

Reformed Approach to Child and Family Services

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Caring
Society

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Introduction

This document sets out the high level positions of the First Nations Child & Family Caring Society (the **Caring Society**) on long term reform of First Nations Child and Family Services to stop Canada's discrimination towards First Nations children, youth, and families and ensure it does not happen again. As a basic principle, the Caring Society will not erode the existing gains First Nations have made via the Canadian Human Rights Tribunal (the **Tribunal**) orders consistent with the direction of Chiefs in Assembly Resolution 40/2022. The Caring Society's positions rely on First Nations-driven research and thus this document will be updated as further research becomes available and is reviewed by First Nations Child and Family Service technical experts including the National Advisory Committee (NAC). The positions are grounded in the reality that First Nations Child and Family Services are a mandatory emergency service that must be available at all times to meet the needs of First Nations children, youth, and families.

Background

The Tribunal has ordered the government of Canada to cease its discriminatory conduct in First Nations Child and Family Services and Jordan's Principle and ensure there are effective and enforceable safeguards to prevent the recurrence of discrimination. The Tribunal retains jurisdiction over these matters and will need to review and approve any agreements with Canada to resolve the discrimination claim.

In 2021, the Assembly of First Nations, the Caring Society, Chiefs of Ontario, Nishnawbe-Aski Nation, and Canada signed an Agreement in Principle (AIP) setting out a framework for a Final Settlement Agreement (FSA) to end Canada's discriminatory conduct and prevent its recurrence. Chiefs in Assembly Resolution 40/2022 provides that the First Nations in Assembly must approve any Final Settlement Agreement put before the Tribunal for its approval.

In December 2023, the Caring Society stepped out of the AIP process to bring a non-compliance order against Canada due to the serious, life-altering, and threatening consequences for First Nations children, youth, and families arising from failed implementation by Canada of the Tribunal's orders on Jordan's Principle. The Caring Society retains its rights to make submissions and representations to the Tribunal on all matters, including child and family services and any proposed Final Settlement Agreement(s) that may be brought forward by one or more of the other parties. The Caring Society is committed to enshrining the best approach to eradicating discrimination from First Nations Child and Family Services and preventing its recurrence.

This document sets out the Caring Society's key positions on the necessary building blocks to achieve the best outcomes for First Nations children, youth, and families based on the current community-informed and evidence-based research for child and family services. These proposals should be read together, as ending discrimination requires a harmonious and holistic set of measures with well-defined and effective principles, definitions, structures, reviews, and enforcement provisions.

Almost 80 percent of all First Nations have delegated the responsibility of child and family services to a First Nations Child and Family Services agency. In addition, 17 percent of First Nations provide some level of prevention services and receive other child and family services from the province/territory, and a further 3 percent are operating under First Nations jurisdiction. Put simply, every First Nations child, youth, and family has a right to live the lives they wish to have free from all forms of discrimination.

The Caring Society strongly advocates for Canada to provide the resources and supports necessary to ensure non-discrimination across all jurisdictional models of child and family service delivery that exist now and may develop in the future. Moreover, the Caring Society takes the position that First Nations are in the best position to govern their relationships with their service providers in keeping with *An Act respecting First Nations, Inuit and Métis children, youth and families*. The human rights complaint and a significant portion of the community-driven research currently in the field is focused on ensuring that First Nations Child and Family Services can be delivered pursuant to a First Nation's delegated authority in a manner free from discrimination and in keeping with the principles of substantive equality and the best interests of the child.

Current AIP Fund Status

The \$19.807 billion over five years is now committed to First Nations Child and Family Services and we call on Canada to provide a detailed breakdown of how much has already been spent, and what expenses are committed against it. April 1, 2024 marks the second fiscal year in the roll-out of the five-year AIP funding commitment. The Caring Society views the \$19.807 billion as baseline allocation to address negative effects of Canada's discrimination that were not sufficiently addressed by the actual orders in 2018 CHRT 4, while further work was done with First Nations, First Nations Child and Family Service agencies, and First Nations not affiliated with First Nations agencies.

The Caring Society recognizes that the AIP has provisions to address the 1965 *Indian Welfare Agreement* in Ontario that are specific to that region and are not included here.

A key Caring Society focus is to *ensure the discrimination towards First Nations children stops and does not recur beyond the five years or any other fixed date funding allocations agreed to by Canada*.

Non-compliance Motion on Jordan's Principle

All First Nations children, including those receiving First Nations Child and Family Services, who are recognized by their Nations, on and off reserve, are eligible for Jordan's Principle pursuant to Tribunal orders (the Orders) and Federal Court orders. The Caring Society brought a non-compliance motion against Canada on December 12, 2023 to address serious harms to children, youth, and families flowing from Canada's longstanding non-compliance with existing Tribunal orders. The Tribunal will hear the matter on June 3 and 4, 2024 in Ottawa.

