Reforming Nova Scotia's Secure Care Model: Gender Bias and Calls to Action

Abby Metcalf*

* Abby Metcalf obtained her Juris Doctor with a specialization in Criminal Justice from Schulich School of Law at Dalhousie University in June of 2023.

She is currently an Articling Student in Nova Scotia focusing primarily on criminal law. Abby would like to thank the many women who inspired her to write this paper and those who supported her both inside and outside the classroom. This paper is not representative of any employer or organization.

ABSTRACT

The following paper is a critical analysis of Nova Scotia's secure care model which is legislated under ss. 55-56 of the *Children and Family Services Act*. Under these provisions, children who are in the care of the Minister of Community Services or Mi'kmaw Family & Children's Services of Nova Scotia may be confined against their will at the Wood Street Centre in Truro, Nova Scotia. This paper makes two critical arguments. The first is that the legislation concerning secure care in this province is notably overbroad, leaving children who are in crisis vulnerable to being subjected to what is akin to a carceral sentence at Wood Street. The second is that girls and adolescent women are particularly vulnerable to being confined in this facility due to lingering paternalistic attitudes toward female behavior, sexual autonomy, and mental health. Upon my review of recorded secure treatment application hearings in Nova Scotia, I found that judicial comments and legal reasoning appeared to demonstrate a bias toward female youth when compared to their male counterparts. This paper ultimately urges law makers to consider the harmful impacts of secure treatment and argues that law reform for secure care in Nova Scotia is necessary to protect and already extremely vulnerable subset of our population.

Citation: (2024) 33Dal J Leg Stud 167

INTRODUCTION

The *Children and Family Services Act (CFSA)* is the provincial authority governing child protection law in Nova Scotia. Under this legislation, children found to be in need of protection can be removed from their parent(s) or guardian(s) and taken into the care of the Minister of Community Services ("the Minister"). Depending on the circumstances, these children may remain in care on a temporary or permanent basis.[1] This paper analyzes and critiques Nova Scotia's secure treatment legislation which can be found in ss. 55-56 of the *CFSA*. Secure treatment is a government sanctioned program impacting children in care between the ages of 12 and 18. This program allows the Minister to place children who are in their care into a locked facility for extended periods of time. This paper argues that the current model for secure treatment in Nova Scotia runs contrary to the primary principles found in the *CFSA*. Moreover, the provinces secure care model appears to be at odds with the federal government's approach to youth confinement found in the *Youth Criminal Justice Act (YCJA),* which is the legislation governing criminal proceedings for children under the age of 18.[2]

Youth placed in the child welfare system are highly susceptible to entering the criminal justice system. In 2009, a study conducted in British Colombia on over 50,000 Canadian children revealed that of the youth who had been in care, one in six had been in youth custody, compared to less than one in fifty in the general youth population.[3] Youth in care are often marginalized, racialized, grow up in poverty, and/or have complex histories of trauma and abuse, all of which contribute to an increased risk of entering the criminal justice system.[4] Youth involved in both the child welfare system and the criminal justice system are frequently referred to as "cross-over youth".[5]

Significant reforms were made to the *YCJA* in 2004, aimed at reducing the institutionalization of at-risk youth.[6] The use of custodial sentences as a response to

---

[1] *Children and Family Services Act*, SNS 1990, c 5 at ss 55-56.
[2] *Youth Criminal Justice* Act, sc 2002 c 1 at preamble.
[3] NicholasBala et al," Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth" (2015) 19 Canadian Crim Law Rev 129 at 134.
[4] Rebecca Jaremko Bromwich, "Cross-over Youth and Youth Criminal Justice Act Evidence Law: Discourse Analysis and Reasons for Law Reform" (2019) 42:4 Man LJ 265.
[5] *Supra* note 4 at 130.
[6] Government of Canada, "The Youth Criminal Justice Act Summary and Background" (2021), online: <https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html> [https://perma.cc/EPL3-6FQ7].

child welfare issues is now strictly prohibited.[7] These legislative changes reflect growing societal concerns about the intersection of the child welfare system and incarceration. Despite these changes, youth in care may still be subjected to confinement via the secure-treatment provisions of the *CFSA*.

