Proposed *Child and Family Services Act* Amendments:

A Position Paper of the Ontario Association of Children's Aid Societies

OACAS *CFSA/FLR* Committee

February 2005

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*Refers to the Ontario Association of Children's Aid Societies *Child and Family Services Act/Family Law Rules* Committee.

MEMBERS OF OACAS *CFSA/FLR* COMMITTEE, 2004

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Mary Ballantyne	*CAS of Simcoe*
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Gail Vandermeulen	*OACAS*
Susan Verrill	*Dilico Ojibway Child and Family Services*
Anne Marie Walsh	*OACAS*

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INTRODUCTION

The Ontario Association of Children's Aid Societies (OACAS), in recognition of the mandated review of the *Child and Family Services Act (CFSA)* in 2005 by the Ministry of Children and Youth Services, has compiled recommendations for proposed amendments to the legislation, which governs the child welfare sector. We welcome the Ministry's review of Ontario's child welfare legislation as an opportunity to further enhance the protection of children in the Province and to augment the supports available to strengthen families.

Amendments to the *Child and Family Services Act* in March 2000 represented a significant contribution to the enhanced protection of children. The legislative amendments, in combination with the implementation of the Ontario Risk Assessment Model (ORAM), initiated changes that were broadly welcomed by the child welfare sector. The new provisions lowered the threshold of intervention in terms of neglect and sought to ensure earlier resolutions particularly for younger children. The *CFSA* and ORAM together have offered a common, research-based approach to child protection that has served to harmonize practice across the Province.

While the most recent amendments to the *CFSA* are laudable, those elements of the *Act*, which lie outside the purview of direct protection, require further attention in order to establish a comprehensive and flexible legislative structure responsive to the breadth and complexity of family needs with regard to their children. In proposing a significant package of amendments to the *CFSA* in 2005, the OACAS *Child and Family Services Act / Family Law Rules (CFSA/FLR)* Committee, in consultation with its member societies, recommends creating the necessary avenues for a more flexible system of child welfare, which would reach beyond the limits of risk-based practice alone. Our recommendations seek to ensure better outcomes for children and families; build upon the strengths of families and their communities; improve efforts for the prevention of harm to children; and strengthen plans for permanency for children and youth.

Early in the process of identifying areas in need of amendment, the OACAS *CFSA/FLR* Committee recognized that the focus of amendments to be considered by the Ministry would lie primarily outside the area of Part III (Child Protection). The amendments of March 2000 were seen as having necessarily focused on Part III, but attention to other Parts of the *Act* was now required. In addition, the work of the OACAS *CFSA/FLR* Committee, in identifying and proposing amendments to the *CFSA*, was enlarged in light of the recommendations of the *Child Welfare Program Evaluation* (2003)[1] and the initiatives taken on by the Child Welfare Secretariat in 2004. The scope of our undertaking has thus posed a challenge, which has grown larger than originally anticipated over the span of our involvement.

[1] *Child Welfare Program Evaluation*. November 2003. This evaluation report was prepared by the Ministry of Children's Services as a result of the review conducted by Lucille Roch.

This Paper outlines a number of proposed recommendations to the *CFSA* originating from a survey of a majority of Children's Aid Societies in 2003. Survey results identified a range of legislative concerns from the spectrum of practice areas in the child welfare sector. Based on the original survey results, as well as subsequent more focused survey results in 2004, together with discussions with CAS network groups, the OACAS *CFSA/FLR* Committee has distilled a core set of concerns deemed by respondents to be in most urgent need of being addressed through legislative amendment. Of paramount concern, and addressed in our recommendations, is the absence in the *Act* of a proclaimed Part VIII (Confidentiality of and Access to Records). Other recommendations seek to enable a flexible, child-centred practice, which would support positive outcomes for children and their families within a broad range of circumstances. Provisions are recommended for expanded permanency options for children and youth, and for a differential response with regard to services offered to families from the earliest contact.

The recommendations contained in this Paper are predicated on the availability of an adequate infrastructure and upon sufficient funding allowances to support the diversity of roles and functions of the Children's Aid Societies in this Province. In amending the *CFSA* to further enhance the protection and well being of children, new legal obligations may result in increased levels of accountability. It is essential to ensure that there will be an appropriate and sustainable funding framework, as well as adequate staffing and training for CAS staff, within the context of manageable workload areas of practice.

The recommendations set out in this Paper have been informed through an extensive consultation process within the child welfare sector. While unanimity on all issues is not possible, we have attempted to consider the views of this broad constituency for the purpose of grounding our recommendations within current research and supporting the ongoing development of a comprehensive scheme of legislative reform.

PRELIMINARY CONSIDERATIONS

Modernizing language

Some of the language of the *Child and Family Services Act* is archaic and modernization of such language should be seriously considered. Examples are the use of the terminology of "Society wardship" and "Crown wardship", and the reference to a child's "apprehension." The terms "Society wardship" and "Crown wardship" could be replaced by the terms "Temporary wardship" and "Permanent wardship" respectively, while the language referring to the status of "temporary care and custody", "temporary access" and "temporary supervision" during adjournment periods could be changed to "interim care and custody", "interim access" and "interim supervision" respectively, in order to avoid confusion. In this regard, one youth reported at a youth advisory group that she thought she would be receiving a crown at a Crown wardship hearing. Similarly, in the case of "apprehension", this is a term generally applied to criminals and an appropriate substituted term, such as "removal" or "admission to care", would appear to be more appropriate when applied to a child. In considering a change of language, it would be important to ensure that there will not be unintended negative consequences for children because of the benefits derived from settled judicial interpretation of the relevant terms.

Modernizing language

The OACAS recommends that serious consideration be given to modernizing some of the archaic and/or stigmatizing language in the CFSA. *Examples are replacing the terms "Society wardship" and "Crown wardship" with the terms "Temporary wardship" and "Permanent wardship" (while consequentially changing the language of "temporary care and custody" to "interim care and custody" including changing the language of all other forms of "temporary orders for access and supervision" to the corresponding "interim orders for access and supervision") and replacing the term "apprehension" with an appropriate substituted term, such as "removal" or "admission to care."*[2]

Rights and entitlements of children and youth under Part V of the CFSA

Given the importance of the *United Nations Convention on the Rights of the Child*, with its explicit emphasis on treating children and youth as rights-holders, it is important to review and update Part V (Rights of Children) of the *CFSA*, which was enacted prior to the *United Nations Convention on the Rights of the Child* taking effect. Although certain rights or entitlements are prescribed in Part V, they relate only to "children in care" and are limited to the particular circumstances described. Of particular concern is section 101 of the *CFSA*, which sets out a confusing double-standard that prohibits the use of corporal punishment only in respect of those children and youth, who are either in CAS care or are receiving services under the *CFSA*. This means that children and youth in a foster home can be differentially treated depending on whether they are the foster children or biological/adoptive children of the same foster parents. A similar form of differential treatment can, at least, conceptually exist for children and youth living in the

[2] In light of the proposed changes in language, this proposed new terminology will be used throughout this Paper.

same family home, where those children and youth receiving services from a CAS will be legally protected from the use of corporal punishment, but those siblings, not receiving such services, will be deprived of the same protection. The importance of a total civil ban against corporal punishment has been reinforced by the admonition to Canada by the United Nations Monitoring Committee on compliance with the *Convention*, which exhorts Canada to take the necessary steps to not only remove section 43 of the *Criminal Code*, but also to "explicitly prohibit all forms of violence against children, however light, within the family, in schools and in other institutions where children may be placed."[3] Consequently, it is proposed that consultation be sought and consideration given to amending section 101 of the *CFSA*, so as to provide for a total civil ban against corporal punishment (without attaching any explicit sanctions, which if they were to exist, could be seen as a backdoor attempt to circumvent section 43 of the *Criminal Code* and to criminalize the use of corporal punishment). In this regard, well-considered proposed model legislation developed by the State of Massachusetts, which can be found at Appendix F, should be carefully examined. It is also important to note that total civil bans against the use of corporal punishment have been enacted in 13 other countries.[4]

***Rights and Entitlements of Children and Youth under Part V of the* CFSA**

The OACAS recommends:

- *that Part V (Rights of Children) of the* CFSA*, which was enacted prior to the implementation of the United Nations Convention on the Rights of the Child be reviewed and updated*[5]
- *that consultation be sought and consideration given to amending section 101 of the* CFSA*, so as to provide for a total civil ban against corporal punishment (without attaching any explicit sanctions, which if they were to exist, could be seen as a backdoor attempt to circumvent section 43 of the Criminal Code and to criminalize the use of corporal punishment). In this regard, proposed model legislation developed by the State of Massachusetts should be carefully examined.*

[3] Committee on the Rights of the Child, Consideration of Reports submitted by State Parties under Article 40 of the Convention, Thirty-fourth session, CRC/C/15/Add. 215 (2003) at paras. 32-33.

[4] Durrant, J.E., Ensom, R., and Coalition on Physical Punishment of Children and Youth (2004). *Joint Statement on Physical Punishment of Children and Youth*. Ottawa: Coalition on Physical Punishment of Children and youth, p 15.

[5] Legislation in other jurisdictions should be examined, such as Prince Edward Island's *Child Protection Act*, S.P.E.I. 2000, c. 3 and Nunavut's *Child and Family Services Act*, R.S.N.W.T. 1998, c. 17.

ALTERNATIVE DISPUTE RESOLUTION [6]

There are many benefits to Alternative Dispute Resolution mechanisms, such as mediation and family group conferencing. For example, the literature suggests that mediation has the following benefits: 1) high settlement rates; 2) more timely resolution of issues; 3) increased compliance with protection plans; 4) better outcomes for children; 5) cost savings; and 6) improved relationships between child protection workers and parents/families. In 1996, the OACAS Civil Litigation Task Force was asked to consider the role of mediation in child welfare and passed the following motion[7], confirming that it:

1. Endorses the role of child protection mediation in child protection;
2. Supports the positive benefits of mediation as identified through research;
3. Believes that the child protection system should have access to a roster of court approved mediators;
4. Encourages the education and training of the bar and social workers in understanding the role, benefits and purpose of mediation;
5. Recommends the creation of a mechanism and criteria for case selection where mediation is to be applied;
6. Supports legal aid as the shared funding mechanism in child protection;
7. Supports amendments to the *Child and Family Services Act* to allow for mediation at any point;
8. Supports the principle of mutual consent in mediation, and;
9. Endorses the need for training and accreditation of mediators with respect to the *CFSA* and the child welfare system.

The Panel of Experts[8], and the Civil Justice Review[9] both endorsed the use of child protection mediation as an appropriate mechanism in many cases. The Panel of Experts recommended the specific inclusion of child protection mediation in the *CFSA* on the basis that: "the legal system is adversarial, complex, costly and time-consuming. Mediation can reduce the litigious aspects of conflict resolution through cooperative and non-coercive problem solving. This can lead to the earlier resolution of child protection disputes and the meaningful involvement of parents and, where appropriate, children. The protection, safety and well-being of the child must be the primary objective of all mediated agreements."

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6 Several earlier documents share the OACAS position on ADR including:
Report of the Child Protection Mediation Working Group to the Child Protection Backlog Steering Committee as presented to the Justice Summit, September 21, 2004;
M. Bernstein, *Child Protection Mediation: Its Time Has Arrived*, in Canadian Family Law Quarterly, Vol. 16, Number 1, July 1998, at pp. 73-12; and
J. Maresca, *Mediating Child Protection Cases* (1995), 74 Child Welfare 731.

7 As reported in Proposed Amendments to the *Child and Family Services Act*: Plain English Interpretation (OACAS CFSA Task Force – November 1996.)

8 The Panel of Experts was formed in 1996 by the Ministry of Community and Social Services to review key provisions in the *Child and Family Services* Act. Their report entitled *Protecting Vulnerable Children* was released in March 1998. Members of the panel included Judge Mary Jane Hatton, Justice Grant Campbell, Detective Hector Colantoni, Rick Ferron, Dr. Dirk Huyer, Theresa Johnson Ortiz, Dr. Harriet MacMillan, and Dr. Nico Trocmé.

9 Ministry of the Attorney General, *Civil Justice Review*, Supplemental and Final Report, November 1996.

Alternative Dispute Resolution [10]

The OACAS recommends that a new section be added as follows:

- *that the court shall consider appropriate Alternative Dispute Resolution mechanisms, including mediation and family group conferencing, prior to making an order at any stage of a child protection proceeding*
- *that the parties shall attend court prepared to address the issue of whether Alternative Dispute Resolution processes would be appropriate in the particular circumstances, having regard to the fact that participation in such processes remains at all times completely voluntary*
- *that if as a result of any Alternative Dispute Resolution mechanism, a written agreement is made after a proceeding is commenced to determine if a child is in need of protection, the parties may file the agreement with the court*
- *that the sessions shall be semi-open, so that conversations that take place privately between a participant and the mediator are confidential, subject to the mediator's reporting duty, but conversations that occur when all of the parties meet together can be introduced into evidence by any of the parties in court, except that this shall not preclude the introduction of otherwise confidential information into evidence with the consent of all parties or where such information relates to the safety of the child.*[11]

[10] The proposed amendments in the first and third bullets are based on sections 22 and 23 of the British Columbia *Child, Family and Community Service Act*, R.S.B.C. 1996, c.46.

[11] The content of this fourth bullet differs from the preceding points in the B.C. model; the B.C. model puts more emphasis on the confidentiality of the communications. In this context, it is important to remember the legal obligations of a Children's Aid Society under subsection 15(3) of the *CFSA,* which by implication require the introduction of relevant evidence into a protection proceeding, particularly where the information is already known to a Society or relates to a child's safety.

SERVICES AND PROTECTION CONCERNS

Expansion of grounds for protection

Domestic violence

The child welfare sector has recognized the growing literature that suggests that children can suffer significant emotional harm by being exposed to domestic violence. The Panel of Experts in 1998 recommended that exposure to domestic violence be included as a separate ground for protection. The fact that exposure to domestic violence has not been included as a separate ground for protection has resulted in an uneven response from both the child welfare sector and from the judiciary. Currently, six out of ten provinces include domestic violence as grounds for protection in their legislation. In Ontario, there continues to be strong support for including domestic violence as a ground for protection under subsection 37(2).

Domestic violence

The OACAS recommends that domestic violence be added to clause 37(2)(f) so that it reads "…and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act, pattern of neglect and/or exposure to domestic violence on the part of the child's parent or the person having charge of the child."

Caregiver behaviours

In 1998, the Panel of Experts contended that the test for emotional harm in subsection 37(2) of the *CFSA* was too onerous, as it relied only on symptoms of the child, rather than behaviours of the caregiver. While the expanded definition of neglect has provided the child welfare sector with additional opportunities to intervene in circumstances where families are neglecting the basic needs of their children, expanding the definition and listing the specific behaviours/ conditions, which put children at risk, would allow the child welfare sector to intervene and protect children more readily. The OACAS reiterates the recommendation of the Panel of Experts that parental behaviours be included within subsection 37(2) as separate grounds for protection.