For more information on the non-compliance motion and to read the documents, go to fnwitness.ca.

Honouring

Getting the reform right is essential for First Nations children. We must end Canada's longstanding and repeated harms to our children. We honour all those who came before who loved the children enough to stand up for them, including the residential school, Sixties Scoop survivors and children, youth, and families affected by Canada's wilful and reckless discrimination in this case; you told your truths and stories through tears and loss, so that this generation of children would not have to suffer from Canada's discriminatory conduct. We hold up the First Nations leadership, First Nations experts and service providers, First Nations frontline workers, community members, and allies who stood up for justice and will continue to stand guard against the recurrence of Canada's discriminatory conduct. We recognize the important contributions of the CHRT parties, the Assembly of First Nations, the Canadian Human Rights Commission, and interested parties: the Chiefs of Ontario, Nishnawbe-Aski Nation, and Amnesty International. We now stand at the doorstep of making it possible for discrimination to be eradicated from the provision of child and family services and must get it right for First Nations children to have a substantively equal chance to grow up safely with their families, get a good education, and be healthy and proud of who they are.

Key Components of Any Funding Arrangement

$$1 \text{ Purpose} + 2 \text{ Principles} + 3 \text{ Definitions} + 4 \text{ Structure} + 5 \text{ Enforcement} = \text{Adequate Funding to support good practice}$$

1 Purpose

The purpose of a reformed approach to First Nations Child and Family Services is to ensure that First Nations children, youth, and families have access to effective and culturally based interventions to prevent and respond to child maltreatment and ensure they can thrive in a manner consistent with applicable child protection legislation and legal orders, including but not limited to *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24; the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6; the orders of the Canadian Human Rights Tribunal in *First Nations Child and Family Caring Society et al. v Attorney General of Canada*, T1340/7008; the *United Nations Declaration on the Rights of Indigenous Peoples*; and the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14.

2 Principles

Best interests of the child: The best interests of the child must be a primary consideration in structuring and implementing the Reformed Funding Approach and the Fully Reformed Funding Approach, ensuring that actions taken in the context of reform promote and protect the best interests of the child. The following factors must be considered to determine the best interests of the child:

1. Primary consideration shall be given to ensuring the funding structure protects the child's right to physical, emotional, and psychological safety, security, and wellbeing.
2. the child's right to live up to their full potential, in line with their right to grow up with a sense of belonging, a sense of attachment, and access to basic necessities tied to personal dignity, including housing, health, and education;
3. the child's cultural, linguistic, religious, and spiritual upbringing and heritage;

4. The distinct circumstances of the child's community(ies) that affect their wellbeing, including:
 - a. culture and language of the surrounding community;
 - b. community strengths and challenges;
 - c. continuity of services, supports, and products on and off reserve, or near the community, as the case may be;
 - d. structural drivers in the community, including systemic racism, that contribute to the intensity, structure, and persistence of cumulative disadvantage.
5. the importance to the child of preserving the child's cultural identity and connections to the language and territory of the First Nations group, community, or people to which the child belongs;
6. the child's needs, given the child's age and stage of development, such as the child's need for stability;
7. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained.

Cultural Continuity

1. Cultural continuity is essential to the wellbeing of a First Nations child, a First Nations family, and an Indigenous group, community or people;
2. the transmission of the languages, cultures, practices, customs, traditions, ceremonies, and knowledge of First Nations peoples is integral to cultural continuity;
3. a child's best interests are often promoted when the child resides with members of his or her family and the culture of the First Nations group, community, or people to which he or she belongs is respected;
4. child and family services provided in relation to a First Nations child are to be provided in a manner that does not contribute to the assimilation of the First Nations group, community or people to which the child belongs or to the destruction of the culture of that Indigenous group, community or people; and
5. the characteristics and challenges of the region in which a First Nations child, a First Nations family or a First Nations group, community or people is located are to be considered.

Honour of the Crown: Canada shall implement the Reformed Funding Approach in a manner consistent with the honour of the Crown.

Needs-based services: Decisions made, and services provided, pursuant to the Reformed Funding Approach shall be responsive to the actual and changing needs of First Nations children, youth, and families, accounting for historical disadvantage and the structural drivers that cause and perpetuate child maltreatment and the distinct circumstances of First Nations communities. Such an approach must account for the existing capacity to collect needs-based data on individual children using contemporaneous data collection and analysis tools.

Reconciliation: The structure and implementation of the Reformed Funding Approach and the Fully Reformed Funding Approach shall be consistent with the Truth and Reconciliation Commission Final Report and Calls to Action.

