d) apply for the shortest time possible

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<sup>30</sup> *Starson v. Swayze*, [2003] 1 SCR 722, 2003 SCC 32 at para. 75

<sup>31</sup> *Nova Scotia (Minister of Health) v. J.J.*, 2005 SCC 12 at para. 23

<sup>32</sup> General Comment No. 1, paras. 15-16

- e) are subject to regular review by a competent, independent and impartial authority or judicial body,<sup>33</sup> and
- f) are proportional to the degree to which such measures affect the person's rights and interests.

Finally, Article 12 requires States Parties to take measures to ensure the equal right of persons with disabilities in a number of areas, including to control their own financial affairs.

Article 13 of the UNCRPD requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate their effective role as direct and indirect participants in all stages of all legal proceedings.<sup>34</sup>

### 3. CONSULTATION

#### a) Recommendation

That the Tribunal consult with children and youth and relevant organizations before finalizing any of the recommendations in this report.

That the Tribunal consult with persons with disabilities and relevant disability rights and elder advocacy organizations before finalizing any of the recommendations in this report and, in particular, to develop policies and practices that support legal capacity, including through assisted decision-making, and that identify the circumstances in which the Tribunal should permit someone to bring a complaint on behalf of another person, absent that person's consent.

#### b) Discussion

The conventions address other rights and obligations relevant to the Tribunal's practices and policies. In particular, the CRC identifies children's right to be heard as a crucial element of

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<sup>33</sup> Canada's reservation also addresses this provision.

<sup>34</sup> Article 13 – Access to justice - States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

policy development.<sup>35</sup> The UNCRPD requires consultation with representative organizations in policy development.<sup>36</sup>

#### 4. Protection of Rights on the Basis of Age under the *Code*

##### a) Recommendation

That the definition of age in the *Code* be repealed.

##### b) Discussion

Currently, the *Code* defines “age” as 19 years or more. The effect of this definition is to deprive people under 19 from protection against discrimination on the basis of age. There are two areas of concern.

First, people under 19 are engaged in the protected areas under the *Code*, including accessing public services, engaging in employment, and in some cases entering tenancy agreements. For example, the *Employment Standards Act*, RSBC 1996, c. 113, permits the employment of children as young as 12, and even younger with the director’s permission (s. 9).<sup>37</sup> We see no rationale for excluding people under 19 from the *Code*’s protection against age discrimination.<sup>38</sup>

Second, the definition serves no useful purpose in light of the introduction of s. 41(2), which provides: “Nothing in this Code prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation.” This ensures that age-based distinctions

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<sup>35</sup> General Comment No. 12, para. 13

<sup>36</sup> Article 4 includes: “In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.”

<sup>37</sup> Note that amendments contained in Bill 8 (2019) will further restrict hiring, for example, requiring the director’s permission to hire a person under 14

<sup>38</sup> In *Arzem v. Ontario (Minister of Community and Social Services)* 2006 OHRTD No 17, the tribunal said that “excluding children from the protective regime because of age – the single most factor that contributes to their vulnerability – markedly contributes to the violation of their protected right” (see para. 59). (Note that the *Arzem* decision has been the subject of subsequent criticism by the Ontario Human Rights Tribunal on the basis that the constitutionality of the age-based discrimination was not properly before the Tribunal.)

permitted by law, such as in relation to driving licences, alcohol, tobacco and adult entertainment, are still fully effective in achieving their aims.

## B. Obligations of a Representative Complainant

### a) Recommendation: Obligations

That the Tribunal set out obligations on a Representative Complainant, including a requirement that the Representative Complainant sign a declaration that they will comply with the obligations. The obligations should include that a Representative Complainant must:

- Act in good faith
- Focus on the represented person's rights to protection against discrimination under the *Code*
- Give the represented person information appropriate to their individual circumstances about the role of the Representative Complainant, the Tribunal processes and timelines, and possible outcomes of the Tribunal process
- In the case of a child, give primary consideration to the best interests of the child in all decisions and actions concerning them, including the impact of the proceeding on the best interests of the child and the benefits and risks of the proceedings on their interest
- In the case of an adult, respect the rights, will and preferences of the represented person
- Give the represented person an opportunity to express their views to the Tribunal about the complaint and to participate in the complaint, at each stage of the Tribunal process, in a manner that is appropriate for them
- Give the represented person regular follow-up, appropriate to their circumstances, about the steps taken on their behalf, where the complaint is at in the process, and what to expect next in the process
- Be accessible to the represented person throughout the processes
- Fulfil the functions of a Representative Complainant, including:
  - learn about the complaint process



- advocate for the provision of procedural and age-appropriate accommodations to enable the represented person to have an effective role as a direct or indirect participant in all BCHRT proceedings
- decide whether to retain a lawyer or legal advocate and provide instructions to that person, and
- assist in gathering evidence to support the proceeding and putting forward the best possible case to the tribunal.

b) [Recommendation: Amend Complaint Form 12](#)

That Form 1.2 be amended to require the Representative Complainant to:

- Confirm the nature of their relationship to the represented person
- Explain why they are bringing the complaint if they are not the person with decision-making authority
- Give any person with decision-making authority a copy of the complaint and information on how to object to the Representative Complainant, and tell the Tribunal how and when that information was provided
- In the case of a child, set out the child's age
- In the case of an adult, set out why they believe that the person lacks the legal capacity to make decisions in the proceeding and provide supporting
- Identify whether they are an adult, and
- Declare that:
  - They understand the nature of the proceeding
  - They have no interest that conflicts with those of the represented person
  - They will remain free conflict of interest, and that where a conflict of interest arises, they will resign from their position as that person's Representative Complainant
  - They will comply with the obligations.

c) [Recommendation: Amend Rules](#)

That the Rules be amended to provide that the Tribunal may remove a Representative Complainant, either on application or on its own motion, and may stay the complaint proceeding pending the appointment of a new Representative Complainant.

d) Discussion

Form 1.2 does not articulate the obligations of the Representative Complainant. While the Tribunal has the authority to determine that a representative complaint cannot proceed, the Working Group is concerned about the lack of explicit obligations to determine that a Representative Complainant is acting in accordance with the best interests of the represented person.<sup>39</sup>

In developing its recommendations, we drew on the approach of the Social Justice Tribunals Ontario [SJTO] as set out in Rule A10 of the SJTO Common Rules<sup>40</sup> and the Practice Direction on Litigation Guardians before Social Justice Tribunals Ontario,<sup>41</sup> which set out the requirements for and responsibilities of litigation guardians,<sup>42</sup> as well as the circumstances when the SJTO may remove a litigation guardian.<sup>43</sup>

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<sup>39</sup> General Comment No. 12, para. 37

<sup>40</sup> [SJTO Common Rules](#)

<sup>41</sup> [Practice Direction on Litigation Guardians before Social Justice Tribunals Ontario](#)

<sup>42</sup> Rules A10.3 and A10.4 set out the requirements of the declaration a litigation guardian must sign including their consent to act; the nature of the relationship to the represented person; that they have no conflict of interest; that they will act in accordance with their responsibilities in Rule A10.8; that they are at least 18 and understand the nature of the proceeding; in the case of a minor, the minor's date of birth and that any other person with custody or legal guardianship has been notified; and, in the case of an adult, the reasons for believing he person is not mentally capable of participating, the nature and extent of the disability causing the mental incapacity, and that no other person has authority to be the litigation guardian, and that any person with power of attorney or guardianship has been notified. Rule A10.8 says that a litigation guardian shall diligently attend to the interests of the person represented and shall take all steps necessary for the protection of those interests including, to the extent possible, informing and consulting with the person represented about the proceedings; considering the impact of the proceeding on the person represented; deciding whether to retain a representative and providing instructions to the representative; and assisting in gathering evidence to support the proceeding and putting forward the best possible case to the tribunal. Rule A10.9 says that no one may be compensated for serving as a litigation guardian unless provided for by law or a pre-existing agreement.