Caregiver behaviours

The OACAS recommends that clauses (m) and (n) be added to subsection 37(2) as follows:

(m) The child has suffered physical and/or emotional harm by being subjected to:

i) chronic neglect
ii) significant alcohol and/or drug usage
iii) significant mental health problems
iv) significantly impaired parental capacity
v) exposure to pornography

as a result of the actions of the person having charge of the child, or caused by that person's failure to provide for, or supervise, or protect the child.

(n) There is a risk that the child is likely to suffer harm as described in clause (m).

Abandonment and residential placement

Two principal unrelated protection grounds have been grouped together in clause 37(2)(i). Many parents have difficulty agreeing to a protection finding that refers to abandonment when residential placement is required, even after an explanation has been provided.

Abandonment and residential placement

The OACAS recommends that two clauses be created out of clause 37(2)(i): one for the "abandoned child or the parent dies" and a separate clause for "need for residential placement."

Definition of "child"

The OACAS reiterates the recommendation of the Panel of Experts in its 1998 report *Protecting Vulnerable Children* that the definition of "child" should include youth up to eighteen years of age. This would be consistent with the definition of a "child" in the *CFSA* under subsection 3(1). A number of other Canadian jurisdictions provide child welfare services to youth up to the age of eighteen. A change in the definition would be consistent with Article 1 of the *United Nations Convention on the Rights of the Child*.

Definition of "child"

The OACAS recommends:

- *that the definition of a "child" in subsection 37(1) be made consistent with that of subsection 3(1), which defines a "child" as "a person under the age of eighteen years."*
- *that all related provisions of the Act affected by this amendment be similarly amended to correspond with this change in age.*
- *that clause 29(2)(a) be amended to increase the age of eligibility for Temporary Care Agreements to under 18 years of age.*

Child's use of services

With the change in definition of age, Societies would be confronted with the responsibility of having to protect older children who have no desire to remain in the Society's care or co-operate with services. The existing "best interests" test often makes it difficult to convince the court to terminate Society involvement when a youth is refusing services. Amendments to subsection 37(3), which relate to the best interests of the child, would allow children over the age of 16 to have a right to exercise control over their lives and request that services be withdrawn, if so desired, and would allow agencies, in appropriate circumstances, to discharge children who are not cooperating and/or benefiting from the services being provided.

Child's use of services

The OACAS recommends that under subsection 37(3) a new clause be added to the list of "best interests" considerations, stating "where a child is sixteen years of age or older, the child's use of services and the child's wishes about future use of services."

Extended Care and Maintenance

The current system of Extended Care and Maintenance allows agencies to provide emotional and financial support to youth under age 21. Societies, and the youth in care network, report that many youth are thereby abandoned and left without financial support while in the middle of post-secondary studies. Consequently, many former Crown wards are forced to end their studies or put them on hold. Such cessation of support has contributed to recent statistics which state that as few as 20% of former Crown wards are self-supporting. The OACAS reiterates its 1996 recommendation, and that of the Panel of Experts in 1998, in suggesting that support to former youth in care be extended to the completion of undergraduate level training or equivalent, or until age 24[12], whichever comes first.

Extended Care and Maintenance

The OACAS recommends that subsection 34(3) of Regulation 70 under the Child and Family Services Act be amended as follows:

- *that support to former Permanent or Crown wards be extended to the completion of undergraduate-level training or equivalent, or age twenty-four, whichever comes first.*
- *that the amount of money paid to former Permanent or Crown wards on Extended Care and Maintenance be adjusted upwards to reflect the current needs of children, having regard to all relevant considerations, including the cost of inflation.*
- *that former Permanent or Crown wards on Extended Care and Maintenance be granted free tuition while attending a post-secondary institution.*

[12] The Panel of Experts used age twenty-three in its recommendations for age extensions to Extended Care and Maintenance in the *CFSA*.

Warrants

In its 1998 report, the Panel of Experts expressed the belief "that well-trained child protection workers are the most appropriate persons to make decisions to apprehend provided there are appropriate consultative mechanisms within agencies."[13] Virtually all non-consensual removals occur because a child is at risk and requiring workers to obtain warrants to bring a child to a place of safety can significantly delay the process. The OACAS supports the recommendation of the Panel of Experts in 1998 that the requirement to obtain a warrant to remove and bring a child to a place of safety be eliminated.

Warrants

The OACAS recommends:

- *that the requirement for obtaining a warrant to remove and bring a child to a place of safety be abolished by repealing the relevant sections of the Act.*
- *that the sections related to the powers of a peace officer and/or parent be retained.*

Warrants for children in care

Children's Aid Societies are legally obligated to have a child remain in or return to care if legally placed in care. The assistance of peace officers is often required and can only be obtained if a warrant is filed with the peace officers.

Section 41: Warrants for children in care

The OACAS recommends that warrants for children in care be retained, but that clause 41(1)(b), relating to the warrant requirement for a fresh removal of a child and transfer to a place of safety be repealed, and that the word "substantial" in clause 41(4)(b) be eliminated, as it has been in virtually all other places in the Act.

Time limits

Currently, subsection 46(1) of the *CFSA* specifies that the first court appearance must occur within five days after a child is brought to a place of safety unless the child is returned to the person who last had charge of the child or a temporary care agreement is made under subsection 29(1). While the OACAS supports a prompt post-removal court appearance to ensure that the rights of parents and children are respected, five days has been found to be insufficient time to prepare court documents and to assess the family, particularly where time is preempted because of intervening weekends and statutory holidays. The Panel of Experts in 1998 recommended an extension to ten days. In seeking to strike a balance between the family's right to a timely show cause hearing and the CAS's need for additional days, the OACAS recommends that subsection 46(1) be amended to enable the post-removal court appearance to occur within five court days after a child is brought to a place of safety, unless the child is returned to the person who last had

[13] *Expert Panel Report*, at p. 40.

charge of the child or a temporary care agreement is taken. Extending this post-removal time period would allow parents to obtain and instruct legal counsel and would also provide a Society with more time to investigate and prepare for court. This change would also allow the parties more time to consider alternative plans, resulting in more settlements and fewer court appearances. This initiative was supported by the Panel of Experts in 1998 and reflects the approach by child welfare legislation in four other provinces.

Time limits

The OACAS recommends that subsection 46(1) be amended to read: "As soon as practicable, but in any event not later than the fifth court day, excluding Saturdays, Sundays, statutory holidays and all other days when the court offices are closed, after a child is brought to a place of safety…"

Duty to report

The duty of the public and professionals to report is an essential element of the child protection system. Amendments to subsection 72(1) have been positively received and have resulted in clearer referrals to Societies. The OACAS supports further amendments being made to the wording, including the addition of the fine section to subsection 72(1) and increasing the maximum fine. The Panel of Experts in 1998 made recommendations similar to those following.

Duty to report

The OACAS recommends:

- *that the requirement that written documentation relevant to suspected protection concerns be included in the referral where appropriate and therefore, that subsection 72(1) be amended to include the words "and the information, including copies of all written material on which the suspicion is based" after the word "suspicion."*
- *that the fine for failing to report be increased from $1000 to $5000.*
- *that subsection 72(6.3) make explicit that notification of a breach of duty to report will be reported to the person's professional association.*

Differential Response

The OACAS supports the findings and recommendations of the Differential Response Sub-Committee of Ontario's Children's Aid Society Directors of Service. The findings of this Group are contained in its Report entitled, *A Differential Service Response for Child Welfare in Ontario* (September 2004.)[14] Child welfare standards, despite the reforms of March 2000, are still inadequate for the diverse circumstances encountered by CASs. Flexibility of response to each case would enable workers to take an interventionist stance in high-risk situations and a more collaborative approach in lower risk cases. The Ontario Model is designed to allow movement

[14] A report entitled *A Differential Service Response for Child Welfare in Ontario* was completed in September 2004 by the Differential Response Sub-Committee of Ontario Children's Aid Society Directors of Service. Co-chairs of the Committee were Marion Roberts (Ottawa CAS) and Rhonda Hallberg (London-Middlesex CAS).

between service options based on a review of a strengths-based child and family assessment that is completed in the context of the child's community and cultural identity.

The implementation of a differential response program for Ontario was supported in the 2003 *Child Welfare Program Evaluation*. This report noted that a differential response model "has the potential to reduce pressure on the child welfare system by diverting some non-urgent cases to other agencies where other services are available." Although the report by the Differential Response Sub-Committee proposes a "broadened screening system allowing for a protection process as well as an assessment process," high risk cases would continue to require a full child protection investigation while cases of lower risk would receive a modified protection/family assessment.

The implementation of a differential response model is already enabled by subsection 15(3) of the *CFSA*, which states that one of the functions of a Society is to "provide guidance, counselling, and other services to families for protecting children or for the prevention of circumstances requiring the protection of children." In order to bring about the desired outcomes inherent in this practice model, amendments of the Regulations will be required. A complete listing of the proposed changes to the Regulations as itemized by the Differential Response Sub-Committee can be found in Appendix "B" of this Paper.

Differential Response

The OACAS recommends that amendments be made to Ontario Regulation 206/00 regarding the implementation of a model of differential response as set out in Appendix B of this Paper.

PERMANENCY AND PLACEMENT OPTIONS

Recommended amendments related to permanency and placement options for children share the common goal of seeking to reduce the disruption for the child who must be separated from his or her parents. The preferential option for placement of the child, whenever possible and appropriate, is with familiar caregivers. This preference underscores the importance of the recommendations pertaining to place of safety, kinship care and customary care.

Time limits for temporary care

During the last review, the Panel of Experts recommended that the 24-month rule be amended to lower the limit for younger children and make the time in care an accumulative total. The goal was to provide time limits to promote permanency planning in decision making for children in care. However, it is necessary to clarify some of the language in section 70.

Time limits for temporary care

The OACAS recommends:

- *that subsection 70(4) be amended to include a statement that the extension of six months is a "one time extension."*
- *that clauses 70(1)(a) and (b) be amended to state it is the age of the child at the time of admission, and not at the time of the order, that governs the time limits.*
- *that a clause referring to a sibling group be added so that the time limit that applies to the entire sibling group is the same as the time limit applicable to the youngest child, in those circumstances where the plan is the same for the whole sibling group.*

Place of safety

Currently, the child protection worker is limited to removing the child (with or without a warrant) and bringing the child to a "place of safety", which by definition, is an approved destination such as a foster home. Other provincial jurisdictions are either silent on this point or allow for flexibility and discretion in the decision as to where a child is placed post-removal. There is provision in the current legislation for the Director to designate "a place" as a place of safety and some Societies are using this authority to designate extended family or community members when a child is removed without parental consent. Nonetheless, the interpretation and practice with regard to placing children in a place other than a pre-approved foster home, when so removed, is varied throughout the province and there is concern expressed by some Societies about using this authority in these situations. Consequently, some children are placed in foster homes upon non-consensual removal in circumstances, which may be unnecessarily disruptive and traumatic for the child. When it is necessary to remove a child from an unsafe situation, placement of the child with familiar caregivers, wherever possible and appropriate, should be facilitated in keeping with the principle of the least disruptive course of action that is available to help a child. It is necessary to clarify in the legislation that CASs do not require the consent of

the custodial parent(s) to seek out and place a child with an extended family or community member. It is also necessary to provide clear authorization for CASs to search the Fast Track Information System to screen applicants for kinship care (as well as for fostering and adoption placements) [see OACAS Recommendations in relation to these two areas of required access to information, which are set out in "Information Practices – Part VIII", found later in this Paper].

Place of safety

The OACAS recommends two possible options for amendment, with preference for the first option:

- *Amend subsection 37(1) by replacing the term "place of safety" with "a safe place." A "safe place" would then be defined as "a foster home, a hospital, a shelter, or the home of a member of the child's extended family or community." In the current wording the Society has the authority to designate any home as a place of safety so the discretion to allow for a home to be considered a "safe place" already exists. This option would eliminate the need for subsection 17(2); or*
- *Amend subsection 37(1) by expanding the definition of "place of safety" to read as follows: " 'place of safety' means a foster home, a hospital, and a place, including the home of a member of the child's extended family or community, or one of a class of places designated as such by a Director under subsection 17(2) of Part I..."*

Importance of kinship ties

It is the legislated preference to place children with extended family or community members where possible and appropriate. Kinship care has been identified as a priority for child welfare by the Provincial Kinship Care Committee[15] and in the *Child Welfare Program Evaluation Report*. As well, several Societies have been involved in the investigation and development of various local models of kinship care. While the OACAS recommends amendments to the *CFSA* with regard to elevating the importance of kinship ties, we recognize that the work of the Provincial Kinship Care Committee and of the local initiatives represents an ongoing project whose specific forms are still being sculpted.

The *Child Welfare Program Evaluation Report* finds that "kinship care (in Illinois) resulted in better outcomes for children and significant savings to the cost of residential care." The report further notes that "permanency planning could be encouraged by providing financial incentives for completed adoptions and alternative care arrangements."

In order to effectively implement a more formal and consistent application of kinship care in the province of Ontario, legislative change is required. The Provincial Kinship Care Committee has identified the importance of developing a flexible, strengths-based kinship care model that encompasses out of care and in care options on the continuum of care options available to children. The development of such a model continues to be the goal of the Provincial Kinship

[15] A draft report entitled *"Ontario Kinship Model"* was presented at the OACAS Consultation in December 2004 by the Provincial Kinship Care Committee, which is composed of CAS Directors of Service, Resource Managers and OACAS staff. Co-chairs of the Committee are Susan Carmichael (Simcoe CAS) and Jacquie Woodward (Ottawa CAS).

Care Committee with the endorsement of the wider child welfare sector. The OACAS is therefore proposing that there be explicit recognition of the importance of kinship ties so that placement with kin, whether temporary or permanent, is supported more clearly in the legislation (i.e. as opposed to being placed in the care of the province) and so that the necessary resources can be allocated to ensure stability for those children placed with kin.

For the purposes of this topic, we will primarily use the term "kinship ties" and by inclusion "kinship" and "kin", but not the term "kinship care", which connotes a particular status. This is similar to the approach taken in British Columbia[16]. This is a decision that may require further examination.[17]

Kinship ties and permanent/concurrent planning: Declaration of Principles

The OACAS recommends that two new provisions be added to the Declaration of Principles in subsection 1(2) as follows:

- *"To recognize that kinship ties and the child's attachment to the extended family and to members of his or her community should be preserved if possible."*[18]
- *"To recognize that positive outcomes can be achieved and significant delays avoided for children and youth through effective early permanency and concurrent planning."*

Kinship ties: Concept of family

The definition of "extended family" in subsection 37(1) is too narrow. A broader concept of family than that implied in the term "family unit" is needed and supports offered to a family should include support to the child's significant familial and kinship ties.