Substantive equality: Substantive equality focuses on achieving equality in outcomes, rather than providing formally equal treatment. The Reformed Funding Approach will be structured and implemented to achieve equality in outcomes for First Nations children, youth, and families in keeping with the following:

1. The rights and distinct needs of a First Nations child impacted by historic and contemporary disadvantage are to be considered to promote the child's ability to live the life they wish to have;
2. the rights and distinct needs of a First Nations child with a disability are to be considered to promote the child's participation, to the same extent as other children, in the activities of their family or the First Nations group, community or people to which they belong;
3. a First Nations child must be able to exercise the rights and benefits conferred under the Reformed Funding Approach, including the right to have their views and preferences considered in decisions that affect them, and they must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;
4. a First Nations child's family member must be able to exercise the rights and benefits conferred under the Reformed Funding Approach, including the right to have their views and preferences considered in decisions that affect them, and they must be able to do so without discrimination, including discrimination based on sex or gender identity or expression;
5. the First Nation must be able to exercise without discrimination its rights under the Reformed Funding Approach, including the right to have the views and preferences of the First Nation considered in decisions that affect that First Nation; and
6. Jordan's Principle is accessible to all First Nations children. Including the provisions to ensure a jurisdictional dispute within or between governments must not result in a gap, denial or adverse differentiation in the child and family services that are provided in relation to First Nations children.

3 Key Definitions to Include in the Reformed Funding Approach and the Fully Reformed Funding Approach

Block funding means funds provided for child and family service purposes under a contribution agreement or statute to be used by service providers with flexibility to meet needs in communities. Carry forwards are allowed and unexpended funds can be retained. Associated terms and conditions should align to the spirit and intent of the Reformed Funding Approach and uphold the Orders.

Child maltreatment means all types of physical and/or emotional maltreatment, sexual abuse, neglect, negligence, and commercial and other exploitation, which results in actual or potential harm to the child's safety and wellbeing, best interests, development, and/or dignity in the context of a relationship of responsibility, trust, or power.

Child removal means the placement of a child in alternative care pursuant to applicable child and family services legislation including but not limited to children placed in care by court order or through agreements with the child's guardian(s) and the child and family service authority designated under provincial/territorial or First Nations law.

Family includes a person whom a child considers to be a close relative or whom the First Nations group, community, or people to which the child belongs considers, in accordance with the customs, traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child.

First Nation not affiliated with a FNCFSA means a First Nation that receives statutory child and family services from a province/territory and is not affiliated with a FNCFSA.

First Nations child means a person who is under the age of majority as set out in the relevant, First Nations, provincial or territorial law and includes:

1. The child resides on or off reserve or in the Yukon and is registered or eligible to be registered under the *Indian Act*, R.S.C., 1985, c. I-5, as amended from time to time;
2. the child has one parent or guardian who is registered or eligible to be registered under the *Indian Act*, R.S.C., 1985, c. I-5;
3. the child resides on or off reserve or in the Yukon and is recognized by their First Nation; or
4. the child is ordinarily resident on reserve.

First Nations Child and Family Services program (FNCFS) means federal initiatives, programs, and/or services to support First Nations children, youth, and families, including but not limited to prevention services, early intervention services, least disruptive measures, child protection, guardianship services, customary care, adoption, custom adoption, and post-majority services.

First Nations Child and Family Service agency (FNCFSA) means an entity authorized by First Nation(s) government(s) to deliver child and family services pursuant to First Nations, provincial or territorial laws, and *An Act Respecting First Nations, Métis and Inuit children, youth and families*.

First Nations exercising jurisdiction means First Nations providing child and family services pursuant to their own laws implemented under *An Act Respecting First Nations, Métis and Inuit children, youth and families* or other mechanisms recognizing their inherent, Treaty, and/or self-government rights.

First Nations youth means a person who is between the age of majority as set out in the relevant, First Nations, provincial, or territorial law and 27 years of age and includes:

1. The youth resides on or off reserve or in the Yukon and is registered or eligible to be registered under the *Indian Act*, R.S.C., 1985, c. I-5, as amended from time to time;
2. the youth has one parent or guardian who is registered or eligible to be registered under the *Indian Act*, R.S.C., 1985, c. I-5;
3. the youth resides on or off reserve or in the Yukon and is recognized by their First Nation; or
4. the youth is ordinarily resident on reserve.