<sup>43</sup> Rule A10.7 provides that a tribunal may refuse or remove a litigation guardian for conflict of interest, another person has substitute-decision making authority, the person has capacity to continue the proceeding, the litigation guardian is unable or unwilling to continue, there is a more appropriate litigation guardian, or no litigation guardian is needed.

Similarly, the Immigration and Refugee Board of Canada, Designated Representative's Guide, sets out the responsibilities of a designated representative for a minor or a person unable to appreciate the nature of the proceedings.<sup>44</sup>

The *Representation Agreement Act* also requires that various certifications be given by a proposed representative, including that the proposed representative has read, understands and agrees to accept the duties and responsibilities of a representative under the *Act*. Those duties include acting honestly and in good faith, and consulting to the extent reasonable with the adult to determine their wishes and complying with them if reasonable to do so. Similar obligations are set out in the *Power of Attorney Act*.

The Working Group found additional guidance in the law of fiduciaries who must not abuse their position of trust or act in any way detrimental to the beneficiary. Rather, the fiduciary has a duty of loyalty, a duty to act with "utmost good faith", and a duty to act in a manner consistent with the best interests of the beneficiary. The fiduciary must scrupulously avoid any situation that could place the fiduciary in a possible or potential conflict of interest.<sup>45</sup>

### C. Minors Making Complaints in their Own Name

This was an issue on which there was not unanimity among Working Group members, though the majority of the members supported this full set of recommendations.

#### a) Recommendation: Consultation

That the Tribunal or Human Rights Commission conduct further research and consultations with children and youth and youth advocacy organizations (such as the Representative for Child and Youth<sup>46</sup>) concerning barriers to accessing the Tribunal.

#### b) Recommendation: Code Amendment

That the *Code* be amended to provide that a minor may make a complaint in their own name.

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<sup>44</sup> [Designative Representative's Guide](#)

<sup>45</sup> Kevin P. McGuiness, Halsbury's Laws of Canada; *Frame v. Smith*, [1987] 2 SCR 99; *Galambos v. Perez*, [2009] S.C.R. 247; *Assu v Chickie*, [1998] B.C.J. No. 2775

<sup>46</sup> *Representative for Children and Youth Act*, SBC 2006, c. 29

c) Recommendation: Legal Assistance

That the Tribunal liaise with legal service agencies to establish a framework for intake of minor complainants who are seeking legal advice directly.

That the *Code* be amended to provide a right to counsel for children, youth, and persons who require legal representation to advance their own complaint.

d) Recommendation: Information for Children and Youth

That the Tribunal make public that a minor may make a complaint in their own name.

That the Tribunal provide all minors filing a complaint on their own behalf information about settlement and legal capacity issues and refer them to appropriate resources and information (like the Child and Youth Legal Centre).

e) Discussion

Section 21 provides that any person may make a complaint. On occasion at least, minors have pursued complaints before the Tribunal in their own name.<sup>47</sup> This has occurred without apparent difficulty, although the Tribunal's publication *Frequently Asked Questions about Settlement Meetings (Mediation)* addresses the question "What if the complainant is a minor?" The answer is as follows:

The Tribunal may accept complaints filed by mature minors (people under 19). The *Infants Act* governs contracting by minors. A contract with a minor is unenforceable against them except in limited circumstances. If the Tribunal is aware that the complainant is a minor, it will refer the respondent to the *Infants Act*. The respondent may agree to participate in the mediation with the minor, or may request that the legal guardian attend. If the parties are unable to agree on the mediation participants, the mediation will not proceed.

The Tribunal has not formalized a policy affirming the right of a minor to file a complaint in their own name. By virtue of Form 1.2, the public may assume that, where a complaint of discrimination is brought by a minor, it will be filed by a Representative Complainant.

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<sup>47</sup> See, for example, *Jubran v. Board of Trustees*, 2002 BCHRT 10; *aff'd School District No. 44 (North Vancouver)*, 2005 BCCA 201

The Working Group considered whether the Tribunal should continue to permit minors to make a complaint in their own name and, if so, how the Tribunal should articulate that right and, in particular, whether the Tribunal should adopt criteria for assessing when a minor is capable of bringing a complaint on their own behalf. This was a topic where the Working Group was not unanimous in its recommendation, though we all agreed about the need for further work and consultation in this area, including about the potential procedural and substantive barriers to minors advancing complaints in their own name, and the issues which could be expected to arise in the complaint process if minors act in their own name.

A majority of the Working Group was persuaded that, as in other administrative contexts affecting children and youth, children and youth should have a right to file a human rights complaint in their own name. Of particular note, in those areas where the *Code's* protections overlap with regulations and protections in another administrative scheme, i.e. employment and tenancy, a minor can file a complaint on their own behalf.<sup>48</sup>

In these administrative contexts, there are no published criteria for when a minor has standing to file a complaint. There are no legislated criteria for evaluating the competence or capacity of the child or youth to act on their own account. It is also notable that, within many administrative schemes, including the *Employment Standards Act* and the *Human Rights Code*, there are shorter time-limits for initiating a complaint,<sup>49</sup> and no automatic postponement in

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<sup>48</sup> The *Workers Compensation Act*, RSBC 1996, c. 492 provides that a worker who is a minor is “sui juris” (see section 12). As such, a minor is entitled to claim compensation under the Act. There is no requirement that the minor act via a representative. Similarly, the *Residential Tenancy Act*, SBC 2002, c. 78 provides that the Act applies to tenancy agreements with a minor, such that the agreement and the Act and regulations are enforceable by and against a person under the age of 19 (see section 3). By implication, a minor can seek redress through the Residential Tenancy Branch and is not required to act through a representative. The *Employment Standards Act*, RSBC 1996, c. 113 contemplates that employees will include minors under the age of 19, as there are additional protections for working children under the age of 12 (director’s approval required) and between the ages of 12 and 15 (parent or guardian consent required). [Note recent amendments in [2019 Bill 8](#) place further restrictions on the hiring of children and youth.] While the Act does not specifically state that a minor has standing to file a complaint to the Employment Standards Branch, the Branch’s form permits a minor to check that they are under the age of 19. A representative from the Branch has confirmed that they do permit a minor (under the age of 19) to commence and pursue their own complaint, subject to parental or guardian approval of any settlement agreement.

<sup>49</sup> The time limit under the Code was extended from six months to one year during the life of the Working Group

respect of a party under legal disability. Furthermore, the process is less formal and more flexible. There is also no requirement of legal counsel.

The Working Group agreed that, in this broader context, limiting a minor's ability to file a human rights complaint would result in a marked and obvious inconsistency in access to justice, and was not justifiable. On the one hand, a 16-year-old who had been injured at work, constructively dismissed at work, or evicted, could seek direct redress from the applicable tribunal, but could not then commence their own complaint for a refusal to accommodate following the work-place injury, for the sexual harassment which gave rise to the constructive dismissal, or for the discriminatory aspect of the eviction.

We also considered how such a restrictive approach could present a barrier to access to justice for some minor complainants, particularly in circumstances where there is not a willing Representative Complainant, and whether such a blanket restriction would run contrary to the purposes of the *Code*.<sup>50</sup> The Ontario Divisional Court identified this as a concern in *C.M.M. v D.G.C.*, 2015 ONSC 2447 (at para. 24) where it concluded that a child need not have a litigation guardian to pursue a claim for child support.