Kinship ties: Concept of family

The OACAS recommends that paragraph 1(2)(1) be amended as follows:
"To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family and support significant familial and kinship ties and, wherever possible, be provided on the basis of mutual consent."

[16] B.C. legislation does not use the term "kinship care", but refers to "kinship ties" and "kin". It is intended, among other things, to assist children in remaining out of care, particularly Aboriginal children. In its legislation British Columbia makes available an income-based subsidy for kinship care providers whether the child is in care or not. Further information regarding B.C.'s legislation, the *Child, Family and Community Service Act* can be found at http://www.qp.gov.bc.ca/statreg/stat/C/96046_01.htm.

[17] For example, the Provincial Kinship Care Committee has defined "kinship care" as "Any living arrangement in which a relative or someone else who has an emotional bond to the child/youth takes primary responsibility to rear the child/youth."

[18] This wording, as slightly amended, is taken from the principles found in clause 2(e) of the *Child, Family and Community Service Act, 1996* of British Columbia.

Kinship ties, kin and kinship: Definitions

Kinship ties, kin and kinship: Definitions

The OACAS recommends that a new definition of "kinship ties" be included in subsections 3(1) and/or 37(1) as follows:

- *that "kinship ties" be defined as "The relationship between a child/youth and a member of his or her extended family or community or any adult who has an emotional bond with the child/youth and that 'kin' and 'kinship' have corresponding meanings."*

Kinship ties: Best interests

Kinship ties: Best interests

The OACAS recommends that the "best interests" definition under paragraph 37(3)(6) be amended to read: "The child's relationships by blood, an adoption order, or other kinship ties."

Promotion of kinship ties: Placement options

There is a need for clearer language in the legislation that legitimizes and safeguards the placement of children with persons who have kinship ties. Provision is needed for the support of kin providers, both financially and by way of court orders specifically inclusive of kinship participation.

Promotion of kinship ties: Placement options

The OACAS recommends that the CFSA *provide mechanisms for the support of kin providers, both financially and by way of special private custody court orders.*

Subsidy for kin providers during adjournment period

Based on the findings outlined in the literature on kinship care, it is necessary to assist kin, by way of financial and other supports, in providing for children so that a child may not have to come into the care of the Society. Subsection 51(2) may be flexible enough to allow for the child to be placed with kin on an interim basis. A more explicit allowance for subsidy would encourage the development of regulations to address the financial supports required by caregivers. Allowance for subsidy should also be included in section 57.

Subsidy for kin providers during adjournment period

The OACAS recommends that clause 51(2)(c) be amended to state that where a child is placed with a person during the adjournment of a protection proceeding subject to interim Society supervision, under this clause, that person "where he or she has a kinship tie with the child, may be eligible to receive a subsidy for the care of the child."

Private Custody Orders under CFSA

Amendments to the *CFSA* that would permit private custody orders[19] for those children who have been found in need of protection, would secure the involvement of kin in the lives of children in those circumstances where children cannot return to the care of their parents. Permanency for children would be enhanced based on the finding of protection and the resulting inapplicability of potentially disruptive status review applications. Under this new scheme, it would be possible for a person with a kinship tie to the child, such as a relative, community member, or foster parent, to apply for a private custody order under the *CFSA*, rather than the Society having to apply for a series of supervision orders because it is too costly and cumbersome for that relative, community member, or foster parent to apply for a custody order under the *Children's Law Reform Act*. The distinction being proposed, however, is that foster parents would not be entitled to be considered for such a private custody order under the *CFSA* until after the child has not only been found to be in need of protection, but also been made a Permanent ward, in order to avoid setting up an unfair competition between the child's foster parents and members of the child's immediate and extended family.

In addition, like any private custody order, these new orders under the *CFSA* would not be time-limited and would be subject to variation, based upon a material change in circumstances, upon notice to the CAS. There is a need to consider whether this variation application should be heard under the *CFSA* or under the *CLRA*. For all other Ontario caregivers who want to assume private custody, their remedies will have to be sought under the *Children's Law Reform Act*. Temporary Care Agreements should also be permitted to include kin as parties where appropriate. As well, nothing in these proposed amendments is meant to interfere with informal kinship care arrangements, which as in British Columbia, would be governed by standards, directives and procedural manuals.

Private Custody Orders under CFSA[20]

The OACAS recommends:

- *that subsection 57(1) be amended to add a new paragraph, which would provide the dispositional authority for a private custody order to be granted in favour of a person with a kinship tie to the child following a finding that the child is in need of protection, based upon a consideration of the child's best interests. An amendment to subsection 57(4) would also be required to reflect this additional disposition that would be available for the court to consider. A private custody order in favour of a foster parent could not be granted at this early stage (see below).*

[19] In some jurisdictions, such as Alberta, this has been called "private guardianship", but in Ontario, we do not have "temporary and permanent "guardianship" orders in the *CFSA* and private applications under the *Children's Law Reform Act* are for "custody" and not "guardianship" orders. Similarly, the elevated custodial status of foster parents is referred to in other jurisdictions, as "foster guardianship", a term that does not fit within the legislative framework of Ontario.

[20] This proposed scheme borrows some components from the legislative framework set out in sections 52-57.1 of the *Alberta Child, Youth and Family Enhancement Act*, R.S.A. 2000, C-12. That statute, however, does not contain separate thresholds for kin, who are not foster parents, on the one hand, and foster parents who are kin on the other.

- *that subsection 57(1) be further amended to add a new paragraph stating that where a child is made a Permanent ward, then the child's foster parent may be granted private custody of the child under the* CFSA *and may be eligible to receive a subsidy for the child's care, provided such a disposition is in the child's best interests.*
- *that like any private custody order, it would not be time-limited and would be subject to variation, based upon a material change in circumstances, upon notice to the CAS. Consideration should be given as to whether such variation applications ought to be heard under the* CFSA *or under the* CLRA.
- *that where a private custody order is made under the* CFSA*, the kin provider be eligible to receive a subsidy for the child's care, and in appropriate cases, to apply to adopt the child.*
- *that the order would have the same force and effect as a private non-protection custody order made under the Children's Law Reform Act.*
- *that the Temporary Care Agreement provisions in section 29 be amended to allow for an agreement that facilitates the placement of a child with a person with kinship ties to that child and would enable the kin provider to be a party to the agreement.*[21]

Sibling access

Representatives from the Youth Advocacy Committee of the OACAS,[22] in consultation with the OACAS *CFSA/FLR* Committee, clearly identified the need for sibling access as being of great significance to youth. It is proposed that the legislation include specific rights for siblings to have access to one another and to be permitted to maintain their relationships.

Sibling access

The OACAS recommends:

- *that subsection 58 (1) include specific reference to siblings through addition of language as follows: "The court may, in the child's best interests…make, vary or terminate an order respecting a person's (including the child's sibling's) access to the child or the child's access to a person (including a sibling)"; and*
- *that subsection 58(2) provide for the right of a sibling to apply for an access order to a child, for example by inclusion of the following statement: "Where a child is in a society's care and custody or supervision", add a clause"(d) a sibling of a child."*

Special Needs Agreements

Although there is provision for Special Needs Agreements in sections 30 and 31 of the *CFSA*, the current practice of CASs is to refrain from entering into these agreements because the Ministry has issued a directive for CASs not to enter into such agreements.

[21] Temporary Care Agreements in B.C. allow for kin to be treated as parties to the agreement where appropriate. See *CFCSA*, clause 35(2)(d).

[22] The Youth Advocacy Committee of the OACAS is a forum for youth in care across Ontario sponsored by the OACAS. Its goal is to identify and bring forward issues of concern to youth in care for advocacy within the child welfare sector.

Special Needs Agreements

The OACAS recommends:

- *that the Special Needs Agreement provisions in sections 30 and 31 of the* CFSA *remain in place with the necessary resources being made available so that Societies and families are able to utilize these agreements where appropriate.*
- *that determination be made as to the appropriateness of CASs as the vehicle to support and administer these agreements*.

Customary care

In June 2004, the First Nations/Aboriginal Child Welfare Issues Sub-Committee of the OACAS produced a preliminary Discussion Paper entitled *Customary Care: Considerations for Child Welfare in Ontario.*[23] The Paper attempted to articulate several grounding principles of customary care and to identify areas of impediment to the implementation of customary care within the child welfare sector. It was circulated to First Nations and Aboriginal communities and to child welfare service providers with a request for feedback. The work of the subcommittee is expected to continue. The subcommittee strongly recommended the amendments proposed in Appendix "C" of this Paper.

Customary care

The OACAS recommends*:*

- *that the Ministry of Children and Youth Services demonstrate commitment to the implementation of customary care practices across the Province for all eligible First Nations children by the provision of clear and decisive legislative and policy direction.*
- *that, consistent with subsection 57(5), the legislative and policy direction taken by the Ministry of Children and Youth Services clearly support First Nations children remaining within the First Nations community, wherever this is possible and consistent with the child's best interests.*

[23] *Customary Care: Considerations for Child Welfare in Ontario*, June 2004. OACAS. This Paper is a discussion paper with respect to current understandings and practices of customary care in the child welfare sector.

ADOPTION

Introduction

The need for legislative reform in the area of adoption has been well documented by both the child welfare sector and the Ministry.[24] Support and recommendations related to openness as a philosophical underpinning for the *CFSA*, the expansion of post adoption services and the provision of adoption subsidies are addressed here. In addition, some specific changes unrelated to the major themes are highlighted. Current recommendations with respect to adoption disclosure are not included in this Paper, as they have already received OACAS Board approval and been submitted to government. They can be reviewed in Appendix E.[25]

Openness as a philosophical underpinning of the CFSA

The primary reason for moving towards a recommendation of openness in adoption is the belief that it is in the best interests of children to do so. There is a significant amount of literature that supports the benefits of openness to children while at the same time it must be acknowledged that empirical research in this area is not extensive.

Definition of openness in adoption

An adoption may be fully open in the sense that the birth family, child and adoptive family have full disclosure and the opportunity for ongoing face-to-face contact. However, there is a range of activities or arrangements that support the growth of an emotionally healthy adoptee without including ongoing direct contact or the sharing of identifying information. This entire range of options helps to define openness as an approach to adoption, while distinguishing an open adoption from one that is open in only some respects.

Clinical options that help define the degree of openness include:

- sharing of complete non-identifying/identifying histories.
- the meeting of adoptive and birth families with/without the sharing of identifying names.
- exchange of letters – ongoing, indirectly/directly.
- exchange of photographs – ongoing, indirectly/directly.
- contact between the child and the birth family through an intermediary.
- scheduled supervised contact.
- scheduled unsupervised contact.
- exchange of gifts.

[24] Reviews of the provincial adoption system between 1996 and 2001 are summarized in the appendix of the report completed by the adoption sub-committee of the Resource Managers Network entitled *Provincial Adoption Initiative, 2001*.

[25] Recommendations regarding adoption disclosure are included in the Submission to the Standing Committee on General Government regarding Bill 77: *Adoption Disclosure Law Amendment Act*, 2001, M. Bernstein & M. Allan, Journal of the Ontario Association of Children's Aid Societies, Vol. 45, Number 2, December 2001, pp.12-20.

- contact with siblings but not birth parents.
- some other appropriate arrangement that is consistent with the present and evolving needs of the child.

Although private practice in both Canada and the United States has supported open adoption for some time, there are sound reasons for not moving at this time to full "open adoption" as the standard in the public sector. At the same time, we have to acknowledge that present best practice in Children's Aid Societies stretches the limits of the current legislation. These limitations are not in keeping with research findings that support greater openness.

It is clear, from consultation with the child welfare sector[26] and review of the literature, that moving cautiously but deliberately in the direction of greater openness, when it is in the best interests of the child, is advisable as the next step in developing adoption in this province.

Openness

The OACAS recommends that the concept of openness in adoption be incorporated into the Declaration of Principles in section 1 to act as an underpinning for decisions impacting upon the future of children under both Part III and Part VII.

Concept of "as if born to"

Section 158 should be amended to include the importance of a life long link for children to their birth families whenever it is in their best interests to do so.

Concept of "as if born to"

The OACAS recommends the amendment of section 158 to replace the premise that an adoptive child is "as if born to" his/her adoptive family. The new statement should ensure the legal rights of the child while acknowledging the importance of the child's birth family in the life of that child.

Changing of given name of adoptee

The current practice of allowing adoptive parents to change the first name of their adopted child is being questioned. The adoptive parents' claiming of the child should not take precedence over the need of the child to maintain his or her identity, subject to safety considerations.

Changing of given name of adoptee

The OACAS recommends that an amendment be made to clause 153(1)(b) to prohibit the changing of the given name of a child under 12 years of age, who is being adopted, if that name is meaningful to the child, unless a new name is required to address safety issues.

[26] Throughout the last year, there have been dialogues with CAS Resource Managers and adoption practitioners, as well as a survey of the child welfare sector arranged by the Adoption Working Group of the OACAS *CFSA/FLR* Committee, with respect to openness (July 2004).

Legislative options under Part III to support a philosophy of openness

If openness becomes an underpinning for the *CFSA*, it will require consideration at every step of the judicial process. It is not just a concept that will help define clinical practice under Part VII; it is critical to the disposition of protection cases under Part III.

The child welfare sector strongly opposes the potential use of openness as a bargaining tool in protection proceedings. It also feels that the judiciary should not determine what openness should look like, except where there is agreement between the parties, including any prospective adopters, and the disposition is in accordance with both stipulated criteria and the child's best interests, as legislatively defined. There is a consensus that the process to determine the nature of openness should also be influenced by sound clinical knowledge. It is also recognized that there must be more than one means to address the degree of openness that is appropriate.

In 1992, a report by the Adoption with Access subcommittee of the Canadian Bar Association – Ontario, recommended adoption with access to the birth family through the use of a contact order defined at the time of Crown wardship.[27]

During the 1990's, other jurisdictions began to address the contact issue through the use of mediated adoption agreements.[28]

An inter-jurisdictional report prepared in May 2004 by the Nova Scotia Department of Community Services indicates that innovative strategies to address openness are now in place in Newfoundland, Nova Scotia, Manitoba and British Columbia.[29]

Under Part III, there will be circumstances where Permanent wardship with no access will continue to be the only safe disposition. For these children, adoption may or may not be the appropriate permanency plan.

There will also be situations where Permanent wardship with access (with no adoption plan) will be in the best interests of the child, such as where the child is older and there is a significant attachment between the child and members of his/her birth family.

The third option, which would require an amendment to section 57 of the *CFSA*, would be Permanent wardship, with an openness order (for the purpose of adoption). It is proposed that all the parties must consent to the openness order, including the prospective adopters, as a child with

[27] Marvin Bernstein, Dianne Caldwell, G. Bruce Clark, & Roselyn Zisman. *Adoption with access or "open adoption"*. Canadian Family Law Quarterly, Vol. 8, Number 3, April 1992, pp. 283-289.