Fully Reformed Funding Approach means a future funding approach that adopts the Reformed Funding Approach as a funding base, adjusted annually for inflation and population, for FNCFSAs, First Nations not affiliated with a FNCFSA, and other service providers, which will also have the capacity to track Measuring to Thrive indicators. The Fully Reformed Funding Approach will adjust to the actual needs of First Nations children over time and address any recurrence of discrimination. Implementation of this approach is not currently possible given the lack of child-specific data collection and analysis supports but will be possible if the Reformed Funding Approach is fully implemented and baseline child-specific data is collected

IFSD means Institute of Fiscal Studies and Democracy

Inflation means a minimum annual adjustment of 2% adjusted upwards to the Consumer Price Index (CPI) where it exceeds 2%.

ISC means Indigenous Services Canada and any successor department.

Jordan's Principle means a child-first substantive equality legal principle that ensures that there is no adverse differentiation, gaps, or denials in government services to First Nations children resident in Canada, including but not exclusively due to jurisdictional disputes within or between federal government departments/initiatives and/or the federal government and other governments. It requires Canada to provide culturally appropriate and substantively equal health, social and educational services, supports, and products to First Nations children in the best interests of the child.

Measuring to Thrive means a set of indicators developed by FNCFS experts with the IFSD to define and monitor child and family service outcomes for the wellbeing of First Nations children, youth, families, and communities.

Non-reallocation means pursuant to 2018 CHRT 4 at para 422 Canada must not reallocate funds from other social programs, especially housing, to fund its obligations pursuant to the Orders and related agreements.

Orders means orders made by the Tribunal or Courts respecting *First Nations Child and Family Caring Society et al. v. Attorney General of Canada T1340/7008*

Population served includes all residents on reserve (regardless of status) and in the Yukon and persons off reserve recognized by their Nations for the purposes of child and family services which are funded by Canada pursuant to 2020 CHRT 36.

Provincial/Territorial agreements means agreements between Canada and one or more provinces and/or territories respecting First Nations Child and Family Services.

Reformed Funding Approach means evidence-informed, community-driven, transparent, multi-year, performance-informed funding structure(s) that shall support and promote the substantive equality and best interest rights of First Nations children, youth, and families who receive child and family services. Funding levels shall be calibrated to achieve substantive equality and shall be determined based on the actual needs of First Nations children, youth, and families, pursuant to the following considerations:

1. Funding shall be culturally appropriate, focused on prevention and based on the actual needs of First Nations children, youth, and families, taking full account of the unique circumstances of the respective First Nation(s), including their historical, cultural, and geographical needs and circumstances.
2. Funding shall address, through culturally based child welfare services, the structural drivers and root causes of the over-representation of First Nations children and youth encountering the child welfare system.

3. Funding shall not be subject to downward adjustments or other adverse conduct by Canada and will be determined pursuant to an evidence-based approach linking a multi-year performance-informed funding structure (block approach) towards needs-based and bottom-up budgeting to support wellbeing, as informed by the Measuring to Thrive framework, which was developed through community-driven evidence-informed research.
4. Funding shall ensure that outcome data on First Nations children, youth, and families can be collected and analyzed to monitor for the recurrence of discrimination, inform child and family services interventions, and calibrate resources to any increased need.

Remoteness means a variable factor measured on a continuum and describes the lived circumstances of First Nations communities for whom issues of access (by road network, by ice road only, by air only, or otherwise), geography, and context exacerbate challenges faced by all First Nations, including increasing the costs associated with child and family services. Remoteness is generally associated with geographic distance from, and access to, service centres (often defined based on population size and density), which affects the costs of shipping goods as well as costs related to personnel, including travel, and living costs.

Special Purpose Allotment (SPA) means a specific authority in the Treasury Board Transfer Policy designed to protect funds from departmental internal vote transfers as with authority to carry over funding across fiscal years.

Structural drivers mean factors that are largely out of a caregiver or caregivers' control, including factors linked to Canada's past legislation, policies or conduct, which have the effect of reinforcing, perpetuating, or exacerbating disadvantage for First Nations children and youth and/or which contribute to the over-representation of First Nations children and youth in the child welfare system, including:

1. poverty
2. poor housing
3. exclusion factors such as racism, systemic racism, and colonialism
4. multi-generational trauma, manifested as substance misuse and intimate partner violence

Tribunal means the Canadian Human Rights Tribunal

4 Structure of the Reformed Funding Approach

The reformed funding structure has different components that are intended to work together. Implementing the approach in a piecemeal approach will compromise the entire funding structure and risk discrimination.