Nova Scotia's secure-treatment legislation is particularly concerning for adolescent girls in care. This paper argues that girls and adolescent women placed into the child protection system have a heightened risk of being placed in a secure care facility based on lingering societal attitudes toward female behaviour and mental health. Research included a study of several secure-treatment hearings held in the Family Division of the Nova Scotia Supreme Court, accessed through the Nova Scotia Legal Aid Commission. Audiotapes of these hearings are referred to as "the Wood Street hearings," This paper seeks to highlight judicial reasoning and sentiments expressed in these hearings which are rooted in gender bias and paternalistic attitudes toward female behaviour.

Part I of this paper provides an overview of secure care legislation and the province's sole secure care facility. Part II discusses the underlying circumstance of girls in care and their progression through the child protection system. Part III analyzes judicial reasoning in the Wood Street hearings, with a specific focus on critiquing the distinct legal analysis present in female cases. Finally, Part IV details recommendations for legislative reform.

I. METHODOLOGY

Research for this paper included a review of 21 audiotaped recordings of secure-treatment hearings held at the Nova Scotia Supreme Court (Family Division) in 2019 and 2020. Any identifiable portions of the proceedings have been excised as these hearings are subject to publication bans intended to protect the identity of involved youth. Additional research included an interview with a former resident of the Wood Street Centre and her legal advocate (identified only by initials in the footnotes as per their request).

II. SECURE CARE IN NOVA SCOTIA

The criteria for issuing a secure-treatment certificate in Nova Scotia can be found in ss 55-56 of the *CFSA*:[8]

> **55** (1) Upon the request of an agency, the Minister may issue a secure-treatment certificate for a period of not more than five days in respect of a

[7] *Ibid.*
[8] *Supra* note 1.

child in care, if the Minister has reasonable and probable grounds to believe that:

> (a) the child is suffering from an emotional or behavioural disorder; and
>
> (b) it is necessary to confine the child in order to remedy or alleviate the disorder.

56 (1) The Minister or an agency with the consent of the Minister may make an application to the court for a secure-treatment order in respect of a child in care.

(2) The Minister shall serve the application upon the child and upon the nearest legal-aid office.

(2A) Where the child who is the subject of an application is not a child in permanent care and custody, the Minister shall notify the child's parent or guardian of the proceeding.

(2B) Where the child who is the subject of an application is not a child in permanent care and custody, the court may, upon application by the parent or guardian of the child, add the parent or guardian as a party to the proceeding.

(3) After a hearing, the court may make a secure-treatment order in respect of the child for a period of not more than forty-five days if the court is satisfied that

> (a) the child is suffering from an emotional or behavioural disorder; and
>
> (b) it is necessary to confine the child in order to remedy or alleviate the disorder.

(4) Upon the application of the Minister or the agency and after a hearing before the expiry of a secure-treatment order, a secure-treatment order may be renewed in respect of the child, for a period of not more than ninety days in the case of a first or subsequent renewal, if the court is satisfied that

> (a) the child is suffering from an emotional or behavioural disorder;
>
> (b) it is necessary to confine the child in order to remedy or alleviate the disorder; and

> (c) repealed 2015, c. 37, s. 45.
>
> (d) there is an appropriate plan of treatment for the child.

As per s. 3(2) of the *CFSA*, a judge must always consider the best interests of the child. This is considered the overarching principle of child protection law:

> **(2)** Where a person is directed pursuant to this Act, except in respect of a proposed adoption, to make an order or determination in the best interests of a child, the person shall consider those of the following circumstances that are relevant:
>
> (a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;
>
> (b) the child's relationships with relatives;
>
> (c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;
>
> (d) the bonding that exists between the child and the child's parent or guardian;
>
> (e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;
>
> (f) the child's physical, mental and emotional level of development;
>
> (g) the child's cultural, racial and linguistic heritage;
>
> (ga) the child's sexual orientation, gender identity and gender expression;
>
> (h) the religious faith, if any, in which the child is being raised;
>
> (i) the merits of a plan for the child's care proposed by an agency, including a proposal that the child be placed for adoption, compared with the merits of the child remaining with or returning to a parent or guardian;
>
> (j) the child's views and wishes, if they can be reasonably ascertained;

> (k) the effect on the child of delay in the disposition of the case;
>
> (l) the risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent or guardian;
>
> (m) the degree of risk, if any, that justified the finding that the child is in need of protective services;
>
> (n) any other relevant circumstances.[9]

If a secure-treatment certificate is granted following a hearing under ss 55-56 of the *CFSA*, a child may be detained at the Wood Street Centre (Wood Street) in Truro, Nova Scotia for a period of 45 days, with an option to extend to 90 days if the Minister can demonstrate that the relevant provisions have been met.[10] Although several provinces have different variations of secure-treatment programs, the legislation in Nova Scotia is notably overbroad, leaving children and youth extremely vulnerable to being confined against their will.