[28] Bernstein, M. *The use and enforceability of mediated written adoption agreements*. Journal of the Ontario Association of Children's Aid Societies, March 1998, Vol. 42, Number 1, pp.19-24.

[29] *Adoption Project, Inter-Jurisdictional Survey of Adoption Services*, prepared by the Adoption Project Team, Family and Children's Services, Nova Scotia Department of Community Services, May 2004.

an "openness order tag" may be difficult to place for adoption. The court may also rely upon any openness agreement that the parties have entered into, with or without the benefit of a mediator. In this regard, it is proposed that Part VII of the *CFSA* be amended, in order to provide for the availability of openness agreements, which may be facilitated by third party mediators.

In Ontario, the application of openness to decisions made under Part III will remove the option of orders that are silent on access and replace them with clear directions either through openness orders[30] or openness agreements that may be facilitated through the use of mediation. Even where the court grants an order of Permanent wardship with no access, it will still be possible (with these new amendments) for the court to recommend to the parties that they consider the merits of an openness order or an openness agreement, including the value of engaging a mediator.

Dispositions regarding Permanent wardship orders

The OACAS recommends an amendment to section 57 to include a new subsection, which would set out three potential dispositions with respect to Permanent wardship orders:

- *Permanent wardship with no access (plan may or may not be for adoption). [In these circumstances, the statutory presumption against access being attached to a Permanent wardship order should be adhered to more stringently.*[31] *The court may also recommend to the parties that they consider the merits of an openness order or an openness agreement, including the value of engaging a mediator].*
- *Permanent wardship with access (plan is not for adoption). [In these circumstances, access should only be granted by the court where the presumption against access being attached to a Permanent wardship order can be rebutted on the basis of cogent evidence].*
- *Permanent wardship with an openness order (plan is for adoption). [In these circumstances, all the parties must consent to the openness order, including the prospective adopters, as a child with an "openness order tag" may be difficult to place for adoption. The court may also rely upon any openness agreement that the parties have entered into under Part VII].*

Principles governing variations of openness agreements/openness orders

It is proposed that any remedies to vary an openness agreement or openness order be permitted only if they adhere to the principles set out below.

[30] "Openness" orders, in earlier drafts, were referred to as "contact" or "communication" orders.
[31] In British Columbia, access orders terminate automatically upon an adoption placement, unless the court orders otherwise.

Principles governing variations of openness agreements/openness orders

The OACAS recommends:

- *that any variation application be preceded by conscientious efforts to resolve the matter outside of the court process, including due consideration of the benefits of mediation.*
- *that any such variation application be restricted to the issue of openness and not the issue of custody or access.*
- *that any such variation application be heard under the Child and Family Services Act and not under the Children's Law Reform Act.*
- *that any such variation application be determined on the basis of clearly articulated and specific child-focused criteria.*
- *that any such legislated variation application scheme also include appropriate appeal mechanisms.*

Legislative options under Part VII to support a philosophy of openness

It is also proposed that openness agreements be recognized under Part VII of the *CFSA*, which may include access to third party mediation. This mechanism will provide certainty and predictability for all members of the adoption triad. For example, birth parents will be more receptive to surrendering parental rights where they have some assurance that the prospective adopters will not change their minds regarding the openness agreed to after adoption finalization. Similarly, the prospective/actual adoptive parents are more likely to agree to post-adoption openness where they have some assurance that such generosity will not be used to ground a post-adoption custody or access application.

It is further proposed that both openness orders and openness agreements be available to the parties and the prospective/actual adopters subsequent to the granting of a Permanent wardship order; before or after the adoption placement; at the time of the adoption hearing; and after the adoption hearing. The timing will vary from cases to case, depending upon when the prospective adopters are identified and upon the changing circumstances of the parties.

Legislative options under Part VII to support a philosophy of openness

The OACAS recommends that openness agreements be recognized under Part VII of the CFSA*, which may include participation by a neutral mediator, and that both openness orders and openness agreements be available to the parties and the prospective/actual adopters at any of the following points in time:*

- *subsequent to the granting of a Permanent wardship order;*
- *before or after the adoption placement;*
- *at the time of the adoption hearing; and*
- *after the adoption hearing.*

The timing will vary from cases to case, depending upon when the prospective adopters are identified and upon the changing circumstances of the parties.

A decision to integrate the principle of openness in Parts III and VII will free more children for the permanency of adoption, while ensuring that they have the best opportunity possible to maintain relationships with people significant to them, who can assist them in developing a strong and healthy identity. Openness is not in the best interests of every child, but it does offer the hope of a richer life for many. Taking this philosophical stance will require the review and potential redrafting of parts of sections 37(3), 58, 59, 140, 143(1), (2) and 160(1) and the development of several new sections to address the addition of openness orders and openness agreements, that can be aided through the mediation process.[32]

Post adoption supports

Legislative reform also needs to address two aspects of post adoption work: post adoption services and subsidies.

Post adoption services

There is great variation across the province with respect to the level of service provided to adoptive families after finalization. In order to support the adoption of children with special needs and the placement of older children, services should be consistently and readily available. Only staff that are knowledgeable about adoption and proficient in counselling should provide these supports.

It is anticipated that greater openness will increase the demand for post adoption services.

Post-adoption services

The OACAS recommends the addition of a new section to Part VII, which would allow for the provision and funding of post adoption services to support the placement of children and to address issues related to openness.

Subsidies

Where a child has special needs and where these needs would have an impact on the finances of a family, Societies should be able to consider, and if appropriate, enter into an agreement to pay a subsidy to the adoptive family. The placement of sibling groups and the future needs of children related to past maltreatment should also be grounds for subsidy arrangements. Above all, legislation should support consistent access to consideration for subsidy to all children placed for adoption, regardless of their location in the province. Both guidelines for the development of subsidy agreements and the provision of appropriate funding are required to facilitate the process.[33]

[32] A submission made to the Adoption subcommittee of the OACAS *CFSA/FLR* Committee by Helen Murphy, Chief Counsel and Margaret O'Reilly, Manager, Adoption Services, both at the Catholic Children's Aid Society of Toronto, will be helpful in the drafting of these sections.

[33] Section 87 of the *Child and Family Services Act* of Nova Scotia addresses the issue of subsidy. Most other provinces have some type of subsidy program.

Subsidies

The OACAS recommends the addition of a new section to Part VII to provide for subsidies to adopting families to meet the special needs of their child, maintain relationships, address financial hardship precipitated by the adoption and/or accommodate future needs of the child that relate to past maltreatment.

Improvement of current legislation

Best practice – Return of the child

If consents are withdrawn either within the prescribed 21-day period, or by court order after the 21 day period has expired, and a child is to be returned to the person who had custody of the child immediately before signing the consent, the process of returning the child should be managed in a manner that is in the best interests of the child, rather than "as soon as the consent is withdrawn."

Best practice – Return of the child

The OACAS recommends that subsections 137(8) and 139(1) be amended to allow time to plan and execute the return of the child in a manner that is in keeping with the need of the child to have closure on current relationships by deleting the phrase "as soon as the consent is withdrawn" and substituting the new phrase "as soon as practicable, but in any event within seven days after the consent is withdrawn."

Review by a Director

Under current legislation, if a Society makes a decision refusing to place a child for adoption with a person, including a foster parent who is caring for a child, or if it makes a decision to remove a child who has been placed with a person for adoption, the matter may be reviewed by a Director. There is presently no prohibition to prevent a Director's review from occurring during adoption probation, which can result in the delay of finalization and a disruption of the adoption placement. This approach is inconsistent with that taken in other parts of the *CFSA*, where there is a clear statutory bar against bringing on Status Review applications or Access applications after a child has been placed for adoption.

Review by a Director

The OACAS recommends that section 144 be amended as follows:

- *that a review of the decision by a Society not to place a child for adoption with a person, including a foster parent, can only be conducted by a Director prior to the commencement of an adoption probation with another family.*
- *that a minimum of seven days should be required between placements to allow a review to be requested.*
- *that such a review must be conducted within sixty days so as not to impede the placement of a child.*

The OACAS also recommends that section 144 be looked at in the larger context of all review mechanisms in order to streamline and integrate methods of accountability.

Adoption acknowledgement on substituted birth registration

At the time of finalization, the completion of an adoption is registered with the Registrar General. This is done through the completion of a form that re-registers children as if they were born to their adoptive parents. The original registrations are sealed and are not available to children even at age of majority. This practice is inconsistent with adoption legislation based on openness.

Adoption acknowledgement on substituted birth registration

The OACAS recommends that the Vital Statistics Act be amended to provide that birth certificates shall acknowledge an adoption, rather than showing the adoptive parents as if they were the child's birth parents.

INFORMATION PRACTICES - PART VIII

Records and Confidentiality

The need to update and proclaim Part VIII (Confidentiality of and Access to Records) was identified as a priority area for amendment of the *CFSA* by a number of Societies in the survey of Children's Aid Societies in 2003. Since the survey was conducted, the application of federal privacy legislation[34] (*PIPEDA*) was extended on January 1, 2004 to provincial entities engaged in commercial activities. Shortly thereafter, the Ontario legislature passed Bill 31, the *Personal Health Information Protection Act* (*PHIPA*), which took effect on November 1, 2004. The full impact of *PHIPA* on Children's Aid Societies is not yet known. While CASs themselves do not fall within the definition of a "health information custodian" under that *Act*, Societies employ persons who may be caught by that definition and would be required to comply with the provisions of *PHIPA*. This could create the unwieldy situation in which *PHIPA* applies to some of the service records of CASs while leaving other records to the individual policies of Societies. Consistent with the position taken by the child welfare sector over the years, in making submissions with respect to *PHIPA*, the OACAS took the position that CASs should be exempted from the application of *PHIPA* and that an updated and proclaimed Part VIII in the *CFSA* should provide a similar but distinct regime for ALL records of Societies.[35] The Ministry of Health and Long-Term Care took the position that no blanket exemption could be granted in the absence of a legislated scheme governing information practices under the *CFSA*. This further underscores the need for some action with respect to Part VIII.

The OACAS *CFSA/FLR* Committee has considered what an updated Part VIII might look like. Although it is recommended that a distinct set of rules be contained in the *CFSA* so that they would be interpreted through the filter of section 1 principles, and in particular the paramount objective of ensuring the protection, well being and best interests of the child, it is recognized that an updated Part VIII would most likely have to look a lot like *PHIPA* and other existing legislated schemes dealing with privacy and access to information in its essential aspects. The following are some of the elements that will inevitably be included in any amended or updated Part VIII:

[34] The Federal privacy legislation is known as *PIPEDA* (the *Personal Information Protection and Electronic Documents Act*). It has been enacted in stages beginning in 2001.

[35] The OACAS has consistently promoted a revised and proclaimed Part VIII of the *CFSA* as distinct from other privacy legislation. The OACAS position has been documented through a number of articles and in submissions to the government all of which may be found on the OACAS members' website at www.oacas.org. These include:

- Bernstein, M. *Privacy and Children's Aid Societies: A response to the draft Privacy of Personal Information Act, 2002* in Journal of the Ontario Association of Children's Aid Societies, September 2002, 46(3). pp. 13-21.
- Submission in response to the Consultation on the Draft *Privacy of Personal Information Act*, 2002. OACAS, March 28, 2002.
- Submission to the Standing Committee on General Government regarding Bill 31: *Health Information Act, 2003*. OACAS, February 6, 2004.
- Submission in response to Draft Regulation under the *Personal Health Information Protection Act, 2004*. OACAS, September 3, 2004.

- The provisions will deal with all aspects of record keeping by CASs, including the collection of information, use of information, access to information (by the subject), disclosure of information (to others), correction at the request of the subject, as well as storage and retention of records.
- The provisions will be informed by the fair information principles set out in the *Canadian Standards Association Model Code for the Protection of Personal Information*, which are referenced in *PIPEDA* and reflected in *PHIPA*. These principles include accountability, consent, limiting collection, use, disclosure and retention, accuracy, safeguards, openness, access and provisions for challenging compliance.
- As a general approach, the provisions will inevitably permit access by the subject to information about himself/herself and will limit disclosure of this information without consent, subject to some stated exceptions and qualifications.
- There will be a mechanism for correcting and/or recording disagreement with information at the request of the subject.
- There will be a provision for review of decisions concerning access, disclosure, and correction/recording disagreement by a third party.

More specifically, the OACAS recommends that the following elements be incorporated into an amended Part VIII:

1) Collection of information

The principle that information about a person should be collected directly from that person, or from others with the person's knowledge and consent wherever possible, reflects a best practices approach in the social work field. It must be recognized, however, that there are circumstances, particularly in the course of an investigation or assessment of allegations that a child is in need of protection, in which it is impracticable to comply with this approach. A revised Part VIII must permit Children's Aid Societies to collect information for the purpose of carrying out their statutory functions without consent of the subject of the information, and indirectly (i.e., from other sources, not from the subject himself or herself).

Collection of information

The OACAS recommends that the amended and proclaimed Part VIII permit Children's Aid Societies to collect information for the purpose of carrying out their statutory functions indirectly and without the consent of the subject of the information.

2) Special treatment of CASs

An amended and proclaimed Part VIII is likely to apply to all service providers governed by the *CFSA*. The OACAS believes that in light of the legislated mandate given to Children's Aid Societies, the rules for disclosure of information by one CAS to another CAS should be different than the rules for disclosure by a CAS to others and the rules for disclosure by other service providers to CASs. The seamless flow of information between Societies should apply for the purposes of all functions mandated to Children's Aid Societies.

Special treatment of CASs

The OACAS recommends that the legislation treat all CASs as extensions of one another for the purpose of providing services and permit full information sharing between Societies without the need for consent and without limitation.

3) Access to records

An amended and proclaimed Part VIII should give open access to the person to his or her own record, subject only to certain enumerated limitations. The following are some examples of exceptions or limitations on a person's right to gain access to information about himself/herself that would be important to include:

- no access to information that would identify a referral/reporting source who is not a person who performs professional or official duties with respect to children, if that source requested anonymity;
- no access if, in the assessment of the Society, access might cause harm to the person or to another person;
- no access to identifying information about other persons who have not given consent, except where the other persons are or were members of the same household, and the information is in a mixed record.

Access to records

The OACAS recommends that an amended and proclaimed Part VIII permit open access by the subject to his or her own record, except for certain enumerated limitations.

4) Disclosure of information

An amended and proclaimed Part VIII should permit disclosure of information to others only with the consent of the subject and as required or permitted by law. A court order for production of a CAS record to someone is one example of disclosure "required by law." Providing information to Ministry reviewers under Part I of the *CFSA* is another. Disclosure "as permitted by law" would cover situations in which a CAS has discretion to disclose information for the purpose of carrying out its statutory functions, for example, but does not have a positive duty to do so.