The Working Group considered the option of an age limit (possibly 14, 15 or 16 years old, the ages when a minor could be expected to engage in areas of employment or tenancy), at which point a minor is presumed to have capacity.<sup>51</sup> However, a majority of the Working Group rejected a specific age limit for a minor to file a complaint in their own. The Working Group was

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<sup>50</sup> There is a body of criticism of the resulting barrier to access to justice which arises from the legal disability of minors (e.g. see *The Child's Right to Standing*, Sonja C. Grove, 2008 Lexis). See also *Arzem v. Ontario (Minister of Community and Social Services)* 2006 OHR TD No 17, noted above in the context of the scope of protection from age-based discrimination – the tribunal's comments reveal a concern with the disenfranchisement of youth's access to justice and redress in the human rights context that also resonate on the issue of standing, and in particular, in circumstances where a vulnerable youth is unable to seek redress for discrimination due to their age and lack of a willing representative. Similarly, in the US Court of Appeal Decision of *Tindall v. Poutlney High School*, (2005) 414 F. 3d 281, the court, speaking in the context of the impact of the requirement of a lawyer in respect of a lawsuit brought on behalf of an infant, recognized the potential barrier on access to justice. Although the court ultimately held that the infant was required to have a lawyer to pursue his claim, the court also observed the impact of this restriction may be to undermine a child's interest in having a claim pursued when counsel is not practically available.

<sup>51</sup> For example, the SJTO Practice Direction provides that a minor may require a litigation guardian depending on the type of case and, at the Human Rights Tribunal of Ontario, a 16 or 17-year-old who has withdrawn from parental control, and is making a claim of discrimination in housing, can file an application on his or her own behalf (see section 4(1) of the Human Rights Code).

persuaded that the guiding principles do not permit an overly rigid approach and require flexibility as children mature at different rates, and neither a child's competence nor their intellectual maturity can be determined by age alone.<sup>52</sup>

In this regard, the Working Group considered the concept of a "mature minor", which involves an assessment of a minor's capacity to consent to medical treatment based on the minor's ability to appreciate the risks, benefits, alternatives, and consequences. However, the "mature minor" principle is used in the context of guided decision-making (i.e. when the minor is under the care of a professional who has ethical and professional obligations). Therefore, the mature minor principle might not be as applicable in an administrative context, where guidance and advice on options and risks could not be provided by the Tribunal.

We also considered an assessment of capacity using the criteria set out in the *Infants Act* in respect of legal capacity to enter into a transaction. Section 21 provides that a court may make an order granting the infant "full capacity" or capacity to enter into a contract. On this approach, the Tribunal could permit a minor to act on their own account, if it was satisfied that doing so was for the benefit of the minor, having regard to the minor's circumstances. However, we questioned how and when a determination of a child's capacity might be carried out, and observed that complaints by a minor are more likely to be the exception rather than the rule.

Another approach to supporting the ability of minors to advance their own interests or claims is through the appointment of legal counsel. The *Family Law Act*, SBC 2011, c. 25, s. 203 provides that the court may appoint a lawyer to represent the interests of a child in cases of severe conflict and where it is necessary to protect the best interests of the child. Under the *Youth Criminal Justice Act*, SC 2002, c. 1, s. 25(1), a young person (age 12-17) has the right to retain and instruct counsel.

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<sup>52</sup> We recognized that there is judicial commentary to support a hard-line on the age to exercise certain "adult" functions. For example, in the *Fitzgard v. Alberta* 2002 ABQB 1086 (upheld, leave to SCC denied), the Court upheld the constitutionality of the age eligibility requirement for voting. Although concluding that the age limitation was discriminatory under section 15 of the *Charter*, and violated the voting rights entrenched in section 3 of the *Charter*, the Court found the limit to be justified under section 1 on the basis that it was rationally connected to the legislature's goal of ensuring that voters are sufficiently mature to cast a rational and informed vote, was minimally impairing and the effects were proportionate.

In the BC Supreme Court context, there is a requirement for legal counsel. A minor does not have standing to advance a claim on their own behalf. Rule 20-2(2) of the *BC Supreme Court Civil Rules* requires that a proceeding brought by or against a person under “legal disability” be started or defended by a litigation guardian. Rule 20-2(8) provides that the lawyer for the person under disability, with certain exceptions, must file a certificate that the person is “an infant or mentally incompetent person”. In contrast, the Rules of Court in the Northwest Territories provide for a discretionary ability of the court to grant an audience to a party under legal disability,<sup>53</sup> although, to date, there is no case law which considers the criteria for granting audience to a party under legal disability.

There are reasons why a minor may be restricted from initiating or participating in court proceedings, particularly without legal counsel, that are not as compelling in the administrative context. In particular, within the court context, there are substantial cost consequences and complicated rules of procedure and evidence. Further, minors are generally entitled to a postponement of the limitation period for commencing a suit until they reach the age of majority and therefore there is reduced urgency in terms of commencing a lawsuit while under legal disability.

The Working Group also considered how extending the right to file a complaint to minors could present some complex issues for the Tribunal process. For example, the Tribunal may need to deal with a respondent’s challenge to a minor’s capacity to proceed in their own name with or without legal representation. These concerns, in our view, are outweighed by the considerations favouring minors’ ability to advance their own human rights complaints.

Finally, to facilitate a minor’s equal access to the Tribunal, and given that a minor may encounter challenges in accessing legal assistance, the Tribunal should coordinate with legal service providers to ensure that there is a framework in place for minors who wish to consult a lawyer directly to assist them in the Tribunal process.

To this end, the Working Group also recommends an amendment to the *Code* to include a right to counsel for a minor or an adult who may require representation to advance their own

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<sup>53</sup> Rule 7 of the Rules provides: 7.(1) A party to a proceeding who is under disability or acts in a representative capacity shall be represented by a solicitor. ... (4) Notwithstanding subrules (1) and (2), the Court may grant audience to any individual where it considers it appropriate in the interests of justice.



complaint. There are different models for providing such representation. As noted above, under s. 203 of the *Family Law Act*, the court may appoint a lawyer to represent the interests of a child in certain circumstances. Under s. 43 of the *Mental Health Act*, RSO 1990, c. M-7, the Board may direct the Children’s Lawyer to arrange for legal representation for the patient in certain circumstances, and s. 33(8) of that Act provides for the right to counsel in certain circumstances. The *Human Rights Code*, RSO 1990, c. H.19, s. 45.11 establishes a legal support centre. In BC, the BC Human Rights Clinic provides free legal services to qualifying complainants, but its existence and mandate is not established by legislation. The Child and Youth Legal Centre also provides assistance with human rights matters. The *Code* could be amended to provide secure funded services for complainants requiring legal representation, and specifically mandate representation for children and youth. This would raise questions about the legislative framework for such services, funding, criteria, and who would determine if the criteria were met.

## D. Practical Application of the Principles in the Complaint Process

### 1. Time Limit for Making a Complaint

#### a) Recommendation

That s. 22(3)(a) of the *Code* be amended to include consideration of whether the person filing the complaint was reasonably capable of making the complaint within the one-year time limit, for example, by specifying that considerations relevant to the public interest include the vulnerability of the person, including vulnerability due to age or disability, during the time limit for filing the complaint.

#### b) Discussion

There is currently a one-year time limit for filing a complaint under the *Code*. Minors may face particular barriers in accessing the human rights process due to their age and circumstances.