1. The Wood Street Problem

Children in care often display signs of emotional or behavioural disorders. These children typically came to the attention of child welfare agencies after exposure to a variety of trauma, including parental neglect, family violence, maltreatment, and physical abuse.[11] These types of trauma can increase the likelihood that a young person will experience health concerns such as substance use, Post Traumatic Stress Disorder, Attention Deficit Hyperactivity Disorder, conduct disorders, learning difficulties and other mental health issues.[12]

Family court judges and delegates of the Department of Community Services have asserted that Wood Street is a therapeutic treatment facility not intended to be used as a punitive measure.[13] While this may have been the government's hope for the facility, the reality of the Wood Street experience differs. The Minister has indicated that Wood Street was designed to help children who are struggling by

---

[9] *Supra* note 1 at s 3(2).
[10] *Supra* note 1 at ss 56(4)
[11] *Supra* note 4 at 134.
[12] Jerry Florres et al, "Crossover Youth and Gender: What are the Challenges of Girls Involved in Both the Foster and Juvenile Justice Systems?" (2018) 91 Child & Youth Rev 149 at 150.
[13] Wood Street Hearings: these audio tapes consist of recorded secure care hearings held in the Nova Scotia Supreme Court (Family Division) between the years of 2019-2020 and were accessed through the Nova Scotia Legal Aid Commission.

providing them with the treatment they need to address their complicated histories of trauma and abuse.[14] However, legal advocates have repeatedly expressed concerns that their clients are not receiving treatment at Wood Street, but rather they are being retraumatized and institutionalized by the facility's strict adherence to stringent practices.[15]

During the Standing Committee Meeting on Community Services held in 2003, delegates for the Minister stated that Wood Street was a facility for children with behavioural issues not equipped to deal with mental health disorders.[16] In distinguishing the two, the Minister's representatives explained that while mental disorders characterized by disturbed behaviour could be treated at the facility, staff could not treat major mental health issues such as, "psychosis, mood disorders, eating disorders or depression that was truly suicidal as opposed to attention-seeking."[17] These statements suggest that Wood Street never intended to provide intensive psychiatric treatment to its residents.

At the Standing Committee meeting, the Minister stated that the facility would have a manager, several supervisors, two social workers, a registered nurse, and 25 youth workers.[18] While it is unclear exactly which types of disorders these employees would be qualified to treat, s. 55(1)(b) of the *CFSA* states that it must be necessary to confine the child in order to remedy the disorder they are allegedly suffering from. This wording suggests that the legislature intended for there to be a connection between the treatment available at Wood Street and the issues a child is experiencing.[19]

A review of the Wood Street hearings revealed that children are often sent to Wood Street multiple times while in the care of the Minister.[20] Recurring applications by the Minister for secure-treatment orders for the same child should signal to the courts that the "treatment" being provided at Wood Street is not capable of

---

[14] Nova Scotia Legislature Standing Committee on Community Services (11 December 2003), online: < https://nslegislature.ca/legislative-business/committees/standing/community-services/archive/community-services/cs_2003dec11.htm> [https://perma.cc/63FA-CP7U].
[15] Katie Toth, "Nightmare at Wood Street" (4 June 2018), online: <https://www.thecoast.ca/halifax/nightmare-at-wood-street/Content?oid=15149314> [https://perma.cc/Z5PE-R5FK].
[16] *Supra* note 15.
[17] *Ibid.*
[18] *Ibid.*
[19] *Supra* note 1 at ss 55(1)(b).
[20] *Supra* note 14.

responding to the issues the child is experiencing. Several former residents have alleged that individualized treatment at the centre is virtually non-existent and that other forms of treatment are sporadic at best.[21] Legal advocates working closely with these children have expressed concerns about the programming at Wood Street and its inability to address underlying causes of problematic behaviour.[22]

Although the Minister has repeatedly asserted that detainment in Wood Street is not a punitive measure, the severe restrictions on children's liberties while at the centre suggest otherwise. Former residents have stated they would rather be sent to youth jail than receive a secure-treatment order due to strict limitations placed on acceptable behaviour.[23] For example, one of the more controversial rules at the centre states that children are forbidden from speaking to each other unless a staff member is present to listen to their conversation.[24]

A child's every move is surveyed and recorded by Wood Street staff in a file that can be presented as evidence against them in future hearings.[25] This practice makes it challenging for lawyers to contest secure-treatment applications as having multiple incident reports on file, regardless of a possible trivial nature, can be used to justify a child's extended stay at Wood Street.

