JUSTICE FOR CHILDREN AND YOUTH

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# Submission to the Standing Committee on Social Policy
# Bill 210, Child and Family Services Statute Law Amendment Act, 2005

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Justice for Children and Youth is a legal clinic and the operating arm of the Canadian Foundation for Children, Youth and the Law. The clinic provides select legal representation to youth aged 17 and under in the areas of income maintenance, education, criminal law, family law, mental health law, health law, constitutional law and human rights.

The Foundation prepares policy/law reform positions on issues relating to the legal practice of the clinic based on the needs and experience of its clients. The Foundation also conducts test case litigation, through interventions and applications, on specific issues related to the rights of children and youth. The clinic also provides public legal education to youth and youth-serving agencies.

Justice for Children and Youth supports the amendments to the *Child and Family Services Act* proposed in Bill 210. In many ways the changes represent a positive step forward to allow for greater flexibility in the long term placement of children, to permit placement in the extended family and community of the child, and to allow for continued contact post adoption where it is deemed to be in the best interests of children. This brief will begin by highlighting the positive aspects of the Bill. There are some small but significant concerns about specific sections, which will be addressed with recommendations for amendments to those sections. Finally, the Bill is only a first step in the reforms that Justice for Children and Youth argues are necessary to best meet the needs of children in the child welfare system. The limits of the amendments from a broader policy perspective will be canvassed with recommendations for further reform.

## Positive Aspects of Bill 210

Post-adoption contact is important, not just for birth parents, but for siblings as well. Justice for Children and Youth has represented many young people who have sought access to siblings who are in care, as well as those who have been adopted. The barriers that the CFSA placed on these requests have meant genuine hardship for children.

Another important and positive aspect of the new bill is the addition of consideration of extended family and community to the definitions of the "best interests of the child" and "place of safety". The young people that seek the help of Justice for Children are more likely to find places to live on their own that are more consistent with those definitions. The scarcity of foster homes and the reluctance by adolescents to live in group home settings, means that many adolescents we represent will find their own solutions rather than seek the support of a children's aid society.

Justice for Children and Youth, along with many others, is pleased with the strong positive statement respecting the use of alternative dispute resolution for *any* issue related to a child's plan of care. Our experience tells us that young people find court processes

confusing and inaccessible. Despite the hard work done by the Office of the Children's Lawyer to approach child representation appropriately, many young people who call us share many of the concerns, fears and reservations about court expressed by the young people in the focus groups conducted by members of the Children in Limbo Task Force of the Sparrow Lake Alliance. Further, many of the concerns that young people have about being in care relate to their plans of care, e.g. degree of their independence, contact with family, placement and school issues. By stating that alternative dispute resolution is an option for any issue related to a child's plan of care, you are offering some hope that the young person has a mechanism to address these important needs.

Permitting judges in child welfare proceedings to make custody orders, in the same form as the *Children's Law Reform Act*, is a welcome elimination of administrative barriers to resolving cases in the best interests of children. We have represented and advised many young people who end up living with extended family or community members, rather than in the care system. Often these young people are asked to commence custody applications on their own in order to regularize school admission or, in at least one case, to justify termination of children's aid involvement. By permitting the courts to make custody orders in the context of children's aid involvement, young people can be better supported in placement options that best meet their needs.

Specific Legislative Concerns

**New CFSA s.20.2(2) – Legal Representation in Alternative Dispute Resolution**

Section 20.2 allows for resolution of issues through alternative dispute resolution, a positive change, as stated above. However, subsection 2 gives the Office of the Children's Lawyer the power to decide whether the child can have legal representation in this process. Although the OCL has the power to decline to represent a child in certain court proceedings, this section goes much further by apparently granting the OCL the power to determine whether the child can be represented by a lawyer at all. Although the circumstances are rare in which young people might retain their own lawyers. Justice for

Children and Youth have been retained directly many times by young people in the care of a children's aid society, or wanting to be in the care of a children's aid society. The situations in which we have been involved tend to be those in which the OCL has ceased their representation (i.e. Crown wardship has been ordered) or OCL were never involved. For example, Justice for Children and Youth has acted for young people on status review applications when they want to terminate their wardship; we have also represented young people who have sought access to siblings while they were in care. All of these situations could go to alternative dispute resolution. A simple amendment is recommended by the insertion of the words "by the Children's Lawyer" to clarify the discretion available to that office.