1. Canada shall provide funding to FNCFS service providers pursuant to the Reformed Funding Approach as a minimum standard on an ongoing basis free of any adverse or discriminatory effects. The specific calibration of the key components of the Reformed Funding Approach are still being finalized pursuant to the community-driven research undertaken by IFSD but generally includes:
 - a. **Baseline budget:** The budget considered sufficient for the delivery of child and family services in keeping with mandated legislation. Baseline funding amount will cover the actual costs of a child in care. This amount will be increased over time to match population growth and inflation.
 - b. **Top-ups:** Are tied to the specific purpose of child and family services and are not intended to remedy community-wide needs in these areas. The recommended values of each of the following top-ups are currently being reviewed by technical experts including those at NAC:
 - i. information technology
 - ii. results and data collection
 - iii. poverty fund
 - iv. emergency fund
 - v. maintenance allocation
 - vi. prevention
 - vii. geography/remoteness
 - viii. inflation with a 2% base adjusted annually upwards to the Consumer Price Index
 - ix. population
 - x. insurance and liability coverage
 - c. Additional funding
 - i. capital, maintenance, and capital replacement
 - ii. First Nations representative services

- iii. post-majority services, supports, and products
 - iv. regional and national technical secretariats
 - v. planning funds (to achieve substantive equality for those affected by Directive 20-1 until 2016 or were not receiving funding pursuant to the FNCFS Program as of 2016 or later)
 - vi. extenuating circumstances funds (i.e., costs for very high needs of children in care)
2. FNCFS service providers will be provided with a model budget under the Reformed Funding Approach and will determine the timing of their transition to the Reformed Funding Approach, in consultation with their First Nations, when they are ready. A minimum of 24 months ought to be provided to ensure adequate time to transition.
 3. The Reformed Funding Approach will include a review mechanism that allows FNCFS service providers to adjust their funding, once transitioned, to ensure that funding is calibrated to need. The review mechanism will allow for adjustments needed in emergency and urgent situations as well as longer-term adjustments based on community health and wellbeing. It will also address any recurrence of discrimination.
 4. Funding provided to FNCFS services providers pursuant to the Reformed Funding Approach will not be time limited or determined by political factors. Funding shall be determined based on the actual needs identified by FNCFS service providers, calibrated pursuant to the ongoing community-driven research, and Measuring to Thrive, once implemented.
 5. First Nations not served by a delegated FNCFS service provider shall be funded in accordance with community need, identified pursuant to the ongoing community-driven research by IFSD. Such funding must ensure First Nations have adequate time to build capacity, including a culturally informed skilled workforce, to meet the needs of their children, youth, and families.
 6. In keeping with Chiefs in Assembly Resolution 86/2023, Canada will, on an ongoing basis, adequately fund regional and national non-political technical secretariats to collect regional and national data on First Nations children, youth, and families relevant to First Nations Child and Family Services, conduct and disseminate research, best practices, and professional and public education.

7. Canada will create national and/or regional funding pools to support over-expenditures in Block Funding for the following:
 - a. **Planning fund:** To ensure First Nations and FNCFSAs that were subject to Directive 20-1 or were not receiving funding pursuant to the FNCFS Program as of 2016 or later have a substantively equal opportunity to design and develop prevention services;
 - b. **Extenuating circumstances fund:** To fund extenuating costs related to the discharge of legislative requirements of First Nations Child and Family Services including but not limited to costs related to supporting high needs children in or out of care, legal proceedings such as inquests or inquiries, and meeting significant changes in statutory obligations.
 - c. **Emergency fund:** To meet the additional costs of FNCFS service providers related to Force Majeure activities and circumstances including, but not limited to climate emergencies, pandemics, civil unrest, and states of emergency.
8. The Reformed Funding Approach will not be time limited and will not be dependent on government political decision makers. The Fully Reformed Funding Approach will be enshrined as the minimum standard for Canada's funding of child and family services and provide the flexibility to *improve* upon its key components pursuant to the needs identified by First Nations and FNCFS service providers.
9. Canada must revise any Provincial/Territorial Agreements in alignment with the Orders and with the full participation of affected First Nations. Canada shall ensure that all Provincial/Territorial Agreements include a provision requiring the provinces/territories to collect and share data with First Nations service providers and the Secretariats on First Nations children, youth, and families calibrated to the Measuring to Thrive framework to ensure that funding is needs-based. Such data shall be collected in an accountable and ethical manner, in keeping with the principles of Ownership Control, Access, and Possession (OCAP).
10. Such revised agreements must be filed with the Tribunal and posted publicly.
11. Canada will publicly and convincingly undertake and support positive measures to ensure all First Nations children, youth, and families including those served by the provinces/territories receive child and family services in a manner that ensures full enjoyment of the *Act Respecting First Nations, Métis and Inuit children, youth and families* and the *United Nations Declaration on the Rights of Indigenous Peoples*.