Disclosure of information

The OACAS recommends that an amended and proclaimed Part VIII permit disclosure of information to others only in accordance with the legislation. Disclosure should be permitted (a) with the consent of the subject, (b) as required by law, and (c) in certain other enumerated circumstances, including (but not limited to) the following:

- *to police in the course of a joint investigation.*
- *to a professional college investigating a complaint related to service provided by an employee of a service provider.*
- *in order to prevent imminent harm to a person.*
- *for the purpose of protecting a child or children.*
- *for the purpose of searching for and securing a placement that is in the best interests of a child, including a kinship arrangement.*

5) Application to all records

Most privacy records legislation is prospective, in that the provisions concerning use, access to, disclosure of and storage/retention apply to all activity from and after the proclamation date. For example, the provisions would apply to use and disclosure of information from the proclamation date, even if the information was collected before the legislation was enacted. The benefit is that a single regime applies to all the records.

On the other hand, it must be acknowledged that historically, not all records were created with the expectation that they would be open to scrutiny by the subject or by others. It is therefore recommended that there be some differential treatment of information collected before the enactment of governing legislation, in that the right of correction/disagreement (see below) should not apply to information before the new provisions are proclaimed.

Application to all records

The OACAS recommends as follows:

- *that Part VIII apply to all collection, use and disclosure of records from the date of proclamation, although such use and disclosure would apply to all records created prior to the proclamation date.*
- *that provisions regarding correction/disagreement apply only to records created after the legislation is proclaimed.*

6) Correction, disagreement by subject

It is recommended that provisions similar to the scheme set out in subsection 55(10) of *PHIPA*, regarding correction of the record, be incorporated into Part VIII of the *CFSA*. Those provisions give a person with the right of access to a record, the companion right to request a correction. The record keeper, who determines that a correction is warranted, is required to make corrections

without obliterating or expunging the original record, by one of the means described in the section. It is further suggested that an alternative mechanism for recording a statement of disagreement on the file be included. Such a provision would cover situations in which the record keeper does not agree with a correction requested by the subject and would serve to reduce the number of requests for third-party review of the decision refusing to correct, which might otherwise result.

While service providers under the *CFSA*, and in particular CASs, come into possession of records of other systems, obtained in the course of carrying out their mandate (e.g., medical records; psychological reports; police records) which become subsumed in the record, there should not be a duty to make corrections to third party records in the possession of service providers.

Correction, disagreement by a subject

The OACAS recommends as follows:

- *that provisions for making corrections without obliterating or expunging the original record be incorporated into Part VIII.*
- *that an alternative mechanism for recording a statement of disagreement on the file be included.*
- *that service providers not be required to make corrections to third party records that come into their possession.*

7) Compliance review

Fair information practices dictate that there be a mechanism for outside scrutiny and challenging compliance by a record keeper. The OACAS holds the view that the issues faced in relation to information, when dealing with services to children and families, are unique in that there are often competing privacy interests involved. For this reason, the OACAS recommends that the provisions for review of compliance with Part VIII should give recourse to a specialist tribunal with knowledge of the child welfare context. Further, any balancing of interests must include a consideration of the protection, well being and best interests of children, as set out in section 1 of the *Act*.

Compliance review

The OACAS recommends that complaints related to compliance with Part VIII by a record keeper should be reviewed by a specialist tribunal with knowledge of the child welfare context and be subject to the principles set out in section 1 of the CFSA*, especially the paramount purpose of ensuring the protection, well being and best interests of children.*

8) Retention

It is recommended that in order to ensure consistent treatment of all persons upon whom rights are conferred by Part VIII, standardized expectations related to retention of various records maintained by service providers under the *CFSA* should be developed and set out in the statute.

Retention

The OACAS recommends that Part VIII clearly set out a schedule for the retention of records created and collected under the CFSA.

9) Children's rights regarding information

It is acknowledged that the trend in legislation is towards a capacity-based model for giving/withholding consent.[36] Notwithstanding this trend, the OACAS proposes that the regime for giving consent to collection, use and disclosure of records under the *CFSA* be based on age, and not on capacity, for the following reasons:

- the children and youth receiving protection services are particularly vulnerable.
- many other provisions in the *CFSA*, including provisions related to giving consent under Part II, Part III and Part VII, are age-based, so this approach is consistent with the *Act* as a whole.
- CASs, in particular, are mandated to provide involuntary services, and in this context, giving children a veto over information is contrary to the duties imposed on CASs.
- a capacity-based model will require the creation of a mechanism for reviewing the determination of capacity and adjudicating upon objections.

Children's rights regarding information

The OACAS recommends that Part VIII be amended and proclaimed, so as to give a child of the age of 12 years or older, rights with respect to information about himself/herself, as follows:

- *the right to request that specific information not be shared with his or her parents.*
- *the right to access his or her own file, including information about members of the child's family with whom the child resided in the same household, for the period of such joint residency.*
- *a parent can access information about his/her child until age eighteen, subject to the child's right to withhold specific information, provided the child is not a Permanent ward (see below).*
- *for Permanent wards, a parent with an access order may obtain the information that is sufficient to give life to the requirement in subsection 61(5) that the parent's wishes concerning "major decisions" be taken into account. This should not give parents with access to a Permanent ward access to the entire child file.*
- *after a child turns eighteen, the child's consent is needed to disclose information about the child to any person.*

10) Former wards

Former children in care of Societies and in particular, former Permanent wards, are currently disadvantaged in terms of access to information, as compared to a person who moved on to adoption. The latter group has clear rights to information and a process for asserting those rights,

[36] Capacity-based models for giving or withholding consent include the *Health Care Consent Act*, *1996* and the *Personal Health Information Protection Act*, *2004*.

while those who grew up in care are often unable to access information about their family of origin without the family's consent. There is no mechanism that would enable such consents to be obtained. It is proposed that, notwithstanding other general provisions about access to and disclosure of information, former Permanent wards, and adults formerly in the care of CASs, be given the same rights to information about their families as adult adoptees.

Former wards

The OACAS recommends that Part VIII specifically give former wards the same rights to information as adult adoptees.

11) Record Searches and Fast Track Information System

CASs are required by a Ministry Directive to upload identifying information to the Fast Track Information System (FTIS). Regulations require CASs to check the FTIS when conducting a protection investigation. The Directive on the use of FTIS, however, prohibits access to the system for any other purpose, such as assessing fostering or adoptive applicants, or those proposed as kinship care providers. This current inability to check the available database, even with consent of the persons applying to foster, adopt or provide kinship care, exposes children to unnecessary risk. In response to the many concerns raised by CASs in relation to child safety and potential liability, the OACAS has repeatedly communicated to the Ministry that its Directive restricting CAS usage of FTIS requires amendment, so that CASs can be authorized "to use a convenient and reliable mechanism that has the capacity to screen out potential caregivers, who may have a history of abusing or neglecting other children."[37]

Record Searches and Fast Track Information System

The OACAS recommends that CASs be authorized to search the Fast Track Information System in order to screen applicants for fostering, adoption and kinship care placements.

[37] See, for example, letter of June 23, 2003, written by Jeanette Lewis to Suzanne Hamilton, former Director of Child Welfare, posted on OACAS Members' website.

PROCEDURAL AND EVIDENTIARY ISSUES

Admissibility of children's statements

It is accepted by the child welfare sector that children should not have to testify in child protection proceedings. Testifying against a parent is very difficult and poses the risk of emotional harm to the child. Section 50 should thus enable a court to receive the evidence of a child without the necessity of the child being present in the courtroom. There is also a need to create a new evidentiary threshold, instead of the legal test of "necessity and reliability", which has arisen in the case law.

Admissibility of children's statements

The OACAS recommends that section 50 be amended as follows:

- *that children's out of court statements be admissible subject to weight, including audio taped and video taped statements, whether they are in original form or transcribed.*
- *that the following statement be included: "Any statement made by a child to a child protection worker, peace officer, medical professional, other professional or other person the court considers appropriate is admissible into evidence through the testimony of the person receiving the statement."*

Past conduct of parent

Clinical experience and research suggest that past parenting behaviour towards a child is the best predictor of future behaviour, and yet, there is still a lack of clarity in both subsection 50(1) and the current case law as to what past parenting evidence can be considered at the various stages of child protection proceedings. There also needs to be wording to overcome the common law evidentiary principle of "issue estoppel" which essentially states that a party is precluded from introducing evidence at a later time, when it was available at an earlier point in time and was a relevant part of the subject-matter of the earlier litigation.

Past conduct of parent

The OACAS recommends that subsection 50(1) be amended as follows:

- *that wording be added which clarifies the components of past parenting evidence.*
- *that a statement be added, stipulating that relevant past parenting evidence is admissible at any stage of child protection proceedings, including at all preliminary stages, at both the protection finding and disposition stages, as well at the Status Review Application and Access Application stages.*
- *that past parenting evidence be admissible even where such evidence could have been introduced at an earlier point in the litigation.*

Admissibility of evidence for finding in need of protection

There is a lack of clarity as to what evidence is admissible to establish the protection finding, given the conflicting case law on this issue. Societies have had difficulty, in some jurisdictions, in having information that arises after the commencement of a Protection Application, but before the finding in need of protection, admitted into evidence.

Admissibility of evidence for finding in need of protection

The OACAS recommends that a new subsection of section 50 be added as follows:
"Evidence that arose before or after the protection application is commenced and that is relevant to the finding in need of protection may be considered by the court at the hearing of the protection application."

Bifurcated hearings

Subsection 50(2) creates delay and additional costs in the presentation of evidence and the resolution of trials by requiring bifurcated hearings, which separate child protection proceedings into two parts or stages, being protection finding and disposition, with evidence related only to disposition being inadmissible before the court makes a finding that the child is in need of protection. The bifurcated hearing is based upon a criminal model, with there being two parts to the hearing – a finding of guilt followed by sentencing. There is also the potential for duplication of evidence in a bifurcated hearing, which would be avoided if a witness could testify fully on a single occasion.

Bifurcated hearings

The OACAS recommends that subsection 50(2) be repealed in order to eliminate the requirement of bifurcated hearings.

Interim supervision orders

Clause 51(2)(b) does not set out any criteria when a court is asked to make an interim supervision order during the adjournment of a protection proceeding, in circumstances where the child is to remain with or return to the care of the parent or other person having charge of the child at the time of CAS intervention. Clarity is required so that the same legal test is applied in each case of interim supervision, with the most appropriate test being the short-term best interests of the child.

Interim supervision orders

The OACAS recommends that clause 51(2)(b) be amended to explicitly state that the legal test for an interim supervision order is the short-term best interests of the child.

Interim access orders

Subsection 51(5) contains no authority for interim access orders to be granted when a child is ordered to remain with, or return to the care of the person who had charge of the child, with or

without an interim supervision order. It is important to amend subsection 51(5) so that interim access orders can be granted whenever an order of interim care and custody is made during an adjournment period. Such a change would create consistency with section 58, with the legal test of best interests being applicable.

Interim access orders

The OACAS recommends that subsection 51(5) be amended as follows:

- *that "clause (2)(b)" be added to the listed clauses in subsection 51(5).*
- *that the words "and is in the best interests of the child" be added.*

Variation of an existing interim care and custody order

Subsection 51(6) does not set out any criteria when a court is asked to make a variation of an interim care and custody order during the adjournment of a protection proceeding. The language permitting variation of an interim care and custody order previously made under subsection 51(2) should be consistent with the legal test articulated in existing case law.

Variation of an existing interim care and custody order

The OACAS recommends that subsection 51(6) be amended to add the words "if a material change in circumstances demonstrates that it would be in the best interests of the child to vary or terminate such order" to the end of the sentence.

Pre-finding assessments

There is general agreement that assessments can assist in narrowing issues or facilitating settlements and that assessments should be available as a tool at the earliest stage of the proceedings in order to avoid protracted delays in the disposition of child protection proceedings. Unfortunately, subsection 54(1) restricts the use of court-ordered assessments to those circumstances where the court has first found the child to be in need of protection. In fact, Ontario is the only Canadian jurisdiction where this protection finding precondition exists.

***Pre-finding* assessments**

The OACAS recommends that subsection 54(1) be amended so that the words "where a child has been found to be in need of protection" are eliminated.

Conditions of Temporary wardship orders

Under section 57, conditions can be attached to supervision orders, but not to Temporary wardship orders. As Temporary wardship orders are usually made where permanency planning for the child contemplates the child's return home to the parent or previous caregiver, it would be beneficial for the court to have the authority to impose conditions on respondents in anticipation

of the child returning home. Clearly stated conditions create court expectations for the respondents as to what needs to be done by them, before they are entitled have the child returned.

Conditions of Temporary wardship orders

The OACAS recommends that a new subsection of section 57 be created stating: "the court, when making an order of Temporary wardship, may impose reasonable terms and conditions on a parent, respondent or any other person who participated in the hearing."

Leave to commence status review application

All parties should be prevented from initiating frivolous and vexatious status review applications, which have the effect of disrupting the child's permanency and security. Although subsection 64(5) requires a parent to seek "leave" or the court's permission before commencing a status review application in respect of a child, who is a Permanent ward and has been living in the same foster home continuously for at least two years before that application, no criteria for the leave motion are set out, although they have been identified in the case law. It is, therefore, proposed that subsection 64(5) be amended to incorporate the criteria established in the case law.

Leave to commence status review application

The OACAS recommends that subsection 64(5) be amended to stipulate the criteria as outlined in the case law, which are as follows:

- *the court must be satisfied that the status review application is being brought bona fides;*
- *the court must be satisfied that that the remedy sought cannot be obtained in any other way than a review of the order itself;*
- *there must be some unusual circumstances that justify the review, notwithstanding the child's permanent status;*
- *the court must be satisfied that the review would likely accomplish the purposes of the Act as set out in section 1, and;*
- *the applicant must establish a prima facie case.*

Payment orders

The current "payment order" terminology of section 60 and other statutory language is not consistent with that of current support legislation. The development of appropriate wording for such a section is needed.

Payment orders

The OACAS recommends that the wording in section 60 be amended to be consistent with current support legislation.

Restraining orders

Pre-finding and interim restraining orders should be available to protect a child and his/her caregiver, including a foster parent, particularly where there may be evidence of spousal/partner assault. The current requirement that a child first be found to be in need of protection is too limiting and is unique to Ontario, among all Canadian jurisdictions.

Restraining orders

The OACAS recommends that subsection 80(1) be amended as follows:

- *that the words "where the court finds that a child is in need of protection" be eliminated*
- *that the words "or the child's caregiver, including a foster parent" be added immediately following the words "restraining or prohibiting a person's access to or contact with the child."*
- *that the words "instead of or in addition to making an order under subsection 57(1)" be expanded to add "or subsection 51(2)" immediately thereafter.*

Offences under CFSA

There is a lack of clarity in the way the *CFSA* is structured with respect to the public's capacity to understand those actions or inactions that constitute offences and the corresponding penalties. There is a further lack of clarity regarding responsibility for the charging of and prosecution of such offences. In the latter case, it is important that CAS Counsel not be seen as the vehicle for prosecuting offences under the *CFSA*.