Wood Street operates on a privilege system similar to systems used in jails. The more the children comply, the more freedom they can earn around the facility.[26] If they do not comply, punitive measures like isolation rooms are used to "correct" behaviour. While Wood Street may be promoted as a treatment program, it has clearly been modeled after a criminal institution.[27]

These practices should be construed as evidence that the Wood Street facility is institutionalizing and criminalizing young children who, as the Minister has noted, are in desperate need of therapy and healing.[28] Children can be handcuffed and transferred to the facility by police, their movements and conversations are restricted, and their contact with their peers and support systems are monitored by facility staff.[29]

---

[21] Emma Halpern, "Looks Like a Duck, Quacks Like a Duck: Confinement and the Long-arm of the Carceral State for Youth in Care" (2017) at 20.
[22] *Supra* note 16.
[23] *Supra* note 16.
[24] *Ibid.*
[25] *Ibid.*
[26] Personal interview with JC, (December 2021).
[27] *Ibid.*
[28] *Supra* note 15.
[29] *Supra* note 1 at ss 59(1); *Supra* note 27.

The Minister's plan for Wood Street juxtaposed with the experiences of children previously detained there suggest that Wood Street has never been adequately resourced to provide the kind of treatment required by children with complex backgrounds. Instead, the facility is a place for the Minister to house or secure children who have (or are perceived to have) become difficult to manage elsewhere. It is difficult to understand how the Wood Street Centre be characterized as being in "the best interests" of any child.

III. GIRLS AND CHILD PROTECTION LAW

To make decisions in the best interests of young girls specifically, the analysis must begin with an understanding of the unique circumstances of female youth in care. Evidence suggests that girls experience greater difficulties prior to entering the child welfare system than their male counterparts.[30] Girls are more likely to enter care due to problems within their family, such as abuse or violence, and are more likely to have been physically and/or sexually abused.[31] Understanding the extent and type of traumas experienced by girls in care is a crucial element in understanding their behavioural patterns. Many girls and adolescent women with this background experience issues with emotional dysregulation, a tendency to self-harm, and other behavioural challenges.[32] Young women who have experienced sexual abuse may also seek out inappropriate sexual relationships, leading to feelings of depression and loneliness.[33]

State intervention when a girl is experiencing behavioural problems is not a new concept. Girls have been criminalized for exhibiting behaviour that society considered "unvirtuous" and "unfeminine" throughout history.[34] This paternalistic approach to female vulnerability can be traced back to the beginning of the juvenile justice system. The first juvenile justice court defined "delinquent" as any youth under the age of sixteen who violated a city ordinance or law.[35] However, when this definition applied to young girls, the court included "incorrigibility, associations with immoral persons,

---

[30] Fitzpatrick, Claire, "What do we know about girls in the care and criminal justice systems?" (2017) 16:3 Safer Communities 134 at 137.
[31] *Ibid* at 137.
[32] Elizabeth B Dowdell et al, "Girls in Foster Care: A Vulnerable and High-Risk Group" (2009) 34:3 Am J Maternal Child Nursing 172 at 174.
[33] *Ibid* at 174.
[34] William Little & Rob McGivern, *Introduction to Sociology,* 1st ed (BC Open Textbook project, 2016) at ch 7.
[35] Lisa Pasko, "Damaged Daughters: The History of Girls' Sexuality and the Juvenile Justice System" (2010) J Crim L & Criminology 1099 at 1100.

vagrancy, frequent attendance at pool halls or saloons, other debauched conduct, and the use of profane language."[36] In the twentieth century, girls who were exhibiting sexually promiscuous behaviour were often brought before the court and confined to residential care facilities.[37] In describing these girls, courts used language such as "manipulative", "wildly sexual", "hysterical", and "untrustworthy".[38] These negative connotations reflect discriminatory social assumptions about girls, women, sexuality and female bodies.