12. Canada must table and support legislation to create effective statutory funding to embed the funding purpose, principles, structures, and levels as minimum standards to be adjusted annually on the basis of population and inflation, as well as funding review mechanisms.
13. Canada recognizes that the transition to the Reformed Funding Approach will take several years and resources, requiring Canada to fund and implement transition measures as recommended in IFSD reports on First Nations Child and Family Service Agencies and First Nations not affiliated with a First Nations agency.
14. Public funding reviews ought to be completed every five years by an independent, non-political expert who is qualified in public finance and has experience working on matters relating to First Nations Peoples. The review will ensure the Reformed Funding Approach and ISC's related conduct are meeting the needs of First Nations children and is adequate for First Nations service providers to meet statutory child and family services requirements. ISC will provide aggregate data to the qualified expert for the purposes of conducting this review within 10 days of any data request and will fully cooperate with the review. First Nations and First Nations service providers, including FNCFS, will be consulted in the funding review and data collected through Measuring to Thrive and other evidence will be considered in the review.
15. The draft funding review report will be provided to First Nations and First Nations Child and Family Service experts, including NAC, for expert review and comment before being presented to the First Nations in Assembly for approval. Canada will table the Funding Review in Parliament and will publicly and specifically respond to any recommendations within 60 days of the final funding report being approved by First Nations in Assembly. Canada will undertake positive measures to implement the recommendations and is obligated to implement recommendations to remediate the recurrence of discrimination.

5 Enforcement of Reforms

The Caring Society takes the position that Canada is not yet ready to be released from the Tribunal's jurisdiction given its ongoing non-compliance in Jordan's Principle and its narrow reading of the Orders regarding First Nations Child and Family Services. In order for the Caring Society to support any proposal that the Tribunal cease its jurisdiction over First Nations Child and Family Services, Canada must:

1. demonstrate that it has stopped its discriminatory conduct;

2. demonstrate to the satisfaction of the Expert Advisory Committee and the Parties that the discrimination will not recur;
3. fully implement the Reformed Funding Approach;
4. amend provincial/territorial agreements in alignment with the Orders in a manner that fully engages respective First Nations and/or First Nations service providers;
5. implement and maintain effective quality control mechanisms to detect and respond to discrimination;
6. implement and maintain effective and accessible complaints and dispute resolution mechanisms that are responsive to the best interests of children, including in urgent matters.

The Caring Society takes note of elements of accountability suggested by Indigenous youth in the *Accountability in our Lifetime* report by the Assembly of Seven Generations namely: i) responsibility, ii) safety, iii) respect, iv) reciprocity, v) relationality, and vi) integrity. The Caring Society welcomes the evidence-based recommendations for a suite of accountability measures as proposed in *Doing Better for Indigenous Children and Families: Jordan's Principle Accountability Report* (2022).

To the extent that Canada fails to abide by the reforms, the parties to the Tribunal complaint must have direct and responsive recourse to a process that ensures compliance in a manner that accounts for children's best interests. Any dispute resolution process (**DR**) must include an effective, robust, public, enforceable, and accessible mechanism to ensure First Nations children, youth, and families can fully enjoy these rights in perpetuity and hold Canada accountable. This mechanism must be principled, public, accessible, and include the following features:

1. **Enforceable:** Decisions made in the DR process must be enforceable by a court and must offer the option of requiring Canada to take any action necessary to ensure compliance with the agreement or cease discrimination. This means that orders/agreements must be specific enough to be enforced.
2. **Based on the paramountcy of human rights:** Since the repeal of section 67 of the *Canadian Human Rights Act*, First Nations Peoples have full and equal access to the federal human rights regime. The DR must offer First Nations parties and claimants at least the same level of protection as the human rights regime so as not to treat them as second-class rights bearers as they have been in the past. Canada must not be allowed to "contract out" of human rights in the agreement. This means:
 - a. Canada must always be the respondent in disputes against a First Nations party and claimant. Orders will not be made against any First Nations party or claimant.