***Offences under* CFSA**

The OACAS recommends that the CFSA *be amended as follows:*

- *that the offences be placed in the* CFSA *together with the sections to which they refer.*
- *that a statement be added that the* CFSA *offences are to be prosecuted under the Provincial Offences Act and are to be prosecuted by the Provincial Crown Attorney.*

Place of hearing

Societies must be enabled to agree between themselves as to where the application will be brought when a child is removed from his/her parent or other caregiver without consent, in a territorial jurisdiction which is different from the child's ordinary residence. This discretionary authority does not currently exist in clause 48(2)(a), as the requirement is to bring the matter before the court in the territorial jurisdiction of the child's removal. This is an important issue, for example, in places where there are large regional health centers or hospitals, which frequently serve children from other jurisdictions.

Place of hearing

The OACAS recommends that clause 48(2)(a) be amended, so that the words, "in either the jurisdiction in which the child ordinarily resides, or" be added before "the territorial jurisdiction in which the place…"

Paramount purpose

It is proposed that subsection 1(1) be congruent with subsection 15(3) of the *CFSA*, which lists "protection" functions prior to "best interests" functions. As well, under subsection 57(1), there can be no consideration of "best interests" until there has first been a determination of "in need of protection."

Paramount purpose

The OACAS recommends that in subsection 1(1) the word "protection" be placed immediately before the words "best interests", instead of immediately afterwards.

Placement in care and custody

In paragraph 57(1)(1), which is the dispositional authority given to a court to make a supervision order, there is no reference to the phrase "placed in the care and custody of", which is the specific language used elsewhere in the Act.

Placement in care and custody

The OACAS recommends that in paragraph 57(1)(1), the words "placed with" be replaced with the words "placed in the care and custody of" in order to harmonize the language with the wording in other parts of the Act, such as in subsection 51(2).

Jurisdiction to hear appeals

Subsections 69(1) and (4) contain an important gap in that they do not include the possibility of appeals from the Superior Court of Justice where a Unified Family Court exists.

Jurisdiction to hear appeals

The OACAS recommends the following amendments:

- *that subsection 69(1) be amended such that the first part of the provision state "An appeal from a court's order under this Part may be made to the appropriate appellate court in accordance with the* Courts of Justice Act *by...,"*
- *that the phrase "Superior Court of Justice" in subsection 69(4) be replaced with the words "the appropriate appellate court."*

Automatic stays pending appeals

The current provision in clause 69(3)(a) allows for an automatic stay of ten days following the appeal of a protection order. This period of time is unrealistic, having regard to a lack of availability of court days for the appellate court to hear motions for interim care and custody pending the appeal hearing. Furthermore, the voluminous amount of documentation that must be prepared in a short period of time is extremely difficult to complete and serve in the timeframes given. Time for the completion and filing of full and in depth material is necessary to a

determination that is based on the child's best interests. Accordingly, it is proposed that that clause 69(3)(a) be amended to provide for an automatic stay of twenty days.

Automatic stays pending appeals

The OACAS recommends that clause 69(3)(a) be amended so that the automatic stay of a protection order is extended from ten days to twenty days.

Entitlement of all parties to appeal

All parties to the litigation should have equal rights to appeal the court's decision under subsection 69(1). The suggested amendment provides the right to parties, who may have been added in the lower proceedings, to appeal the decision.

Entitlement of all parties to appeal

The OACAS recommends that subsection 69(1) be amended by adding "or (f) a party to the proceedings in which the order appealed from was made."

Jurisdiction of appeal court to make interim access/supervision orders

Subsection 69(4) does not explicitly confer upon an appeal court the authority to make interim access orders and/or supervision orders pending the final disposition of an appeal.

Jurisdiction of appeal court to make interim access/supervision orders

The OACAS recommends that subsection 69(4) be amended, so that after the phrase "order for the child's care and custody", the words "and the child's access, or the child's supervision" are added.

Expiry of protection orders

An amendment is required in subsection 71(1) that explicitly states that any order under Part III will also expire upon death of the child. It is unnecessary and potentially traumatic to a child's family for a Society to have to bring a status review application before the court to terminate a protection order in such circumstances.

Expiry of protection orders

The OACAS recommends that the words "or c) dies," be added to subsection 71(1).

Homemakers

Section 78 has neither been used nor funded and thus this provision serves only to identify an illusory option.

Homemakers

The OACAS recommends that all sections and references to "homemakers" in the CFSA *be eliminated and that section 78 be repealed.*

Orders confirming protection finding

The language of subsection 57(1) ought to clarify that a finding or determination that a child is in need of protection is an "order" and not just a "finding." This would, for example, make it clear that a protection finding is subject to appeal.

Orders confirming protection finding

The OACAS recommends that subsection 57(1) be amended after the opening words "where the court finds that a child is in need of protection", and that the phrase "pursuant to an order under subsection 37(2)" be added.

Recognition and enforceability of out-of-province protection orders

Ontario and the Yukon are the only province and territory that do not have a provision for the recognition and enforceability of protection orders made in other jurisdictions. The recognition and enforceability of such orders made in other provinces and territories are essential for the appropriate care and supervision of the many children and families who cross provincial borders. It is not appropriate to have fresh protection proceedings begin in Ontario when a judicial officer in another jurisdiction has already made a legal determination regarding the care that the child has been or is receiving and the requirement for CAS intervention.

Recognition and enforceability of out-of-province protection orders

The OACAS recommends that a new section be added to the CFSA *to recognize and enforce Canadian orders made in other provinces and territories including child protection orders, as though they had been made in Ontario.*

Relationship between child protection and child custody proceedings

There appears to be confusion about the jurisdictional relationship between child protection proceedings and general custody proceedings. It is suggested that a new section be enacted, which would reflect current case law and practice. The section should be written to permit alternative caregivers to obtain custody so as to allow the conclusion of *CFSA* proceedings.

Relationship between child protection and child custody proceedings

The OACAS recommends that a new section be added explicitly stating that proceedings under the Children's Law Reform Act (CLRA) *may continue while there is an outstanding proceeding under the* Child and Family Services Act (CFSA)*, on notice to the Children's Aid Society named in the* CFSA *proceedings as a party, but the* CLRA *order shall be stayed until the* CFSA *proceedings are withdrawn, discontinued or terminated.*

Where necessary for CAS to remove child in another territorial jurisdiction during ongoing legal proceedings

A new subsection in section 48 is needed which would allow a Society with existing legal proceedings or a supervision order to enter another territorial jurisdiction to remove a child and to bring the appropriate step in the litigation within its own ongoing legal proceedings. Such provision would avoid the duplication of proceedings in different jurisdictions involving the same child.

Where necessary for CAS to remove child in another territorial jurisdiction during ongoing legal proceedings

The OACAS recommends that a new subsection be added to section 48 as follows:

- *that a Society's territorial jurisdiction as designated pursuant to subsection 15(2) be expanded to include other territorial jurisdictions for all children subject to current court orders under clauses 51(2)(a),(b) or (c) or paragraph 57(1)(1).*
- *that the phrase "except where the child is subject to legal proceedings pursuant to this Act in another territorial jurisdiction" be added to clause 48(2)(a).*

Requirement of notice to CAS of motion to transfer territorial jurisdiction

There is a need to amend subsection 48(3) in order to make explicit the necessity of giving notice to the CAS in the proposed territorial jurisdiction, upon a motion to transfer territorial jurisdiction, and allowing for submissions from that CAS. This would provide consistency with subrule 5(9) of the *Family Law Rules*.

Requirement of notice to CAS of motion to transfer territorial jurisdiction

The OACAS recommends that subsection 48(3) be amended such that after "the court may order", the clause be added: "after the Children's Aid Society in the other territorial jurisdiction has been given adequate notice and has been given the opportunity to make submissions."

Where necessary for motion to be heard by telephone conference by justice in another jurisdiction subsequent to child's non-consensual removal

Subsection 48(4) does not allow justices in other jurisdictions to hear, by means of telephone conference, motions for interim care and custody or interim supervision subsequent to a child's non-consensual removal, when justices in the smaller or more remote areas are not available within five days (or the proposed amendment to five court days) to hear the matter.

Where necessary for motion to be heard by telephone conference by justice in another jurisdiction subsequent to child's non-consensual removal

The OACAS recommends the following:

- *that subsection 48(4) be amended in order to add the phrase "except where a child is brought to a place of safety and the court in that society's territorial jurisdiction is not available to hear the matter within the time frames outlined in subsection 46(1)."*
- *that provision be made for a justice to hear a matter by means of telephone conference and/or "video remand" while presiding in another territorial jurisdiction in circumstances where a motion is brought for interim care and custody subsequent to a child's non-consensual removal.*
- *that clause 48(2)(a) be amended in order to add the phrase "unless the court in the territorial jurisdiction is not available to hear the matter."*

CAS complaint review procedure [38]

The right of persons to use a CAS complaint review procedure is governed by section 68. There are two mandatory steps, one being access to a Society's board of directors and the second being access to a Ministry Director. The Board of Directors has not proven to be an effective complaints resolution step, given the reluctance of board members to overturn decisions made by social work staff and the Society's Executive Director. The Ministry Director has also proven to be an ineffective complaints resolution step, given the lack of statutory authority to overturn or rescind decisions made by a Society. At present, many non-clients are accessing the complaints review procedure and there are no reasonable limits to accessing this procedure.

[38] OACAS, November 2004. *Achieving a Better Balance* – p. 10. This Paper provides a response from OACAS member agencies to the Ministry of Children and Youth Services Accountability Discussion Paper: Finding the Right Balance, and Bernstein, M. *Analysis of the Current Written Complaints Review Procedure of the Catholic Children's Aid Society of Metropolitan Toronto and Recommendations for Change*, Canadian Family Law Quarterly, Vol. 16, Number 1, July 1998, pp.121-144.

CAS complaint review procedure

The OACAS recommends that section 68 be amended as follows:

- *that the reference to complaints review procedure be changed to "client complaint resolution procedure."*
- *that the reference to a "society's board of directors" and Ministry Director in subsections 68(2) and 68(3) respectively be deleted.*
- *that specific criteria be identified for initiating a complaint.*
- *that a new subsection be added stipulating that the complaints resolution procedure cannot be accessed by: a non-client; a person making a frivolous or vexatious complaint or acting in bad faith; or a person engaged in litigation with the Society in respect of the same subject matter.*

Child Abuse Register [39]

The establishment of the Fast Track Information System (FTIS), which allows for province-wide checks relating to child protection investigations, has eliminated the usefulness of the Child Abuse Register. Little statistical information of value is generated and protracted expunction hearings add significantly to legal costs, an area where the Ministry is interested in cost containment. The Child Abuse Register should be eliminated and the recommendations of the *Bala Report*[40] should be seriously considered.

Child Abuse Register

The OACAS recommends that the Child Abuse Register be abolished by Proclamation of the Amendment (Statutes of Ontario, 1999, chapter 2, Section 27) that repealed section 75; and by Proclamation of the Amendment (Statutes of Ontario, 1999, chapter 2, Section 28) that repealed section 76.

Protection from liability for CAS board of directors

While Society officers and employees do benefit from the protection from liability set out in subsection 15(6), this protection is not extended to all members of the boards of directors of Societies for acts taken in good faith. In addition, under section 81 of the *Corporations Act*, CAS Board Directors may be exposed to liability for unpaid wages, regardless of negligence or other default on their part. It is important to correct this legislative gap and also to address the anomaly of personal liability of Society directors for unpaid wages in the event of a Society becoming insolvent.

[39] See OACAS, November 2004. *Achieving a Better Balance*, p. 11.
[40] Bala, N. Report: *Review of the Ontario Child Abuse Register*, January 1988.

Protection from liability for CAS board of directors

The OACAS recommends that subsection 15(6) be amended such that the first part of the provision provides that: "No action shall be instituted against an officer or employee of a Society or a member of a Society's board of directors, including any proceeding for lost wages under the Corporations Act*..."*

Child Abuse Review Teams [41]

Child Abuse Review Teams are no longer relevant as Societies have learned to use the courts more conscientiously before returning children to their parents or previous caregivers. The Ontario Risk Assessment Model (ORAM), OACAS training, current practices and community case coordination models have made these teams redundant. In addition, Societies do not have the resources necessary or at their disposal to comply with section 73 and constitute a team of "persons who are professionally qualified to perform medical, psychological, developmental, education or social assessments" with at least one of them being a "legally qualified medical practitioner."

Child Abuse Review Teams

The OACAS recommends that section 73 be repealed.

Five-year review of the Act

Section 224 provides the Minister of Children and Youth Services with too much discretion to determine what sections of the *CFSA* are appropriate for each five-year review.

Five-year review of the Act

The OACAS recommends that section 224 be amended as follows:

- *that the words "or those provisions of it specified by the Minister" contained in subsection 224(1) be deleted.*
- *that the words "and what provisions of this Act are included in the review" contained in subsection 224(2) be deleted.*

[41] See OACAS, November 2004. *Achieving a Better Balance*, p. 11.

CONCLUSION

The recommendations contained within this Position Paper represent a distillation of the combined efforts of a broad cross-section of those working in the field of child welfare today. The work of the OACAS *CFSA/FLR* Committee, based on a survey of the Children's Aid Societies of the Province, as well as other means, has identified areas of proposed amendment, including and extending beyond the primary protection concerns of Part III.

While we welcome a regular 5-year review of the legislation governing child welfare practices in Ontario, the OACAS *CFSA/FLR* Committee respectfully submits that the terms of reference and the scope of any five-year review of the *CFSA* need to be made public by the Minister well in advance of such review. In the absence of early clear parameters, the work of this Committee has endeavoured to provide a comprehensive and integrated spectrum of proposed amendments to the child welfare legislation.

The areas of both adoption and confidentiality of records have been identified by the broad child welfare sector as requiring significant revision in the immediate future. Permanency planning, whether through adoption or alternative forms of custody, has been recognized as a vital strategy for the well being of children by child welfare professionals, as well as by the Ministry of Children and Youth Services in its *Child Welfare Program Evaluation Report* and in the priority areas identified by the Child Welfare Secretariat. At the same time, the absence of a proclaimed Part VIII of the *CFSA* continues to pose significant difficulties for Societies in the area of confidentiality and access to records. The OACAS *CFSA/FLR* Committee strongly asserts that Part VIII of the *CFSA* cannot be placed on the backburner while CASs continue to be caught by a fragmented and growing web of provincial and federal privacy laws. Moreover, the absence of a proclaimed Part VIII has contributed increasingly to inconsistent practices of information sharing among Children's Aid Societies and to a lack of clarity regarding interpretation of privacy requirements pertaining to the child welfare sector across the Province.