Under s. 22(3) of the *Code*, the Tribunal has discretion to accept a late-filed complaint if it determines that it is in the public interest to do so and would not substantially prejudice any person. The Tribunal’s case law provides that this is a context-specific determination that includes consideration of factors such as the length of the delay, reasons for the delay, and public interest in the complaint, including whether the complaint addresses an issue where there is a gap in the jurisprudence. Given the breadth of the discretion, the Tribunal could

consider barriers faced by a minor in filing a complaint. For example, the age, maturity, disadvantages, and legal incapacity of the complainant, and the absence of a willing, appropriate representative could factor into the reasons for the delay and the vulnerability of the complainant.

However, there are two issues with leaving such considerations to be assessed on a purely case-by-case basis. First, there would be no requirement to consider or give particular weight to these considerations. Absent legislative amendment, it would likely be an inappropriate fettering of the Tribunal's discretion to prescribe specific factors that must be considered. Rather, the factors would need to be raised in argument by or on behalf of a complainant. The second issue is that, unless the necessary considerations are set out in the *Code*, it is unlikely they will be understood by the persons meant to benefit from them.

The Working Group considered that, in civil actions, the *Limitation Act*, SBC 2012, c. 13 provides that the limitation period for commencing an action is postponed during the period of "legal disability". As a result, a minor has an additional two years upon reaching the age of majority to file a court action. We do not recommend a similar provision given our recommendation that minors should be permitted to make a complaint in their own name. Instead, the Working Group suggests that the factors for permitting a complaint after the expiry of the time limit be updated to recognize the particular vulnerabilities that children and youth may face in advancing their rights under the *Code*.

## 2. Who Can Bring the Complaint

### a) Recommendation: Complaint on behalf of a child

That Form 1.2 be amended to permit any person to file a representative complaint on behalf of a child or youth subject to:

- a) the obligations set out above
- b) proof of consent of the parents or legal guardians of the represented person, or certification that all persons with decision-making authority respecting the person have been notified of the complaint and a way for them to object to the Representative Complainant, and proof of such notice.

b) Recommendation: Complaints on behalf of an adult

That the Tribunal conduct further research and consultation regarding who may file a complaint on behalf of an adult absent their consent.

c) Discussion

Section 21 of the *Code* provides that a person can make a complaint on behalf of another person. Currently, the Tribunal requires a Representative Complainant to file a Form 1.2 – Complaint on behalf of another Person.

It appears that the form contemplates that only a parent or legal guardian may make the complaint on behalf of a child,<sup>54</sup> and that a person must have legal authority to make a complaint on behalf of an adult without legal capacity. This differs from other representative complaints where any person can make the complaint on behalf of another person if the person whose rights are being advanced consents.

With respect to children and youth, the SJTO Practice Direction does not specifically limit litigation guardians to parents or guardians. It appears to balance the goals of removing unnecessary restrictions on who can be a litigation guardian, while also recognizing the role of parents and other persons with decision-making authority. In the case of children and youth, this is consistent with Article 3 of the UNCRC which provides that States Parties shall respect the responsibilities, rights and duties of parents and others to provide appropriate direction and guidance in the child's exercise of the rights in the convention, in a manner consistent with the evolving capacities of the child. Accordingly, while the Representative Complainant should not be limited to a parent or legal guardian, there must be notice to the parent or legal guardian with the opportunity for them to object to the Representative Complainant.

Similarly, with respect to adults, the SJTO Practice Direction provides that someone else (such as a friend, family member, or support worker) may be their litigation guardian, unless there is someone such as a person with a continuing power of attorney or a court-appointed or

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<sup>54</sup> Form 1.2 provides two options for a representative of a child. First, it provides that in the case of a child with more than one parent or guardian, one parent or legal guardian may represent the child and the other parent or legal guardian must consent to the complaint being filed and must authorize the other legal guardian to act on the child's behalf. Second, it provides that in the case of a child with one parent or guardian, the sole legal guardian may represent the child.

statutory guardian of property whose authority covers being a litigation guardian before the tribunal. In that case, the SJTO Practice Direction provides that only this person can be the litigation guardian. The difficulty we see with adopting this approach lies in our concern around Article 12 of the UNCRPD and the need for further research and consultation regarding substitute decision-making in the human rights context. For this reason, we recommend that the Tribunal retain its current practice until it has consulted on this issue.

While the SJTO requires a declaration that the litigation guardian is at least 18 years of age and understands the nature of the proceeding (see Rules A10.3 and A10.4), a majority of the Working Group was persuaded that the age restriction may not be justified. We recognize that requiring a Representative Complainant to be an adult would be consistent with legislative restrictions in BC under the *Representation Agreement Act* and *Power of Attorney Act*. It was suggested that this would also act as a possible safeguard for ensuring that the represented person has competent advice and assistance throughout the Tribunal process, particularly if the Representative Complainant does not retain legal counsel. Further, if a Representative Complainant were a minor, there would be potential issues regarding settlement of a complaint. However, consistent with respect for the equality rights of children and youth and the knowledge that age is not determinative of capacity, a majority of the Working Group did not recommend an age restriction. Rather, the Representative Complainant must identify whether they are an adult and must declare that they understand the nature of the proceeding, in addition to understanding, acknowledging, and accepting their obligations as a Representative. The Tribunal can then address issues and solutions in the rare case where a minor may file a representative complaint on behalf of another person.

The SJTO, *Representation Agreement Act*, and *Power of Attorney Act* generally restrict a representative from receiving compensation, to prevent representatives with a pecuniary interest in the outcome, and the Tribunal should consider including a similar restriction.

### **3. Sole Guardians**

#### **a) Recommendation**

That Form 1.2 be amended so that, in the case of a guardian filing a complaint on behalf of a child, it requires the basis for the person's authority but does not require supporting documentation where none is available.

b) Discussion

When a sole guardian files a complaint on behalf of their child, the current complaint form requires supporting documentation such as a court order or the relevant part of a separation agreement granting them guardianship. However, a person may be the sole guardian by operation of law and not have documentation that shows that they are the sole guardian.

**4. Data Collection and Service Standards**

a) Recommendation: Data Collection

That the Tribunal amend its complaint forms and maintain statistics regarding the number of complaints filed (a) by children or youth; (b) on behalf of children and youth; and (c) on behalf of adults without legal capacity.

b) Recommendation: Service Standards

That the Tribunal establish modified time frames, as necessary, for the stages of a complaint made by or on behalf of children and youth and report on whether it has met those service standards.

c) Discussion

If complainants are required to indicate whether they are under the age of 19, this information can be used both for statistical purposes and to ensure that those without the legal capacity to contract under the *Infants Act* are identified and directed to appropriate resources and information before any mediation takes place at which the legal capacity to contract may become an issue.

Further, because the timeliness of complaints will have different implications for children and youth, the Tribunal's current [service standards](#) may not meet the needs of children and youth. Rather, the Tribunal should establish modified time frames, as necessary, for the stages of complaints made by or on behalf of a children and youth. We discuss an example of such time frames below in the context of case management. The Tribunal should also report specifically on whether it has met its service standards.

## 5. Complaint naming convention

### a) Recommendation

That representative complaints be named according to the represented person, followed by the identification of the Representative Complainant (e.g. Child (as represented by Parent A) v. Respondent).

### b) Discussion

The Tribunal currently names a complaint according to the parties, e.g. Complainant v. Respondent. Under the *Code*, a complainant is defined as the person who makes the complaint. Accordingly, the Tribunal has historically named the complaint with a focus on the person making the complaint on behalf of the represented person e.g., Parent A obo Child B v. Respondent. The Working Group recommends that this naming convention for representative complaints be changed to better reflect a child-centred approach. For consistency, this convention should apply in all representative complaints.