Historically, women engaging in "deviant" or "risky" behaviour were often seen as doubly deviant due to their open defiance of gender norms.[39] In comparison, aggressive or even criminal behaviour by men and boys was seen as consistent with their self-assertive character and human nature.[40] While societal expectations of young women have evolved since the early days of juvenile justice, judicial reasoning in some of the Wood Street hearings shows that girls in care are still being assessed through a paternalistic lens on the basis of gendered stereotypes. Judges must ensure that their interpretation of the best interest principle is not rooted in outdated conceptions of female behaviour and female vulnerability.

IV. LEGAL ANALYSIS AND GENDER BIAS

The audio recordings of 21 secure-treatment hearings were reviewed with a focus on the judicial commentary regarding grounds for granting a secure-treatment certificate.[41] While some of the secure-treatment orders were uncontested by the child and their lawyer, the judicial commentary offers valuable insight into the Court's determination that confining a child to Wood Street was in their best interests.

1. Emotional and Behavioural Disorder

Although the secure treatment legislation in the *CFSA* does not define an emotional and behavioural disorder, the Wood Street hearings reveal that this has been interpreted to include a wide spectrum of behaviours and diagnoses. The most common formal diagnoses featured in the Wood Street hearings were Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder and Conduct Disorder. This reflects the prevalence of mental health issues among children in care discussed in Part I of this paper. However, it is significant that in many cases, these

[36] *Ibid* at 1099.
[37] *Ibid* at 1102
[38] *Ibid* at 1112.
[39] *Supra* note 35.
[40] *Ibid.*
[41] *Supra* note 14.

diagnoses were historical, and the children were not required to undergo mental health assessments upon the Minister's application for a secure-treatment order.

For example, in Case 18, a representative for the Minister testified that it would be a waste of resources to assess a child each time they are admitted to Wood Street and that children are only sent for reassessment if they begin displaying new behaviours.[42] These comments raise doubts about the intention and ability of Wood Street services to provide individualized treatment.

Other common diagnoses present in these cases were anxiety, depression, self-harm, and suicidal ideations. As previously mentioned, the Minister was clear at the Standing Committee meeting that Wood Street was not designed to treat these types of mental health disorders.[43]

Even more concerning were cases where no formal diagnosis was provided by a mental health professional, but the judge made a finding that the child was suffering from an emotional or behavioural disorder based on a "concerning pattern of behaviour". This term is referenced by both Ministerial witnesses and judges in 11 of the 21 decisions. It appears to refer to several types of behaviours recorded by social workers and group home workers in the child's file. Common behaviours referenced include being gone from placement without permission, using drugs and alcohol, not participating in therapy, skipping school, not following program rules, being verbally or physically aggressive, and being argumentative. In cases involving girls, the risk of sexual exploitation, including pursuing relationships with older men and engaging in "risky" sexual behaviour were repeatedly listed in support of the conclusion that it was necessary to confine the child. This echoes the paternalistic approach used to control and confine young women since the conception of juvenile justice.

In the six cases studied involving boys, all were determined to be suffering from an emotional or behavioural disorder based on a formal mental health diagnosis. The fact that the male youth was unwilling to take their prescribed medication to treat these disorders was frequently cited as a reason to confine the child. Moreover, physical aggression toward staff or others was listed as a factor in every case involving a male youth. Comments made in these cases focussed primarily on the physical threat the youth's behaviour posed to themselves and to others.

[42] *Supra* note 14.
[43] *Supra* note 15.

In cases involving girls, the focus appeared to be on the child's ability to make sound choices. An example of this problematic reasoning was found in Case 14 where the judge commented that if they could, they would send the young girl to a desert island so she could figure things out and not have all of these tough influences around her. Another troubling example comes from Case 18, where a reason the secure-treatment certificate was granted was because the child left her group home after having minor surgery so that she could recover at a friend's house. The judge referenced this in their decision, stating they had no idea if the friend's house was an acceptable environment, questioning the youth's judgement as she had a history of making poor choices for herself.

Other concerning comments from the hearings include "minimizing her relationship with older men", "no longer fighting the bigger things in life" and "seems like a compassionate young girl but needs to address her own behaviour before she can help anyone else". The overall tenor of judicial reasoning in cases involving female youth is notably paternalistic compared to cases where the judge is considering a male youth's behaviour. It is difficult to understand how these comments are related to the youth having an alleged emotional or behavioural disorder.