**RECOMMENDATION: Section 20.2(2) should be amended to read as follows:**

> **(2) If a society or a person, including a child, who is receiving child welfare services proposes that a prescribed method of alternative dispute resolution be undertaken to assist in resolving an issue relating to a child or a plan for the child's care, legal representation may be provided <u>by the Children's Lawyer</u> for the child if the Children's Lawyer is of the opinion that legal representation <u>by the Children's Lawyer</u> is appropriate.**

**New CFSA s. 145.1 & s.153.1 – Openness Orders**

Section 153.1 allows for the variation or termination of an openness order, but does not permit a child to make this application. A child over 12 is entitled to receive notice of the application and be treated like a party, but the power to initiate a variation of openness is denied to the child. In contrast, a child over 12 can initiate a status review application. For example, a 16 year old cannot seek to vary an openness order to stop personal information from being sent to a birth parent by the children's aid society or adoptive parents. This is compounded by the lack of legislative provisions in the CFSA addressing confidentiality and access to information. It is also compounded by the fact that, unlike access orders, the consent of a child over the age of 16 is not required for an openness order under the new s. 145.1(3).

**RECOMMENDATION: Section 145.1(3)(c) be amended to require the consent of a child over the age of 16 to an openness order.**

**RECOMMENDATION: Section 153.1(1) be amended to permit the child over the age of 12 to apply to vary or terminate an openness order.**

**New CFSA s. 153.4 – Alternative Dispute Resolution re. Openness Orders**

Section 153.4 does not make it clear that a child over the age of 12 years is entitled to participate in alternative dispute resolution in respect of openness applications. Although the section makes it clear that the child can participate as if he or she were a party to the proceedings, alternative dispute resolution should be included explicitly.

**RECOMMENDATION: Section 153.4 be amended to read as follows:**

> **153.4 A child who receives notice of a proceeding under section 145.1, 145.2, 153.1 or 153.2 is entitled to participate in the proceedings and any alternative dispute resolution as if he or she were a party.**

**CFSA s. 71(2) – Continuing Care**

Bill 210 eliminates the administrative barrier of requiring the Director's approval for extended care for young people over the age of 18 and includes Crown wardship as well as custody orders – all of which is important improvements to the section. There is no upper age limit and the program will be in accordance with regulations. At present this support ceases at age 21. Justice for Children and Youth recommends that this be extended to 24 years or, as in child support legislation, until the young person has completed a post-secondary degree or diploma. This would ensure that young people in the child welfare system are treated as the law requires they be treated in families.

**RECOMMENDATION: The Regulations for Continuing Care past age 18 permit support until the age of 24 years or until the young person has completed a post-secondary degree or diploma.**

Limits of the Amendments

It should be no surprise to the Committee that Justice for Children and Youth recommends that amendments to the *Child and Family Services Act* must be more extensive that what is currently proposed in order to responsibly improve the child welfare system in Ontario. Justice for Children and Youth has recommended to previous governments that the age limit for finding a child to be in need of protection is set too low at age 16. Although we do not support coercive or mandatory CAS involvement with young people aged 16 and 17, services must be made available to them. We have advised and represented many young people in this age group who are living in or have left abusive home situation,s and have no place to turn to for support. Immigrant children, for example, often do not seek help until they are over 16. The United Nations *Convention on the Rights of the Child* defines child as being under 18 years of age. The requirement that children be protected from all forms of violence, abuse and neglect extends to all children, not just those under the age of 16. Compliance with the *Convention* requires that 16 and 17 year olds be included in the child welfare system.

The confidentiality and access to information provisions currently in the legislation have never been proclaimed in force. As a result of this lack of legislative requirements, children's aid societies have developed their own policies around disclosure of information. The problem for young people is that there is no sense that they have any right to access vital information about themselves. A request by a young person to see their file is answered by a letter in which a social worker has reviewed the file and determined what the young person should know. Often lawyers are permitted to review the file on behalf of a client, but not every young person can or should have to retain a lawyer to access personal information. All other public bodies in this province are

required to meet legislated standards for the protection or personal information and for the release of such information to those to whom it relates. The current provisions need to be reviewed with a view to enacting appropriate legislation to address this gaping hole in the *Child and Family Services Act*.

The revised s.68 of the Act allows for a more comprehensive complaint procedure to be prescribed by regulation. This hints at a positive first step in making children's aid societies more accountable, assuming the regulations establish a more accessible process for people who have had contact with the child welfare system. However, without some form of independent review that includes actions by children's aid societies as well as licensed care providers, the complaints process will remain unsatisfactory to most. This process must also be accessible to young people so that those in the care of children's aid societies can feel they will be listened to when things go wrong.

Another area that requires attention relates to the issues facing children with disabilities and special needs. Although the CFSA makes clear provision for Special Needs Agreements, what has become clear over the last couple of years is the inadequacy of the response to the needs of these children. The case resolution process in the province works well on some areas and in others is woefully inadequate. No parents should have to relinquish their legal relationship with their children in order to access services to meet their special needs. The special needs provisions of the CFSA should be strengthened to ensure entitlement to resources for those children and families deemed to have high needs. A review of these provisions should focus on the most appropriate way to deliver services to high needs and high risk children who are not otherwise in need of protection.