## 6. Information for Represented Persons

### a) Recommendation

That the Tribunal have appropriate and accessible information available to represented persons about the ways in which they can participate in all stages of the complaint process.

### b) Discussion

To facilitate the participation of children and youth in the complaint process, the Tribunal should develop materials about the different parts of the process and the right of the youth or child to participate, how they might exercise that right, and what it means to exercise the right. Information must be appropriate to child's level of understanding.<sup>55</sup> The CRC has said:

Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in

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<sup>55</sup> Under the UNCRC, a child has the right "to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice" (Article 13). See, in particular, General Comment No. 12, para. 25. Similarly, the UNCRPD requires action to ensure that persons with disabilities can seek, receive and impart information on an equal basis. The required action includes providing public information in accessible formats and facilitating accessible means of communication (Article 21).

particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome. The child must, furthermore, receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard.<sup>56</sup>

## **7. Training of Tribunal Members, Mediators and Staff**

### **a) Recommendation**

That the Tribunal provide training to staff, mediators and members to ensure compliance with a child-centred approach and the guiding principles set out in this report.

### **b) Discussion**

Training will be crucial to ensuring that new policies and practices are effective in promoting the rights of children, youth and persons without legal capacity under the conventions. The Working Group has not articulated the various areas of training that would be required, but notes that staff, mediators and members would all need to understand the guiding principles and how those principles impact the Tribunal's practices and processes. In particular, the child-centred approach, initially, may challenge preconceptions about involving a child in proceedings.<sup>57</sup>

Those having contact with children will require specific training, as would mediators and decision-makers. Topics might include cultural competency training, interviewing techniques, trauma-informed approaches, and developmentally appropriate approaches. Tribunal members would benefit from training about the ways in which they may hear evidence, directly or indirectly, of the views of children and youth, as discussed below.

Further, because the UNCRC requires that a Tribunal give the views of the child due weight in accordance with the age and maturity of the child, this is another area where training is recommended. Article 12 requires that the Tribunal give serious consideration to the views of

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<sup>56</sup> General Comment No. 12, para. 41

<sup>57</sup> For example, see the General Comment No. 12, regarding age and the statement that a child need only have a sufficient understanding to be capable of appropriately forming a view on the matter.

the child. To give due weight, the Tribunal must assess the capacity of the child on a case-by-case basis, understanding that age alone is not determinative but that the child's ability to express their views in a reasonable and independent manner must be considered.<sup>58</sup>

## 8. Triage

### a) Recommendation

That, as part of its screening process, the Tribunal identify complaints filed by or on behalf of children or youth with potentially time-sensitive issues. In those cases, where the complaint sets out a possible contravention of the *Code*, the Tribunal should immediately assign the complaint to a Tribunal Member to manage the complaint [**Member manager**], as discussed below.

### b) Discussion

The SJTO has created a Child and Youth Division to ensure access to justice for children and youth who come to its tribunals. In June 2017, the Division launched a pilot project where child and youth cases from the Human Rights Tribunal of Ontario are streamed to a specialized panel of adjudicators and mediators with expertise in child and youth issues. Cases are assessed and triaged as “urgent”, “fast-tracked” or “normal” depending on the circumstances of each case.<sup>59</sup> The assessment occurs at the outset of the complaint and after mediation if the complaint is not resolved.

Assessment and assignment to a Member manager at the outset would allow the Tribunal to assess the urgency with which the Tribunal should proceed and to ensure a time line and appropriate steps, such as early mediation and hearings, are scheduled accordingly.

## 9. Case Management

### a) Recommendation: Role of Member manager

That, on assignment, the Member manager review the complaint to assess the urgency with which the Tribunal should proceed and identify any issues arising regarding the timeliness of

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<sup>58</sup> General Comment No. 12, paras. 28-31 and 44-45

<sup>59</sup> Social Justice Tribunals of Ontario, “SJTO Child and Youth Division Launches Pilot at HRTTO” (July 21, 2017), online: <http://www.sjto.gov.on.ca/hrto-july-21-2017hrto-child-youth-cases-handled-specialists/>.



the complaint or the Representative Complainant's declaration, and should thereafter schedule case conferences with the parties, as necessary, to re-evaluate the urgency of the complaint and represented person's participation.

b) Discussion

In the Child and Youth Division of the SJTO, the Division head initially reviews each complaint to identify when mediation will be scheduled: urgent – mediation will be scheduled in 2-4 weeks; fast track – mediation will be scheduled in 4-8 weeks; and normal – mediation will be scheduled in the regular process.<sup>60</sup> Absent other issues that must be addressed before proceeding, such as the timeliness of the complaint or the appropriateness of the Represented Complainant, the Member manager should consider whether the first step should be a mediation scheduled within two to eight weeks.

The Member manager should convene a case conference where they may:

- a. review the obligations of the Representative Complainant and ensure that the Representative Complainant understands those obligations
- b. develop a communication plan regarding how the represented person will be informed of the process as it proceeds
- c. conduct a preliminary review of how the represented person may participate and have their views considered at each stage of the process
- d. flag any diminishing remedies that may trigger an expedited timeline
- e. set time frames for the next steps in the complaint process.

The Member manager must have enough contact with the parties to ensure the plan for the complaint process remains relevant to the circumstances. In particular, the ways in which a child expresses their views may change in terms of both their development and the stage of the proceeding. This will vary from case to case and must not become too onerous for the Representative Complainant in terms of expenditure of resources, for example.

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<sup>60</sup> Conversation between Sarah Rauch, Katherine Hardie and the head of the Child and Youth Division.

## 10. Mediation

### a) Recommendation: Mediator contact

That a mediator contact the parties sufficiently in advance of the mediation to discuss the participation of the represented person.

### b) Recommendation: Accommodation

That the Tribunal develop accommodation options to support the participation of children and youth in the mediation process.

### c) Discussion

Mediation offers the possibility of participation in a safe and non-adversarial process and, in appropriate circumstances, it can offer a welcoming space for children to be heard.<sup>61</sup>

The mediator should speak to the Representative Complainant before the mediation to discuss the options for participation and determine which, if any, will be used.<sup>62</sup> The mediator should also discuss confidentiality issues that may arise through the child's participation, and how the child is to be advised of their confidentiality obligations. Generally, a pre-mediation call one to two days in advance is not enough time for the Representative Complainant to consider the options and, where appropriate, speak to the represented person about their participation. Therefore, the mediator should make contact two to three weeks before the mediation.

The Ontario Child and Youth Division has adopted a model of mediation that focuses on the needs of the child going forward rather than on what has happened to date, areas of conflict, or

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<sup>61</sup> Jennifer Winestone, "Best interests and little voices: Child participation in the family mediation dialogue" (January 2015) online: [https://www.mediate.com/articles/WinestoneJ3.cfm#\\_ftnref](https://www.mediate.com/articles/WinestoneJ3.cfm#_ftnref).