2. Necessary to Confine

Judges frequently referenced a "risky" behavioural pattern in finding that it was necessary to confine (NTC) the child. While some behaviours like self-harming and substance abuse are quite serious, findings of NTC have also been based on generic behaviours common amongst teenagers. For example, in Case 11, the judge determined it was NTC the youth based on the following findings: she had difficulty following rules, was argumentative with staff, she was dismissive of feedback, she minimized her own behaviour, and she did not show an appreciation of the risks associated with the use of marijuana. Confining the child based on these criteria alone demonstrates that children in care are held to a different standard than the general youth population. Had the girl in Case 11 been in the care of her parents, she would never have found herself before a judge.

Judicial comments in the Wood Street hearings suggest that female youth are more likely to be confined under the secure care model because the legal system (and wider society) views them as vulnerable and incapable of making good choices. Of the 21 cases reviewed for this paper, 14 involved female youth, with 1 case where gender was not specified.In over half of those cases, the risk of sexual exploitation or risky sexual behaviour was a factor in determining that it was necessary to confine the child to Wood Street. While exploitation and human trafficking is a legitimate concern

for youth in care, the state should not lock young girls away to protect them. Doing so does not reduce the risk of sexual exploitation but instead penalizes victims of sexual predators which is in contradiction to Canada's approach to human trafficking and prostitution.[44]

In Case 9, the child's lawyer questioned a Ministerial witness about the sexual exploitation treatment provided at Wood Street. When asked how Wood Street intended to alleviate or remedy this issue in accordance with s. 55(b) of the *CFSA,* the Minister's witness argued that Wood Street had a class on healthy relationships and being assertive. The witness went on to suggest that the youth was at risk because she makes poor choices for herself, and that Wood Street intended to correct that. This line of reasoning incorrectly suggests that fault associated with exploitation lies solely with the youth. This victim-blaming mentality regarding exploitation was not isolated to Case 9. Several of these cases reference the fact that the child is spending time with people known to the agency to be predators or that the youth is involved with an older man. These allegations, which are made by witnesses for the Minister, are then considered by the judge as part of the "concerning pattern of behavior" that leads to a finding that it is necessary to confine the child. It is concerning that the state's response to this issue is to confine these girls in what is essentially a prison and severely restricting their liberties (including the right to speak freely). The learned compliance enforced at Wood Street could actually make these young girls more susceptible to sexual exploitation once they are released back into the community.

The Minister's comments in Case 9 demonstrate an inability and unwillingness to address the underlying issues affecting youth in care. Child abuse and sexual abuse are common among young girls in care and there is a clear link between those experiences and the risk of exploitation.[45] Gender-based research on trauma and abuse offer several explanations for why young girls in care are at a heightened risk of being sexually exploited. This cannot be reduced to the suggestion that young girls make bad choices and are susceptible to peer pressure, or that they are to blame for vulnerabilities that are the consequences of societal failings. It remains unclear how a locked facility that periodically isolates children and forces compliance will alleviate

---

[44] Government of Canada, "Prostitution Criminal Law Reform: Bill C-36, The Protection of Communities and Exploited Persons Act" (2016) online: <https://www.justice.gc.ca/eng/rp-pr/other-autre/c36faq/> [https://perma.cc/F6L7-AE5Y].

[45] Michelle R Lillie, "An Unholy Alliance: The Connection Between Foster Care and Human Trafficking" (Presentation delivered at the 5th Annual Conference on Human Trafficking, 2013) online: <https://humantraffickingsearch.org/an-unholy-alliance-the-connection-between-foster-care-and-human-trafficking/> [https://perma.cc/ARB7-37UD].

the risk of sexual exploitation. If anything, the threat of being sent back to Wood Steet could increase vulnerability to human trafficking if a girl is inclined to escape the possibility that they may be forced back into this "treatment" facility in the future.

V. LEGISLATIVE REFORM

Significant competing interests are at stake during a secure-treatment hearing with arguments from both sides having merit. However, the purpose of this paper is not to debate the philosophy behind secure-treatment models. Instead, this paper seeks to highlight several contradictions within Nova Scotia's secure care model and the Wood Street facility itself.

Courts continually defer to the Minister's characterization of Wood Street as a treatment centre. In doing so, courts can reason that a stay in this facility is in the best interests of a child who appears to be in crisis. However, the Wood Street hearings and experiences of former Wood Street residents clearly demonstrate that this facility is punitive rather than therapeutic. The best interests analysis cannot be properly applied until courts acknowledge that the severe restrictions on children's liberties while at the Wood Street facility amount to incarceration.