While the OACAS acknowledges that Part VII (Adoption) and Part VIII (Confidentiality of and Access to Records) are significant portions of the *CFSA*, which require amendment, we also submit that it is absolutely vital that any review of the child welfare legislation avoid being conducted in a piecemeal fashion. The OACAS and the members of the OACAS *CFSA/FLR* Committee wish to stress the deeply felt need for a comprehensive and integrated approach to the regular ministerial review of the legislation. The mandate to review the *CFSA* every five years must be addressed, having regard to: the significant shifts in service demand; the changing community needs; and the impact of current legislation upon the child welfare sector during a five year period.

Finally, legislative reform cannot be based solely on concerns of cost containment. It is imperative that child welfare legislation be drafted according to the panoply of outcomes which we know to be beneficial and which our society envisions for its children and youth. Legislation

in child welfare provides the preliminary scaffolding that permits societal protection of the vulnerable young. If, however, the components of such legislation are not both comprehensive and fully integrated, the impact of any reform on our collective ability to address the complex dimensions of the lives of children and youth, on a day-to-day basis, will be significantly compromised, despite the best intentions of lawmakers, policy developers and practitioners.

APPENDIX A: SUMMARY OF RECOMMENDATIONS

PRELIMINARY CONSIDERATIONS

Modernizing language

The OACAS recommends that serious consideration be given to modernizing some of the archaic and/or stigmatizing language in the CFSA*. Examples are replacing the terms "Society wardship" and "Crown wardship" with the terms "Temporary wardship" and "Permanent wardship" (while consequentially changing the language of "temporary care and custody" to "interim care and custody" including changing the language of all other forms of "temporary orders for access and supervision" to the corresponding "interim orders for access and supervision") and replacing the term "apprehension" with an appropriate substituted term, such as "removal" or "admission to care."*[42]

Rights and Entitlements of Children and Youth under Part V of the CFSA

The OACAS recommends:

- *that Part V (Rights of Children) of the* CFSA*, which was enacted prior to the implementation of the United Nations Convention on the Rights of the Child be reviewed and updated*[43]
- *that consultation be sought and consideration given to amending section 101 of the* CFSA*, so as to provide for a total civil ban against corporal punishment (without attaching any explicit sanctions, which if they were to exist, could be seen as a backdoor attempt to circumvent section 43 of the Criminal Code and to criminalize the use of corporal punishment). In this regard, proposed model legislation developed by the State of Massachusetts should be carefully examined.*

ALTERNATIVE DISPUTE RESOLUTION [44]

Alternative Dispute Resolution [45]

The OACAS recommends that a new section be added as follows:

- *that the court shall consider appropriate Alternative Dispute Resolution mechanisms, including mediation and family group conferencing, prior to making an order at any stage of a child protection proceeding*
- *that the parties shall attend court prepared to address the issue of whether Alternative Dispute Resolution processes would be appropriate in the particular circumstances, having*

[42] In light of the proposed changes in language, this proposed new terminology will be used throughout this Paper.

[43] Legislation in other jurisdictions should be examined, such as Prince Edward Island's *Child Protection Act*, S.P.E.I. 2000, c. 3 and Nunavut's *Child and Family Services Act*, R.S.N.W.T. 1998, c. 17.

[44] Several earlier documents share the OACAS position on ADR including:
Report of the Child Protection Mediation Working Group to the Child Protection Backlog Steering Committee as presented to the Justice Summit, September 21, 2004;
M. Bernstein, *Child Protection Mediation: Its Time Has Arrived*, in Canadian Family Law Quarterly, Vol. 16, Number 1, July 1998, at pp. 73-12; and
J. Maresca, *Mediating Child Protection Cases* (1995), 74 Child Welfare 731.

[45] The proposed amendments in the first and third bullets are based on sections 22 and 23 of the British Columbia *Child, Family and Community Service Act*, R.S.B.C. 1996, c.46.

regard to the fact that participation in such processes remains at all times completely voluntary

- *that if as a result of any Alternative Dispute Resolution mechanism, a written agreement is made after a proceeding is commenced to determine if a child is in need of protection, the parties may file the agreement with the court*
- *that the sessions shall be semi-open, so that conversations that take place privately between a participant and the mediator are confidential, subject to the mediator's reporting duty, but conversations that occur when all of the parties meet together can be introduced into evidence by any of the parties in court, except that this shall not preclude the introduction of otherwise confidential information into evidence with the consent of all parties or where such information relates to the safety of the child.*[46]

SERVICES AND PROTECTION CONCERNS

Domestic violence

The OACAS recommends that domestic violence be added to clause 37(2)(f) so that it reads "…and there are reasonable grounds to believe that the emotional harm suffered by the child results from the actions, failure to act, pattern of neglect and/or exposure to domestic violence on the part of the child's parent or the person having charge of the child."

Caregiver behaviours

The OACAS recommends that clauses (m) and (n) be added to subsection 37(2) as follows:

(m) The child has suffered physical and/or emotional harm by being subjected to:

i) chronic neglect
ii) significant alcohol and/or drug usage
iii) significant mental health problems
iv) significantly impaired parental capacity
v) exposure to pornography

as a result of the actions of the person having charge of the child, or caused by that person's failure to provide for, or supervise, or protect the child.

(n) There is a risk that the child is likely to suffer harm as described in clause (m).

[46] The content of this fourth bullet differs from the preceding points in the B.C. model; the B.C. model puts more emphasis on the confidentiality of the communications. In this context, it is important to remember the legal obligations of a Children's Aid Society under subsection 15(3) of the *CFSA,* which by implication require the introduction of relevant evidence into a protection proceeding, particularly where the information is already known to a Society or relates to a child's safety.

Abandonment and residential placement

The OACAS recommends that two clauses be created out of clause 37(2)(i): one for the "abandoned child or the parent dies" and a separate clause for "need for residential placement."

Definition of "child"

The OACAS recommends:

- *that the definition of a "child" in subsection 37(1) be made consistent with that of subsection 3(1), which defines a "child" as "a person under the age of eighteen years."*
- *that all related provisions of the Act affected by this amendment be similarly amended to correspond with this change in age.*
- *that clause 29(2)(a) be amended to increase the age of eligibility for Temporary Care Agreements to under 18 years of age.*

Child's use of services

The OACAS recommends that under subsection 37(3) a new clause be added to the list of "best interests" considerations, stating "where a child is sixteen years of age or older, the child's use of services and the child's wishes about future use of services."

Extended Care and Maintenance

The OACAS recommends that subsection 34(3) of Regulation 70 under the Child and Family Services Act be amended as follows:

- *that support to former Permanent or Crown wards be extended to the completion of undergraduate-level training or equivalent, or age twenty-four, whichever comes first.*
- *that the amount of money paid to former Permanent or Crown wards on Extended Care and Maintenance be adjusted upwards to reflect the current needs of children, having regard to all relevant considerations, including the cost of inflation.*
- *that former Permanent or Crown wards on Extended Care and Maintenance be granted free tuition while attending a post-secondary institution.*

Warrants

The OACAS recommends:

- *that the requirement for obtaining a warrant to remove and bring a child to a place of safety be abolished by repealing the relevant sections of the Act.*
- *that the sections related to the powers of a peace officer and/or parent be retained.*

Section 41: Warrants for children in care

The OACAS recommends that warrants for children in care be retained, but that clause 41(1)(b), relating to the warrant requirement for a fresh removal of a child and transfer to a place of safety be repealed, and that the word "substantial" in clause 41(4)(b) be eliminated, as it has been in virtually all other places in the Act.

Time limits

The OACAS recommends that subsection 46(1) be amended to read: "As soon as practicable, but in any event not later than the fifth court day, excluding Saturdays, Sundays, statutory holidays and all other days when the court offices are closed, after a child is brought to a place of safety…"

Duty to report

The OACAS recommends:

- *that the requirement that written documentation relevant to suspected protection concerns be included in the referral where appropriate and therefore, that subsection 72(1) be amended to include the words "and the information, including copies of all written material on which the suspicion is based" after the word "suspicion."*
- *that the fine for failing to report be increased from $1000 to $5000.*
- *that subsection 72(6.3) make explicit that notification of a breach of duty to report will be reported to the person's professional association.*

Differential Response

The OACAS recommends that amendments be made to Ontario Regulation 206/00 regarding the implementation of a model of differential response as set out in Appendix B of this Paper.

PERMANENCY AND PLACEMENT OPTIONS

Time limits for temporary care

The OACAS recommends:

- *that subsection 70(4) be amended to include a statement that the extension of six months is a "one time extension."*
- *that clauses 70(1)(a) and (b) be amended to state it is the age of the child at the time of admission, and not at the time of the order, that governs the time limits.*
- *that a clause referring to a sibling group be added so that the time limit that applies to the entire sibling group is the same as the time limit applicable to the youngest child, in those circumstances where the plan is the same for the whole sibling group.*

Place of safety

The OACAS recommends two possible options for amendment, with preference for the first option:

- *Amend subsection 37(1) by replacing the term "place of safety" with "a safe place." A "safe place" would then be defined as "a foster home, a hospital, a shelter, or the home of a member of the child's extended family or community." In the current wording the Society has the authority to designate any home as a place of safety so the discretion to allow for a home to be considered a "safe place" already exists. This option would eliminate the need for subsection 17(2); or*

- *Amend subsection 37(1) by expanding the definition of "place of safety" to read as follows: " 'place of safety' means a foster home, a hospital, and a place, including the home of a member of the child's extended family or community, or one of a class of places designated as such by a Director under subsection 17(2) of Part I..."*

Kinship ties and permanent/concurrent planning: Declaration of Principles

The OACAS recommends that two new provisions be added to the Declaration of Principles in subsection 1(2) as follows:

- *"To recognize that kinship ties and the child's attachment to the extended family and to members of his or her community should be preserved if possible."*[47]
- *"To recognize that positive outcomes can be achieved and significant delays avoided for children and youth through effective early permanency and concurrent planning."*

Kinship ties: Concept of family

The OACAS recommends that paragraph 1(2)(1) be amended as follows:
"To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family and support significant familial and kinship ties and, wherever possible, be provided on the basis of mutual consent."

Kinship ties, kin and kinship: Definitions

The OACAS recommends that a new definition of "kinship ties" be included in subsections 3(1) and/or 37(1) as follows:

- *that "kinship ties" be defined as "The relationship between a child/youth and a member of his or her extended family or community or any adult who has an emotional bond with the child/youth and that 'kin' and 'kinship' have corresponding meanings."*

Kinship ties: Best interests

The OACAS recommends that the "best interests" definition under paragraph 37(3)(6) be amended to read: "The child's relationships by blood, an adoption order, or other kinship ties."

Promotion of kinship ties: Placement options

The OACAS recommends that the CFSA provide mechanisms for the support of kin providers, both financially and by way of special private custody court orders.

Subsidy for kin providers during adjournment period

The OACAS recommends that clause 51(2)(c) be amended to state that where a child is placed with a person during the adjournment of a protection proceeding subject to interim Society supervision, under this clause, that person "where he or she has a kinship tie with the child, may be eligible to receive a subsidy for the care of the child."

[47] This wording, as slightly amended, is taken from the principles found in clause 2(e) of the *Child, Family and Community Service Act, 1996* of British Columbia.

Private Custody Orders under CFSA[48]

The OACAS recommends:

- *that subsection 57(1) be amended to add a new paragraph, which would provide the dispositional authority for a private custody order to be granted in favour of a person with a kinship tie to the child following a finding that the child is in need of protection, based upon a consideration of the child's best interests. An amendment to subsection 57(4) would also be required to reflect this additional disposition that would be available for the court to consider. A private custody order in favour of a foster parent could not be granted at this early stage (see below).*
- *that subsection 57(1) be further amended to add a new paragraph stating that where a child is made a Permanent ward, then the child's foster parent may be granted private custody of the child under the* CFSA *and may be eligible to receive a subsidy for the child's care, provided such a disposition is in the child's best interests.*
- *that like any private custody order, it would not be time-limited and would be subject to variation, based upon a material change in circumstances, upon notice to the CAS. Consideration should be given as to whether such variation applications ought to be heard under the* CFSA *or under the* CLRA.
- *that where a private custody order is made under the* CFSA*, the kin provider be eligible to receive a subsidy for the child's care, and in appropriate cases, to apply to adopt the child.*
- *that the order would have the same force and effect as a private non-protection custody order made under the Children's Law Reform Act.*
- *that the Temporary Care Agreement provisions in section 29 be amended to allow for an agreement that facilitates the placement of a child with a person with kinship ties to that child and would enable the kin provider to be a party to the agreement.*[49]

Sibling access

The OACAS recommends:

- *that subsection 58 (1) include specific reference to siblings through addition of language as follows: "The court may, in the child's best interests…make, vary or terminate an order respecting a person's (including the child's sibling's) access to the child or the child's access to a person (including a sibling)"; and*
- *that subsection 58(2) provide for the right of a sibling to apply for an access order to a child, for example by inclusion of the following statement: "Where a child is in a society's care and custody or supervision", add a clause"(d) a sibling of a child."*

[48] This proposed scheme borrows some components from the legislative framework set out in sections 52-57.1 of the *Alberta Child, Youth and Family Enhancement Act*, R.S.A. 2000, C-12. That statute, however, does not contain separate thresholds for kin, who are not foster parents, on the one hand, and foster parents who are kin on the other.

[49] Temporary Care Agreements in B.C. allow for kin to be treated as parties to the agreement where appropriate. See *CFCSA*, clause 35(2)(d).

Special Needs Agreements

The OACAS recommends:

- *that the Special Needs Agreement provisions in sections 30 and 31 of the* CFSA *remain in place with the necessary resources being made available so that Societies and families are able to utilize these agreements where appropriate.*
- *that determination be made as to the appropriateness of CASs as the vehicle to support and administer these agreements*.

Customary care

The OACAS recommends:

- *that the Ministry of Children and Youth Services demonstrate commitment to the implementation of customary care practices across the Province for all eligible First Nations children by the provision of clear and decisive legislative and policy direction.*
- *that, consistent with subsection 57(5), the legislative and policy direction taken by the Ministry of Children and Youth Services clearly support First Nations children remaining within the First Nations community, wherever this is possible and consistent with the child's best interests.*

ADOPTION

Openness

The OACAS recommends that the concept of openness in adoption be incorporated into the Declaration of Principles in section 1 to act as an underpinning for decisions impacting upon the future of children under both Part III and Part VII.

Concept of "as if born to"

The OACAS recommends the amendment of section 158 to replace the premise that an adoptive child is "as if born to" his/her adoptive family. The new statement should ensure the legal rights of the child while acknowledging the importance of the child's birth family in the life of that child.

Changing of given name of adoptee

The OACAS recommends that an amendment be made to clause 153(1)(b) to prohibit the changing of the given name of a child under 12 years of age, who is being adopted, if that name is meaningful to the child, unless a new name is required to address safety issues.