<sup>62</sup> See the discussion below regarding accommodation in the decision-making process. The options for the child or youth's direct or indirect participation in mediation may include:

- o A mediator may meet with the child or youth before or during to the mediation to illicit information about their perspectives, feelings and experiences with respect to the issues in the complaint.
- o The child or youth may attend all or part of the mediation; for example, they may attend an initial joint session or one or more caucus sessions.
- o The Representative Complainant or mediator may call or otherwise consult with them during the course of the mediation.
- o The child or youth may prepare a written or recorded statement that they wish to have read or played at the mediation.
- o The Representative Complainant will advance the child or youth's viewpoints and interests.

different perspectives. The Division is also evaluating the model, including tracking substantive outcomes (on an anonymous basis), and reports that the model is working well

As noted above, the Tribunal looked to family law as one area where there has been attention on implementing the UNCRC. There is a growing awareness of the importance of offering children an opportunity to participate in family dispute resolution processes, including mediation.<sup>63</sup> One commentator has written that a child should be offered the chance to participate in mediation unless it is reasonable to conclude that the child is not developmentally ready for meaningful participation, or participation may cause the child harm by causing or increasing their stress and anxiety.<sup>64</sup>

Others have said that, in a child-centred mediation, the objective is not to ascertain the “wishes” of the child. Rather it is to explore more widely their perspectives, feelings and experiences, as well as their hopes for the future.<sup>65</sup> Child-inclusive mediation therefore does not need to involve the child in expressing a view on the choices as the adults see them. Rather, it provides children with an opportunity to give their perspectives on how they are feeling about the situation, which may in turn have benefits in terms of reaching a resolution of the dispute that accords with the needs and interests of the child.

In England and Wales, the government has a policy that children are to be involved in family mediation, presumptively from 10 years of age, or at a younger age if they have sufficient maturity.<sup>66</sup> This is a rights-based policy, and the child’s participation is to occur regardless of whether the parents consent. Various programs are being piloted to assess how to involve children in mediation in those jurisdictions.

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<sup>63</sup> Rachel Birnbaum and Nicholas Bala, “Child inclusive mediation: Research on Views of the Child reports in Ontario” (February 27, 2017), online: <https://apfmnet.org/child-reports-mediation-research-ontario/>.

<sup>64</sup> Jennifer Winestone, “Best interests and little voices: Child participation in the family mediation dialogue” (January 2015) online: [https://www.mediate.com/articles/WinestoneJ3.cfm#\\_ftnref](https://www.mediate.com/articles/WinestoneJ3.cfm#_ftnref).

<sup>65</sup> Felicity Bell; Judy Cashmore; Patrick Parkinson; Judi Single, Outcomes of Child-Inclusive Mediation, 27 Int’l J.L. Pol. & Fam. 116 (2013)

<sup>66</sup> Walker, J., & Sherwood, L. (2016), “It’s My Life Too: Radical Innovations in Child-Inclusive Mediation” (53<sup>rd</sup> AFCC Annual Conference, Seattle, June 1-4, 2016).

A different approach is used in the United States. The *Model Standards of Practice for Family and Divorce Mediation* were developed by the Symposium on Standards of Practice and approved by the American Bar Association House of Delegates in February 2001.<sup>67</sup> Standard VIII provides guidance on the family mediator's role in assisting participants in determining how to promote the best interests of the children in the process. The standard provides that, except in extraordinary circumstances, children should not participate in the mediation process without the consent of both parents and the children's court-appointed representative. However, the mediator should inform the parties about the available options for the child's participation, and consult about whether and how the child will participate.

We were persuaded that the mediator must discuss the child-centred approach with the parties, to determine what kind of participation, if any, is in the best interests of the child. We recommend a flexible approach that does not turn solely on the age of the child. The mediator may need to challenge preconceptions the parties may have and keep the focus of the discussions on safe and welcoming methods for participation.

Finally, notwithstanding the legal incapacity of minors to contract, discussed below, where a child has been provided with the opportunity to participate significantly in mediation leading to a settlement, the child might be offered the opportunity to sign any settlement agreement or release flowing from that mediation as a means of recognizing their participation in, and agreement to, the settlement with the respondent(s).

## **11. Settlement Agreements – Minors**

### **a) Recommendation: Code Amendment**

That the *Code* be amended so that any agreement reached to resolve a complaint between a minor and another person is enforceable by and against that person despite s. 19 of the *Infants Act*, RSBC 1996, c. 223.

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<sup>67</sup> The Association of Family and Conciliation Courts, *Model Standards of Practice for Family and Divorce Mediation* (approved by the ABA House of Delegates February, 2001), online: at <http://www.mediate.com/articles/afccstds.cfm>.

b) **Recommendation: Form Amendment**

That the Tribunal amend its regular complaint form to include a box for complainants to identify whether they are under the age of 19.

c) **Discussion**

Section 19 of the *Infants Act* provides that a contract entered into with a minor is generally not enforceable as against the minor. A minor may, however, apply to court under s. 21 of the *Infants Act* for an order granting them full capacity or capacity for the purposes of entering into a specific contract. Section 19 of the *Infants Act* does not apply where another enactment specifies that a type of contract is enforceable as against an infant.

In the context of human rights complaints, a minor complainant does not have the legal capacity necessary to settle their own complaint. Currently, the Tribunal advises the parties of this and gives the option to the respondent of proceeding to mediation with the minor, or proceeding only with the presence of the minor's legal guardian. The Employment Standards Branch has informed us that they allow minor workers to settle their own complaints, provided that the parent or guardian signs the settlement agreement.

Just as we recommend an amendment to the *Code* to specifically permit a minor to make a complaint in their own name, we recommend an amendment to allow the child or youth complainant to enter an enforceable contract to settle the complaint.

We also recommend that the Tribunal amend the complaint form to identify whether the person making the complaint is under 19 years of age both for statistical purposes and to ensure that those without the legal capacity to contract under the *Infants Act* are identified and directed to appropriate resources and information before any mediation takes place at which the legal capacity to contract may become an issue.

**12. Settlement Agreements – Representative Complaints**

a) **Recommendation**

That the Tribunal conduct research and consultations about the settlement of representative complaints, including whether it should recommend that the *Code* be amended to give the Tribunal or Human Rights Commissioner the authority to review and approve settlements of representative complaints.

b) Discussion

The settlement of representative complaints raises issues deserving of further research and consultation.

The SJTO Practice Direction provides that, when a litigation guardian receives settlement monies, the money generally belongs to the person they are representing. This raises a question about whether there is or ought to be oversight of the expenditure of settlement funds, another topic for further research and consultation.

Settlements made on behalf of those without legal capacity in court proceedings are usually subject to approval by either the Public Guardian and Trustee [PGT] or the court itself. The PGT has expressed the view that it does not have the jurisdiction to review the settlement of a human rights complaint, except those which expressly provide for the payment of legal fees out of settlement funds designated for an infant (under s. 40(1.1)(a) of the *Infants Act*). Such review will clearly apply to, and may restrict the use of, contingency fee agreements in the human rights context (which, it should be noted, provide an important access to justice tool). It may also impact settlements which expressly provide for the payment of legal fees.

In almost all other legal settlement contexts, legislation supports robust processes for approval or oversight of settlements for children. In the human rights context, there are additional relevant considerations. First, any process must be straightforward enough to further rather than undermine the goal of facilitating the just and timely resolution of human rights complaints. Further, the human rights system does not provide for the recovery of legal fees and thus contains no vehicle for recovery of costs associated with such oversight. Alternatives might include the approval of a settlement agreement if the represented person has legal counsel, or has an opportunity to seek legal advice within a specified time period after a tentative settlement has been reached. These issues require further assessment before any specific recommendations may be made.

### 13. Decision-Making Processes

a) Recommendation: Accommodation

That the Tribunal develop accommodation options to support the participation of children and youth in its decision-making processes.

b) [Recommendation: Independent Assessments](#)

That the *Code* be amended to specify that the Tribunal has authority to order an independent assessment of the child's views in relation to a complaint.

c) [Recommendation: Interviews](#)

That the Tribunal develop criteria for when Member interviews of children may be appropriate and obtain specialized training for conducting those interviews.

d) [Discussion](#)

The CRC has said that States Parties should encourage children and youth to form a free view and should provide an environment that enables them to exercise the right to be heard.<sup>68</sup> This is a right of children and youth, not an obligation.<sup>69</sup> In *B.K.G v. D.L.G.*, 2010 YKSC 44, the court stated that “more than just lip service must be paid to children’s legal rights to be heard. Because of the importance of children’s participation to the quality of the decision and to their short- and long-term best interests, the participation must be meaningful”.