The *CFSA* secure care legislation must be amended to ensure that children are not being arbitrarily confined at Wood Street. Even the implementation of better treatment practices at Wood Street would not address concerns that children who are non-compliant rather than in crisis are being detained at Wood Street. This includes concerns that girls are being locked away to protect them from sexual predators, rather than equipping them with treatment to address underlying issues leading to vulnerability. Several recommendations for law reform listed below are based on Ontario's secure care legislation found in ss 157-158 of the *Child Youth and Family Services Act*.[46]

1. Constraining the criteria for commitment in a secure-treatment facility

The criteria for confinement in ss 55-56 of the *CFSA* are overbroad and capture a wide spectrum of behaviour. Elastic terms like an emotional/behavioural disorder allow the court and Minister to make moral assumptions about behaviour rather than drawing on a diagnosis from a mental health professional. It is difficult, if not impossible to construct a treatment plan to alleviate a "disorder" based on a "risky pattern of behaviour" alone. Confinement should only be used in cases where it is

[46] *Child Youth and Family Services Act*, SO 2017, c 14 at ss 157-178.

clear it will be in the best interests of the child. Constructing a more robust set of criteria could include the following provisions:

- "The child is suffering from a mental health disorder."
- "As a result of the mental health disorder, the child has caused or attempted to cause significant bodily harm to themselves or others within the 12 months preceding the application."
- "Treatment for the child's mental health disorder is available at the facility."

This list is not exhaustive, however, the criteria listed above are essential to address the underlying bias towards females within the legislation. The following recommendations expand on these criteria and offer additional provisions to protect the rights of all children.

2. Secure care is only appropriate when there are no less intrusive options to provide treatment to the child.

During the Standing Committee Meeting, the delegate for the Minister explicitly stated they would explore all other options before confining children to Wood Street. This should be reflected in legislation. However, this provision would be susceptible confinement based on a lack of viable resources in the community for these children. This challenge cannot be overcome without reconsidering several structural features of the child welfare system to ensure adequate, less intrusive treatment options.

3. The court may order assessment of the child by a professional unrelated to the applicant.

This recommendation was taken directly from secure treatment legislation in Ontario.[47] It is not appropriate to confine children based solely on historical assessments and evidence provided by the Minister and their representatives. Confining a child should require a professional mental health assessment independent of the facility and wider Ministry. This provision would also ensure that assessment would guide the kind of treatment the child needs from the facility.

4. The facility can provide treatment that meets the child's needs, as per a mental health professional.

This provision's inclusion is intended to ensure that youth confined in secure treatment facilities receive the treatment they undeniably need. Forced compliance is not an appropriate measure of whether treatment is effective. Similarly, repetitive

[47] *Ibid* at s 163.

secure-treatment certificates should signal to the court that the treatment provided is not effective.

5. Physical restraints, segregation, and other forms of punishment should be used only in emergency situations.

Current legislation provides no direction on how children are to be treated once they are placed at Wood Street. The inclusion of explicit instructions on how and when intrusive and punitive measures can be used would provide an avenue for the use of these practices to be challenged in court if applied incorrectly. Punishment should not be the framework of any treatment plan for children.

CONCLUSION

Prioritizing law reform for secure-treatment legislation in Nova Scotia is necessary to protect an already vulnerable population. Children in care are faced with insurmountable challenges throughout their lives: the trauma they experience, the environments in which they grow up, and the legislation they are subjected to play an integral role in determining their future. Although the *YCJA* has attempted to address the concerns of youth crossing over from the child welfare system to the criminal justice system, the secure care model in Nova Scotia continues to undermine these efforts.[48]

It is incumbent on legislators to recognize the harmful impacts of institutionalizing youth under the current provincial secure care model. Moreover, it is essential that courts rethink their approach to the best interest analysis when granting a secure-treatment certificate. Paternalistic ideologies about female behaviour should have no bearing in the modern court room. The areas of concern for law reform identified in the previous section are only a starting point. They should not be viewed as a solution to the problems with secure care in this province or the operational concerns at Wood Street. Instead, these recommendations offer direction for focused law reform and list the minimum protections necessary to make the secure care approach tolerable.

[48] *Supra* note 4.