As a result of two inquests in which Justice for Children and Youth had standing, recommendations were made in relation to the extraordinary measures provisions of the CFSA. Although some of the recommendations formed part of new regulations under the Act, Justice for Children and Youth was disappointed to see that not all of these recommendations made their way into Bill 210. The recommendations from the Inquest

into the Death of William Edgar that make specific reference to the CFSA are attached as Appendix "A".

Finally, Justice for Children and Youth recommends that the CFSA include a preamble or statement of principles that makes specific reference to the United Nations *Convention on the Rights of the Child*. Any review of the legislation, and any amendments proposed, must take into account Canada's and Ontario's obligations to comply with the *Convention*.

**RECOMMENDATIONS:**

**The definition of a child in need of protection should be extended to include all children under 18 years of age, but services should be provided to 16 and 17 year olds only with their consent.**

**Review the confidentiality sections of the CFSA with a view to amendment and enactment of an accountable process for access to information and protection of privacy of records under the Act.**

**Establish an independent process to hear and deal with complaints by persons, including children, concerning the services sought or received from children's aid societies and other licensed care providers under the CFSA.**

**Strengthen the Special Needs provisions of the CFSA to ensure entitlement to services and resources for those children with the highest needs and to ensure that these services are delivered in the most appropriate manner.**

**The CFSA should include a preamble or statement of principles that makes specific reference to the United Nations *Convention on the Rights of the Child*.**

**RECOMMENDATIONS**

1. **Section 20.2(2) should be amended to read as follows:**

   **(2) If a society or a person, including a child, who is receiving child welfare services proposes that a prescribed method of alternative dispute resolution be undertaken to assist in resolving an issue relating to a child or a plan for the child's care, legal representation may be provided by the Children's Lawyer for the child if the Children's Lawyer is of the opinion that legal representation by the Children's Lawyer is appropriate.**

2. **Section 145.1(3)(c) be amended to require the consent of a child over the age of 16 to an openness order.**

3. **Section 153.1(1) be amended to permit the child over the age of 12 to apply to vary or terminate an openness order.**

4. **Section 153.4 be amended to read as follows:**

   **153.4 A child who receives notice of a proceeding under section 145.1, 145.2, 153.1 or 153.2 is entitled to participate in the proceedings and any alternative dispute resolution as if he or she were a party.**

5. **The Regulations for Continuing Care past age 18 permit support until the age of 24 years or until the young person has completed a post-secondary degree or diploma.**

6. **The definition of a child in need of protection should be extended to include all children under 18 years of age, but services should be provided to 16 and 17 year olds only with their consent.**

7. **Review the confidentiality sections of the CFSA with a view to amendment and enactment of an accountable process for access to information and protection of privacy of records under the Act.**

8. **Establish an independent process to hear and deal with complaints by persons, including children, concerning the services sought or received from children's aid societies and other licensed care providers under the CFSA.**

9. **Strengthen the Special Needs provisions of the CFSA to ensure entitlement to services and resources for those children with the highest needs and to ensure that these services are delivered in the most appropriate manner.**

10. **The CFSA should include a preamble or statement of principles that makes specific reference to the United Nations *Convention on the Rights of the Child*.**

## Appendix A

## Recommendations from the Inquest into the Death of William Edgar

6. The Ministry should immediately commence a review of the CFSA with a view to updating Part VI – Extraordinary Measures to provide a clear definition of intrusive procedures and to establish clear legislated limits on their use on children and youth in the care of service providers under the child welfare and children's mental health systems.

7. The CFSA should be amended to establish a Review Panel to monitor the use of intrusive measures on children and youth in care and advise the Ministry on best practices and policy.

8.The licensing regulations of the CFSA should be amended to ensure compliance by the licensee with the Act and its intent, including the following:

- Use of restraint should clearly be differentiated in the service provider's policies from disciplinary practices
- Licensing review should include a review of all incident reports of the use of restraints to ensure compliance with the legislation
- Terms such as time out, isolation, restraint and removal should be clearly defined in the regulations and licensing guidelines and be incorporated in the policies of the licensees.

9. The licensing regulations pursuant to the CFSA should be amended to establish clear criteria by which to monitor the quality of services provided to children and youth in the care of licensed service providers including the following:

- Criteria by which to evaluate the behaviour management plan of the facility or residence to ensure it is in the best interests of the children and youth
- Specific criteria to be included in the plan of care for each child or youth in the residence to ensure an individualized behaviour management plan
- Specified ongoing training to staff that is formalized and external to ongoing internal training and clinical support

10. The CFSA should be amended to require that children and youth in care have the right to be informed of the extraordinary measures or intrusive procedures used by the service provider upon admission to the residential placement.

11. Although the Act clearly states that children in care are not to be subjected to corporal punishment, the legislation should be amended to more clearly define the term to provide grater accountability and certainty by excluding the use of physical force on a child as a consequence or punishment for behaviour other than to prevent imminent harm to self or others.