Accommodations may be required for age-related or disability-related needs, as well as in relation to cultural and language needs.<sup>70</sup> When fashioning accommodations, the interests of the child must be at the forefront.<sup>71</sup> The right to be heard must be exercised “ensuring full protection of the child”<sup>72</sup> and must “account for the child’s individual and social situation and

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<sup>68</sup> General Comment No. 12, para. 11

<sup>69</sup> General Comment No. 12, paras. 16 and 22

<sup>70</sup> General Comment No. 12, para. 21.

<sup>71</sup> *Eaton v. Brant County Board of Education*, [1997] 1 SCR 241 at para. 77, the court said: “The decision-making body must further ensure that its determination of the appropriate accommodation for an exceptional child be from a subjective, child-centered perspective, one which attempts to make equality meaningful from the child’s point of view as opposed to that of the adults in his or her life. As a means of achieving this aim, it must also determine that the form of accommodation chosen is in the child’s best interests...For older children and those who are able to communicate their wishes and needs, their own views will play an important role in the determination of best interests”.

<sup>72</sup> General Comment No. 12, para. 21

an environment in which the child feels respected and secure when freely expressing her or his opinions.”<sup>73</sup>

There are different ways in which a child’s interests and views may be heard. The method chosen should be determined by the child or youth or Representative Complainant, according to the particular situation.<sup>74</sup> We discuss five options here.

ii. Direct participation, with accommodations

The CRC recommends that, wherever possible, the child be given the opportunity to be directly heard in any proceedings.<sup>75</sup> A preliminary issue when a child seeks to participate directly in an administrative process is capacity. As noted above, Article 12 requires the assessment of capacity to form an autonomous view.

Section 5 of the *Evidence Act*, RSBC 1996, c. 124 presumes capacity to testify for witnesses over the age of 14, and provides criteria for evaluating the capacity of younger witnesses (they are able to communicate their evidence, and either can swear/affirm to tell the truth, or promise to tell the truth).<sup>76</sup>

Where a child decides to directly participate in a proceeding, the CRC recommends that the environment be accessible and child-appropriate:

A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained

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<sup>73</sup> General Comment No. 12, para. 23

<sup>74</sup> General Comment No. 12, para. 36

<sup>75</sup> General Comment No. 12, para. 35

<sup>76</sup> Section 5 provides that “if a proposed witness in a proceeding is a person under 14 years of age or a person whose mental capacity is challenged, the judge, justice or other presiding officer must, before permitting the person to give evidence, conduct an inquiry to determine whether (a)the person understands the nature of an oath or a solemn affirmation, and (b)the person is able to communicate the evidence. If a person does not understand the nature of an oath/solemn affirmation, a person who is able to communicate the evidence may testify on promising to tell the truth. With respect to witnesses over the age of 14, a party seeking to challenge their capacity bears the burden of establishing a lack of capacity.



staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.<sup>77</sup>

Preferably, a child is not heard in open court.<sup>78</sup> In addition to the elements of the hearing room environment, the Tribunal may suggest testimony by video, or other accommodations such as a therapy dog or support person.<sup>79</sup>

There may also be circumstances where an adverse party requests the attendance of a child at a hearing for cross-examination on critical factual issues. In such circumstances, the BC Supreme Court context may provide guidance on evaluating the legitimacy and appropriateness of the request.<sup>80</sup>

### iii. Recorded Statements

Another option is for a child to record their evidence. Subject to their interest, ability, and willingness to do so, the child should be able to express their views orally, in writing, or in print, in the form of art, or through any other media of the child's choice, and to be provided with disability and age-appropriate assistance to do so.<sup>81</sup>

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<sup>77</sup> General Comment No. 12, para. 34

<sup>78</sup> General Comment No. 12, para. 43

<sup>79</sup> The UNHCR [Guidelines on Determining the Best Interests of the Child](#) (2008 United Nations High Commissioner for Refugees) [**Refugee Guidelines**] at p. 60 says that many children find it easier to speak in the presence of a friend or guardian, but caution must be exercised as current care-givers, foster parents, and others may have a personal interest in the process and may prevent the child from freely expressing his or her views.

<sup>80</sup> Under Rule 7-2(8) of the BC Supreme Court Civil Rules, a party may conduct an “examination for discovery” of an infant, unless the court orders otherwise. In *Dann-Mills (Litigation guardian of) v. Tessier*, 2015 BCSC 386, the court considered the circumstances in which it may be inappropriate to conduct an examination for discovery of a mentally competent infant. It set out non-exhaustive considerations: the child’s age, ability to understand the truth, ability to express himself/herself, attention span, the prospect of undue anxiety on the part of the child or potential harm to the child, as well as the utility of the evidence in light of the issues in the proceeding. While there is no presumption in the Tribunal context that a child or youth would be required to attend a hearing for cross-examination – and the UNCRC make participation a choice of the child - the *Tessier* considerations may provide useful guidance.

<sup>81</sup> General Comment No. 12, para. 21 provides: “... full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences ...”

While recorded evidence may give rise to considerations of fairness, these must be considered in the particular circumstances, including the purpose for which the evidence is being tendered, and in light of the guiding principles.

#### iv. Assessment and Reports

Assessments and Views of the Child reports provide a child with the opportunity to be heard in an indirect manner. Such assessments are often conducted in child protection<sup>82</sup> or family law<sup>83</sup> proceedings, when the views of the child are a fundamental and necessary component of the assessment of the child's best interests.<sup>84</sup> A report provides an assessment of the child's views, and permits evidence to be introduced indirectly concerning the child's state of mind, without requiring the child to testify. The individual who has conducted the assessment can be cross-examined on the report's findings.

However, there are potential challenges with incorporating the assessment or views of the child report in the human rights context. First, there is no express ability in the *Code* for the Tribunal to require a child to attend for an assessment. The Working Group therefore recommends that the *Code* be amended to provide the Tribunal with the necessary authority.

Second, a question arises as to what circumstances would prompt a Tribunal to determine that an assessment report on the views of the child is necessary. It must be anticipated that, at least in some cases, the Representative Complainant would challenge the need for such an assessment, and potentially the conclusions in the report. Another concern is the cost of the report, and who should be required to pay for the assessment if the Tribunal decides that one is necessary. These are issues the Tribunal would need to address.

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<sup>82</sup> The *Child, Family and Community Services Act* similarly authorizes the court to order a child or a parent to undergo "a medical, psychiatric or other examination" where such an examination is likely to assist the court "(a) in determining whether the child needs protection, or (b) in making an order relating to the child."

<sup>83</sup> The *Family Law Act* provides that a judge can request an assessor to report on "the views of a child."

<sup>84</sup> For example, s. 37(2)(b) of British Columbia's *Family Law Act* provides that in determining the best interests of a child, the court must consider all of the child's needs and circumstances, including "the child's views, unless it would be inappropriate to consider them."

v. Judicial Interviews

The CRC states that a child should not be interviewed more often than necessary.<sup>85</sup> Judicial interviews are an infrequent tool utilized in family law proceedings and involve a child being questioned outside of the hearing by the judge. The purpose of a judicial interview was stated in *L.E.G. v. A.G.*, 2002 BCSC 1455 [*L.E.G.*] as follows:

(i) ... to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives; (ii) to give children an opportunity to satisfy themselves that the judge has understood their wishes and feelings, and (iii) to help children to understand the nature of the Judge's task and the court process.