- b. All processes must be open to the public and decisions must be made available to the public to promote transparency and accountability (with restrictions permitted only at the request of a First Nations individual to ensure the privacy of specific children, families or other vulnerable persons).
 - c. The process must respect the rights of children and youth to participate in matters affecting them.
 - d. First Nations claimants must still have the power to elect to make complaints under the *Canadian Human Rights Act*. The DR must not bar access to the human rights regime.
 - e. Decision makers must have jurisdiction over their own process (i.e., be “master of their own house”) and have broad remedial powers to make individual and systemic orders to stop discrimination and prevent its recurrence (including the power to grant injunctive relief), compensate victims, deter wilful and reckless discrimination, and order costs.
 - f. Human rights norms, the best interests of the child, and terms of Fully Reformed Funding Approach as endorsed by orders of the Tribunal must prevail in any disputes.
 - g. International Human Rights Law norms, and UNDRIP in particular, shall be incorporated and applied in all procedural and substantive decisions of the DR.
 - h. Robust protection against retaliation and mechanisms to address retaliation must be assured for First Nations claimants and parties who engage the DR, and anyone associated with them.
3. **Ethical:** Adjudicators, staff, and agents must be persons of good character with demonstrated experience adjudicating matters respecting Indigenous children, youth, and families. They have an obligation to carry out their duties with the highest level of independence and integrity. Adjudicators, staff, and agents must not have served in a political capacity for at least five years and are required to disclose any perceived or actual conflicts of interest to the Parties.
4. **Effective:** In order to provide effective and meaningful relief, the DR processes must:
- a. **Be nimble:** Dispute that could impact a child will be dealt with on an emergency basis as expeditiously as possible.
 - b. **Disallow procedural stalling:** Because time is critical in administrative decisions that impact children, if an appeal from a denial is not heard or a decision is not rendered within the established timeline, it is presumed to be granted. The resulting order shall be final and not reviewable unless Canada can show prejudice.

- c. **Offer quick relief:** Arbitrator must have the power to make interim orders and provide interlocutory relief.
 - d. **Be proactive:** must include mechanisms to proactively identify and remedy potential patterns of discrimination.
5. **Equitable:** Various measures must be taken to level the playing field between First Nations claimants and parties against. These include:
- a. **State funding:** Legal representation and social support for First Nations claimants and parties taking part in the dispute process;
 - b. **Reverse onus:** If there is a disagreement between Canada and First Nations claimant, Canada shall bear the burden of showing that its proposed solution is in keeping with the best interests of the child and substantive equality;
 - c. **Safeguards against legal warfare by Canada against First Nations children:** Procedural fairness cannot be invoked by Canada to cause delays unless it can be shown that the delay is in the best interests of children.
6. **Sustainable:** the DR must offer a suitable solution to addressing and preventing discrimination.
- a. **Non-regression and progressive realization:** the DR must guard against slippage. Any gains made for First Nations children cannot be clawed up.
 - b. **Durable:** the DR must allow for effective, binding, and enforceable dispute resolutions beyond the period of the FSA.
 - c. **Accountable:** the DR must include robust reviews aiming to proactively address issues and propose evidence-based solutions.

Further Elements of Effective Reform

1. Liability

Canada will be the insurer of last resort for all First Nations Child and Family Services providers including their employees, agents, and advisors (including Elders, Knowledge Keepers, and youth) when the First Nations Child and Family Services provider was unable to access insurance or access adequate levels of insurance to safeguard against tort actions or other claims arising from good-faith decision making.

2. Reform of ISC

Pursuant to 2022 CHRT 8, an Expert Advisory Committee (the **EAC**) has been formed to oversee the implementation of an evidence-informed work plan to prevent the recurrence of discrimination and that Canada shall undertake reasonable measures to begin implementing the workplan. The Caring Society welcomes the expert advice of the EAC and recommends that the EAC reports directly to Chiefs in Assembly and to the Tribunal on its work and views of Canada's risk of recidivism and the sufficiency of safeguards to detect and address discrimination.

3. Key Safeguards to Protect Against the Recurrence of Discrimination

- a. Canada shall not rely on the *Financial Administration Act* or any other Federal Act as a basis for failure to fully implement the nature, scope, and purpose of the Reformed Funding Approach, ensuring that the Reformed Funding Approach is interpreted and implemented in a manner that reflects the quasi-constitutional nature of the *Canadian Human Rights Act* and the remedies made thereunder.
- b. Canada must adequately fund regional and national organizations led by First Nations youth and young adults to enable their full participation in matters affecting them including First Nations Child and Family Services.
- c. Canada must safeguard funding allocations for First Nations Child and Family Services by placing them in a Special Purpose Allotment with authority to carry over to future fiscal years to avoid the money being used for other government priorities.
- d. Consistent with the Tribunals' non-reallocation order (2018 CHRT 4), Canada shall not engage or require First Nations not affiliated to a FNCFS Agency and/or FNCFS Agencies to engage in the practice of reallocation. In particular, Canada shall not repeat its practice of reallocating funding from other First Nations programs to address shortfalls in the FNCFS Program. This ensures FNCFS budgets are in a better position to meet the actual needs of the children and families they serve.
- e. Canada shall fund First Nations delivering child and family services pursuant to *An Act respecting First Nations, Inuit and Métis children, youth and families*, Treaty, or other mechanisms recognizing their inherent rights in a substantively equal and non-discriminatory manner, with the minimum standards of the *Canadian Human Rights Act* and the Orders in T1340/7008. Funding provided to First Nations delivering their own child and family services shall not negatively impact existing service provision and shall in no way negatively impact services and supports available to First Nations children, youth, and families by a FNCFSA or other service provider.