The courts have cautioned that judicial interviews should be used sparingly, as it is not usually the best means to gather information or evidence about the child's situation, needs, wishes and feelings.

At the same time, in *C.J.J. v. A.J.*, 2016 BCSC 676, the Court determined it was appropriate to conduct a judicial interview when: (1) The child reported to have been frustrated in the past about not having his views taken into account; (2) The child wanted a judicial interview; (3) The Court felt that an interview would allow the child to be reassured that the Court had heard and understood his views; (4) An interview would give the Court an opportunity to explain to the process and considerations affecting the outcome; and (5) A judicial interview would enhance the likelihood that the child would accept the outcome.

Judicial interviews may raise concerns of due process, as the child is interviewed by the decision-maker in the absence of other affected parties. However, in *K.M.H. v. P.S.W.*, 2018 BCSC 1318, the Court noted that "The judicial interview is **not** intended to be an evidence-gathering exercise or to give the child an opportunity to provide factual information about the dispute..." (emphasis added).

In the BC Human Rights Tribunal context, the Rules permit a Member to question parties or witnesses at a hearing, and to make directions and orders with respect to the conduct of the hearing. The *Code* also provides that a member or panel may direct that all or part of the evidence of a witness be heard in private (section 27.2(4)). However, it would be important to

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<sup>85</sup> General Comment No. 12, para. 24

define the circumstances when a child interview could be conducted, whether all parties should be excluded and if so on what basis, and the scope of the subject matter for the interview.

When they are held, interviews with a child should take place in a confidential and child-friendly atmosphere. If possible, the venue should be chosen by the child. Emphasis should be placed on putting the child at ease and developing a relationship of trust.<sup>86</sup>

Finally, training for judicial interviews would be important. In *L.E.G.*, the court said (at para. 25):

Judges usually are not trained to interview children in a way that allows them to accurately assess the real wishes of the child. Judge's lack knowledge about developmental differences in cognitive, language and emotional capacities in children. From a clinical perspective, being interviewed in chambers can be far from a relaxing experience for children. Rather, it can be a formidable and inherently stressful experience for most children."<sup>87</sup>

vi. Hearsay

A child or youth may be heard indirectly, through a representative or appropriate body, which may raise issues regarding hearsay. The common law test for admissibility is based on the *R. v. Khan*, [1990] 2 SCR 531 criteria – necessity and reliability. In the family law context, s. 202 of the *Family Law Act* expressly permits the introduction of hearsay evidence, and also removes the common law requirement of “necessity”, thereby focusing exclusively on “reliability”.

Hearsay evidence is routinely admitted in proceedings before the BC Human Rights Tribunal. Section 27.2 of the *Code* provides that the Tribunal may receive and accept evidence and information it considers necessary and appropriate, whether or not the evidence or information would be admissible in a court of law.<sup>88</sup> Notwithstanding this flexibility, the Tribunal must account for the reliability of the hearsay evidence. Considerations will include the source of the hearsay evidence, concerns of pressure or influence, and the age and maturity of the child.

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<sup>86</sup> Refugee Guidelines at p. 60

<sup>87</sup> See also: Carolyn Savoury, A Voice for "The Small": Judicial "Meetings" in Custody and Access Disputes, (2012-2013) 28 Can. J. Fam. L. 225 - 259 ;

<sup>88</sup> But see section 27.2(3) which states section 27.2(1) does not override an Act expressly limiting the extent to which or purposes for which evidence may be admitted or used in any proceeding.

## IV. APPENDIX A – WORKING GROUP TERMS OF REFERENCE

### Mandate

1. The British Columbia Human Rights Tribunal is convening a Working Group on Strengthening Tribunal Processes for Representative Complaints [Working Group], for the purpose of developing recommendations to the Tribunal to improve its process for complaints brought on behalf of persons without legal capacity [Representative Complaints]. Specifically, the Tribunal seeks recommendations from the Working Group:
  - a. to identify and fill gaps in the Tribunal’s current process, as necessary.
  - b. with respect to Representative Complaints brought on behalf of children, on building a child-centred approach that is consistent with the United Nations Convention on the Rights of the Child.
2. The Tribunal seeks particular focus from the Working Group in respect of 1(b) above.
3. Presently, the Tribunal’s complaint process consists of four components: (i) intake, (ii) mediation, (iii) intervening steps, such as preliminary applications, and (iv) hearing. It is expected that the Working Group will identify key issues related to Representative Complaints at each stage of the Tribunal’s process, and ultimately prepare a series of recommendations for addressing those issues through internal Tribunal policies and procedures, and external guidelines and directives as appropriate.

### Working Group Chair & Membership

4. The Working Group is convened for a temporary period of time for the purpose outlined above.
5. The Working Group shall consist of no more than 8 members, including two representatives of the Tribunal who will serve as Co-Chairs [Co-Chairs].
6. The remaining 6 members shall consist of lawyers and civil society members with significant experience in law, policy, and advocacy in the fields of human rights and/or children’s rights.
7. Working Group members will adhere to the highest level of professionalism in their dealings with one another and the issues before them. They will in particular embody the purposes of the British Columbia Human Rights Code; shall be respectful, courteous and punctual; and shall carry out their work in good faith, avoiding and declaring any conflicts of interest and acting in the best interests of the mandate of the Tribunal and purposes of the Code.
8. Working Group members will be bound by confidentiality in respect of all Working Group work including discussions and the final outcome. Public statements, if any, may be made only by the Chair of the Tribunal who retains ultimate authority over the Working Group.
9. Working Group members will follow the directions of the Co-Chairs.
10. The Co-Chairs may remove a member of the Working Group where, in their sole discretion, such member violates the obligations set out in paragraphs 6 and 7 above or where such member is unwilling or unable to participate in the work of the Working Group.

## Working Draft: Report

11. A member of the Working Group can resign their post by sending to the Co-Chairs, in writing by email or letter, notice of their resignation. The Co-Chairs reserve the right to, but need not, replace such member.

### Organization of Work

12. It is expected that the work of the Working Group will be undertaken at prescheduled meetings and independently by members in the intervening time. A schedule of meetings will be set by the Working Group at its First Meeting, which should be convened by not later than June 2018.

13. The Co-Chairs will organize meetings of the Working Group in advance based on availability of all members, but quorum will be achieved with half of the full number of members present.

14. The Co-Chairs may assign work to be undertaken by members in advance of meetings for discussion at the meetings. Where a member is unable to attend a meeting, it is expected that the member will submit any such work in advance of the meeting they will miss in any event.

15. The Co-Chairs may delegate specific tasks to individual or sub-groups of Working Group members with timelines for the reporting back to the Working Group as a whole.

16. Drafting of the final report shall be subject to an organization of work as devised by the Working Group as a whole under the guidance of the Co-Chairs.

### Deliverables

17. The Working Group shall by November 2018 deliver to the Tribunal Chair, via the Co-Chairs, a Report containing:

- a. Synopsis of the Tribunal's obligations in respect of complaints brought obo of others, with separate sections for adults and children;
- b. Relevant issues in the Tribunal's process;
- c. Synopsis of other relevant approaches and obligations;
- d. Executive Summary of Recommendations;
- e. Report detailing each recommendation, explaining its connection to an obligation and/or issue, relevant background, and guidelines for the recommendation's implementation.

### Participation is Voluntary

18. Participation in the Working Group is voluntary. No remuneration or compensation will attach to time given and work done as a Member of the Working Group. There is no promise nor expectation of future work or compensation flowing from participation in the Working Group.

### Agreement & Signature

I, \_\_\_\_\_, have read and agree to the above terms of reference. In so agreeing, I consent to participate in the Working Group.