- f. ISC shall be reformed pursuant to the recommendations of the EAC, in keeping with the Tribunal's guidance and orders made in T1340/7008.
- g. Canada shall provide adequate and needs-based funding for a non-political National Secretariat and Regional Secretariats that shall function as hubs for data collection, best practices, and technical and operational support for FNCFS service providers.
- h. Canada shall provide sufficient funding to ensure First Nations and First Nations Child and Family Service agencies are able to purchase applicable liability insurance. Where such insurance is inadequate or unavailable, Canada shall be the insurer of last resort for any liability claims against First Nations, FNCFSAs, their employees and agents (including but not limited to Elders, youth, and contractors), where these have acted in good faith.
- i. Canada shall consider compensation payments from class actions owing to its own discriminatory conduct towards First Nations and/or First Nations citizens as a trigger for the need to provide emergency surge capacity funding to ensure First Nations Child and Family Services and other allied services have the capacity to respond to any increase in the need for First Nations Child and Family Services.
- j. Canada shall, on an ongoing basis, support the independent operation of the EAC as a non-political body of interdisciplinary experts, including by undertaking positive measures to implement its recommendations and report annually to Parliament on its work.

4. Timing of Reform

The Assembly of First Nations (AFN) and the Caring Society requested that the IFSD undertake research to assist in better understanding how discrimination could be eradicated from the FNCFS Program.

In December 2018, IFSD's Phase 1 report, *Enabling First Nations Children to Thrive*,¹ made eight recommendations for funding and structural changes to the First Nations Child and Family Services, as well as three recommendations for further research. The report was previously submitted as evidence to the Tribunal by the Caring Society in January 2019.

Following the acceptance of IFSD's report by the National Advisory Committee (NAC), IFSD was asked to undertake a follow-up study to identify options and plans for a change in structure and resources in FNCFS to transition agencies to an outcome-based approach based on wellbeing for thriving First Nations children.

¹ http://www.ifsd.ca/web/default/files/public/First%20Nations/IFSD%20Enabling%20Children%20to%20Thrive_February%202019.pdf

In July 2020, IFSD's Phase 2 report, *Funding First Nations Child and Family Services (FNCFS): A Performance Budget Approach to Well-being*,² proposed a new funding mechanism for First Nations Child and Family Services as well as an updated framework on child, family, and community wellbeing, named Measuring to Thrive. In order to adequately test the Measuring to Thrive framework and the funding approach, the Tribunal ordered in 2022 CHRT 8 that the approach be tested directly with First Nations Child and Family Service providers in the field, in what is now referred to as Phase 3.

Phase 3 is almost complete, as ordered by the Tribunal in 2022 CHRT 8. The Caring Society is strongly of the view that reform cannot be implemented until this community-driven research is complete, reviewed by technical experts in the regions and at the National Advisory Committee, as required pursuant to the Chiefs in Assembly Resolution 86/2023. In addition, in keeping with Chiefs in Assembly Resolution 40/2022, the final approach to be shared with the Tribunal has been approved by First Nations in Assembly. The Caring Society continues to monitor the progress of Phase 3 and remains optimistic that reform will be ready in 2024.

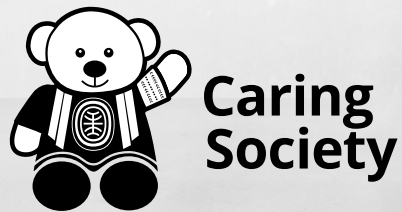
IFSD is also nearing completion of a report on a funding approach for First Nations not affiliated with a FNCFS, ordered pursuant to 2022 CHRT 8. First Nations not affiliated with a FNCFS requested additional time to review the results and thus that report will be ready in March for review by First Nations technical experts and the full consideration of First Nations not affiliated with a FNCFS.

The EAC work on reforming ISC is also ongoing and the Caring Society will welcome its views on the status of Canada's readiness for any further releases from the Tribunal's jurisdiction.

Getting This Right

The Caring Society is committed to transparency and accountability, and we welcome this opportunity to share our positions publicly to assist First Nations and First Nations Service Providers working in the best interests of First Nations children, youth, and families. We will be updating and/or adding to these positions as more information becomes available. This is a historic moment. The unfairness leading to this litigation has been going on for centuries and we have never had such an important legal moment to stop the discrimination of First Nations children and prevent it from happening again. We take this sacred duty very seriously and welcome suggestions from First Nations and First Nations service providers to ensure we get this right.

2 <https://fncaringsociety.com/publications/funding-first-nations-child-and-family-services-fncfs-performance-budget-approach-well>



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