Dispositions regarding Permanent wardship orders

The OACAS recommends an amendment to section 57 to include a new subsection, which would set out three potential dispositions with respect to Permanent wardship orders:

- *Permanent wardship with no access (plan may or may not be for adoption). [In these circumstances, the statutory presumption against access being attached to a Permanent wardship order should be adhered to more stringently.*[50] *The court may also recommend to the parties that they consider the merits of an openness order or an openness agreement, including the value of engaging a mediator].*
- *Permanent wardship with access (plan is not for adoption). [In these circumstances, access should only be granted by the court where the presumption against access being attached to a Permanent wardship order can be rebutted on the basis of cogent evidence].*
- *Permanent wardship with an openness order (plan is for adoption). [In these circumstances, all the parties must consent to the openness order, including the prospective adopters, as a child with an "openness order tag" may be difficult to place for adoption. The court may also rely upon any openness agreement that the parties have entered into under Part VII].*

Principles governing variations of openness agreements/openness orders

The OACAS recommends:

- *that any variation application be preceded by conscientious efforts to resolve the matter outside of the court process, including due consideration of the benefits of mediation.*
- *that any such variation application be restricted to the issue of openness and not the issue of custody or access.*
- *that any such variation application be heard under the Child and Family Services Act and not under the Children's Law Reform Act.*
- *that any such variation application be determined on the basis of clearly articulated and specific child-focused criteria.*
- *that any such legislated variation application scheme also include appropriate appeal mechanisms.*

Legislative options under Part VII to support a philosophy of openness

The OACAS recommends that openness agreements be recognized under Part VII of the CFSA*, which may include participation by a neutral mediator, and that both openness orders and openness agreements be available to the parties and the prospective/actual adopters at any of the following points in time:*

- *subsequent to the granting of a Permanent wardship order;*
- *before or after the adoption placement;*
- *at the time of the adoption hearing; and*
- *after the adoption hearing.*

[50] In British Columbia, access orders terminate automatically upon an adoption placement, unless the court orders otherwise.

- *The timing will vary from cases to case, depending upon when the prospective adopters are identified and upon the changing circumstances of the parties.*

Post-adoption services

The OACAS recommends the addition of a new section to Part VII, which would allow for the provision and funding of post adoption services to support the placement of children and to address issues related to openness.

Subsidies

The OACAS recommends the addition of a new section to Part VII to provide for subsidies to adopting families to meet the special needs of their child, maintain relationships, address financial hardship precipitated by the adoption and/or accommodate future needs of the child that relate to past maltreatment.

Best practice – Return of the child

The OACAS recommends that subsections 137(8) and 139(1) be amended to allow time to plan and execute the return of the child in a manner that is in keeping with the need of the child to have closure on current relationships by deleting the phrase "as soon as the consent is withdrawn" and substituting the new phrase "as soon as practicable, but in any event within seven days after the consent is withdrawn."

Review by a Director

The OACAS recommends that section 144 be amended as follows:

- *that a review of the decision by a Society not to place a child for adoption with a person, including a foster parent, can only be conducted by a Director prior to the commencement of an adoption probation with another family.*
- *that a minimum of seven days should be required between placements to allow a review to be requested.*
- *that such a review must be conducted within sixty days so as not to impede the placement of a child.*

The OACAS also recommends that section 144 be looked at in the larger context of all review mechanisms in order to streamline and integrate methods of accountability.

Adoption acknowledgement on substituted birth registration

The OACAS recommends that the Vital Statistics Act be amended to provide that birth certificates shall acknowledge an adoption, rather than showing the adoptive parents as if they were the child's birth parents.

INFORMATION PRACTICES - PART VIII

Collection of information

The OACAS recommends that the amended and proclaimed Part VIII permit Children's Aid Societies to collect information for the purpose of carrying out their statutory functions indirectly and without the consent of the subject of the information.

Special treatment of CASs

The OACAS recommends that the legislation treat all CASs as extensions of one another for the purpose of providing services and permit full information sharing between Societies without the need for consent and without limitation.

Access to records

The OACAS recommends that an amended and proclaimed Part VIII permit open access by the subject to his or her own record, except for certain enumerated limitations.

Disclosure of information

The OACAS recommends that an amended and proclaimed Part VIII permit disclosure of information to others only in accordance with the legislation. Disclosure should be permitted (a) with the consent of the subject, (b) as required by law, and (c) in certain other enumerated circumstances, including (but not limited to) the following:

- *to police in the course of a joint investigation.*
- *to a professional college investigating a complaint related to service provided by an employee of a service provider.*
- *in order to prevent imminent harm to a person.*
- *for the purpose of protecting a child or children.*
- *for the purpose of searching for and securing a placement that is in the best interests of a child, including a kinship arrangement.*

Application to all records

The OACAS recommends as follows:

- *that Part VIII apply to all collection, use and disclosure of records from the date of proclamation, although such use and disclosure would apply to all records created prior to the proclamation date.*
- *that provisions regarding correction/disagreement apply only to records created after the legislation is proclaimed.*

Correction, disagreement by a subject

The OACAS recommends as follows:

- *that provisions for making corrections without obliterating or expunging the original record be incorporated into Part VIII.*
- *that an alternative mechanism for recording a statement of disagreement on the file be included.*
- *that service providers not be required to make corrections to third party records that come into their possession.*

Compliance review

The OACAS recommends that complaints related to compliance with Part VIII by a record keeper should be reviewed by a specialist tribunal with knowledge of the child welfare context and be subject to the principles set out in section 1 of the CFSA*, especially the paramount purpose of ensuring the protection, well being and best interests of children.*

Retention

The OACAS recommends that Part VIII clearly set out a schedule for the retention of records created and collected under the CFSA.

Children's rights regarding information

The OACAS recommends that Part VIII be amended and proclaimed, so as to give a child of the age of 12 years or older, rights with respect to information about himself/herself, as follows:

- *the right to request that specific information not be shared with his or her parents.*
- *the right to access his or her own file, including information about members of the child's family with whom the child resided in the same household, for the period of such joint residency.*
- *a parent can access information about his/her child until age eighteen, subject to the child's right to withhold specific information, provided the child is not a Permanent ward (see below).*
- *for Permanent wards, a parent with an access order may obtain the information that is sufficient to give life to the requirement in subsection 61(5) that the parent's wishes concerning "major decisions" be taken into account. This should not give parents with access to a Permanent ward access to the entire child file.*
- *after a child turns eighteen, the child's consent is needed to disclose information about the child to any person.*

Former wards

The OACAS recommends that Part VIII specifically give former wards the same rights to information as adult adoptees.

Record Searches and Fast Track Information System

The OACAS recommends that CASs be authorized to search the Fast Track Information System in order to screen applicants for fostering, adoption and kinship care placements.

PROCEDURAL AND EVIDENTIARY ISSUES

Admissibility of children's statements

The OACAS recommends that section 50 be amended as follows:

- *that children's out of court statements be admissible subject to weight, including audio taped and video taped statements, whether they are in original form or transcribed.*
- *that the following statement be included: "Any statement made by a child to a child protection worker, peace officer, medical professional, other professional or other person the court considers appropriate is admissible into evidence through the testimony of the person receiving the statement."*

Past conduct of parent

The OACAS recommends that subsection 50(1) be amended as follows:

- *that wording be added which clarifies the components of past parenting evidence.*
- *that a statement be added, stipulating that relevant past parenting evidence is admissible at any stage of child protection proceedings, including at all preliminary stages, at both the protection finding and disposition stages, as well at the Status Review Application and Access Application stages.*
- *that past parenting evidence be admissible even where such evidence could have been introduced at an earlier point in the litigation.*

Admissibility of evidence for finding in need of protection

The OACAS recommends that a new subsection of section 50 be added as follows:
"Evidence that arose before or after the protection application is commenced and that is relevant to the finding in need of protection may be considered by the court at the hearing of the protection application."

Bifurcated hearings

The OACAS recommends that subsection 50(2) be repealed in order to eliminate the requirement of bifurcated hearings.

Interim supervision orders

The OACAS recommends that clause 51(2)(b) be amended to explicitly state that the legal test for an interim supervision order is the short-term best interests of the child.

Interim access orders

The OACAS recommends that subsection 51(5) be amended as follows:

- *that "clause (2)(b)" be added to the listed clauses in subsection 51(5).*
- *that the words "and is in the best interests of the child" be added.*

Variation of an existing interim care and custody order

The OACAS recommends that subsection 51(6) be amended to add the words "if a material change in circumstances demonstrates that it would be in the best interests of the child to vary or terminate such order" to the end of the sentence.

Pre-finding assessments

The OACAS recommends that subsection 54(1) be amended so that the words "where a child has been found to be in need of protection" are eliminated.

Conditions of Temporary wardship orders

The OACAS recommends that a new subsection of section 57 be created stating: "the court, when making an order of Temporary wardship, may impose reasonable terms and conditions on a parent, respondent or any other person who participated in the hearing."

Leave to commence status review application

The OACAS recommends that subsection 64(5) be amended to stipulate the criteria as outlined in the case law, which are as follows:

- *the court must be satisfied that the status review application is being brought bona fides;*
- *the court must be satisfied that that the remedy sought cannot be obtained in any other way than a review of the order itself;*
- *there must be some unusual circumstances that justify the review, notwithstanding the child's permanent status;*
- *the court must be satisfied that the review would likely accomplish the purposes of the Act as set out in section 1, and;*
- *the applicant must establish a prima facie case.*

Payment orders

The OACAS recommends that the wording in section 60 be amended to be consistent with current support legislation.

Restraining orders

The OACAS recommends that subsection 80(1) be amended as follows:

- *that the words "where the court finds that a child is in need of protection" be eliminated*
- *that the words "or the child's caregiver, including a foster parent" be added immediately following the words "restraining or prohibiting a person's access to or contact with the child."*
- *that the words "instead of or in addition to making an order under subsection 57(1)" be expanded to add "or subsection 51(2)" immediately thereafter.*

Offences under CFSA

The OACAS recommends that the CFSA *be amended as follows:*

- *that the offences be placed in the* CFSA *together with the sections to which they refer.*
- *that a statement be added that the* CFSA *offences are to be prosecuted under the Provincial Offences Act and are to be prosecuted by the Provincial Crown Attorney.*

Place of hearing

The OACAS recommends that clause 48(2)(a) be amended, so that the words, "in either the jurisdiction in which the child ordinarily resides, or" be added before "the territorial jurisdiction in which the place…"

Paramount purpose

The OACAS recommends that in subsection 1(1) the word "protection" be placed immediately before the words "best interests", instead of immediately afterwards.

Placement in care and custody

The OACAS recommends that in paragraph 57(1)(1), the words "placed with" be replaced with the words "placed in the care and custody of" in order to harmonize the language with the wording in other parts of the Act, such as in subsection 51(2).

Jurisdiction to hear appeals

The OACAS recommends the following amendments:

- *that subsection 69(1) be amended such that the first part of the provision state "An appeal from a court's order under this Part may be made to the appropriate appellate court in accordance with the* Courts of Justice Act *by...,"*
- *that the phrase "Superior Court of Justice" in subsection 69(4) be replaced with the words "the appropriate appellate court."*

Automatic stays pending appeals

The OACAS recommends that clause 69(3)(a) be amended so that the automatic stay of a protection order is extended from ten days to twenty days.

Entitlement of all parties to appeal

The OACAS recommends that subsection 69(1) be amended by adding "or (f) a party to the proceedings in which the order appealed from was made."

Jurisdiction of appeal court to make interim access/supervision orders

The OACAS recommends that subsection 69(4) be amended, so that after the phrase "order for the child's care and custody", the words "and the child's access, or the child's supervision" are added.

Expiry of protection orders

The OACAS recommends that the words "or c) dies," be added to subsection 71(1).

Homemakers

The OACAS recommends that all sections and references to "homemakers" in the CFSA *be eliminated and that section 78 be repealed.*

Orders confirming protection finding

The OACAS recommends that subsection 57(1) be amended after the opening words "where the court finds that a child is in need of protection", and that the phrase "pursuant to an order under subsection 37(2)" be added.

Recognition and enforceability of out-of-province protection orders

The OACAS recommends that a new section be added to the CFSA *to recognize and enforce Canadian orders made in other provinces and territories including child protection orders, as though they had been made in Ontario.*

Relationship between child protection and child custody proceedings

The OACAS recommends that a new section be added explicitly stating that proceedings under the Children's Law Reform Act (CLRA) *may continue while there is an outstanding proceeding under the* Child and Family Services Act (CFSA)*, on notice to the Children's Aid Society named in the* CFSA *proceedings as a party, but the* CLRA *order shall be stayed until the* CFSA *proceedings are withdrawn, discontinued or terminated.*

Where necessary for CAS to remove child in another territorial jurisdiction during ongoing legal proceedings

The OACAS recommends that a new subsection be added to section 48 as follows:

- *that a Society's territorial jurisdiction as designated pursuant to subsection 15(2) be expanded to include other territorial jurisdictions for all children subject to current court orders under clauses 51(2)(a),(b) or (c) or paragraph 57(1)(1).*
- *that the phrase "except where the child is subject to legal proceedings pursuant to this Act in another territorial jurisdiction" be added to clause 48(2)(a).*

Requirement of notice to CAS of motion to transfer territorial jurisdiction

The OACAS recommends that subsection 48(3) be amended such that after "the court may order", the clause be added: "after the Children's Aid Society in the other territorial jurisdiction has been given adequate notice and has been given the opportunity to make submissions."

Where necessary for motion to be heard by telephone conference by justice in another jurisdiction subsequent to child's non-consensual removal

The OACAS recommends the following:

- *that subsection 48(4) be amended in order to add the phrase "except where a child is brought to a place of safety and the court in that society's territorial jurisdiction is not available to hear the matter within the time frames outlined in subsection 46(1)."*
- *that provision be made for a justice to hear a matter by means of telephone conference and/or "video remand" while presiding in another territorial jurisdiction in circumstances where a motion is brought for interim care and custody subsequent to a child's non-consensual removal.*
- *that clause 48(2)(a) be amended in order to add the phrase "unless the court in the territorial jurisdiction is not available to hear the matter."*

CAS complaint review procedure

The OACAS recommends that section 68 be amended as follows:

- *that the reference to complaints review procedure be changed to "client complaint resolution procedure."*
- *that the reference to a "society's board of directors" and Ministry Director in subsections 68(2) and 68(3) respectively be deleted.*
- *that specific criteria be identified for initiating a complaint.*
- *that a new subsection be added stipulating that the complaints resolution procedure cannot be accessed by: a non-client; a person making a frivolous or vexatious complaint or acting in bad faith; or a person engaged in litigation with the Society in respect of the same subject matter.*

Child Abuse Register

The OACAS recommends that the Child Abuse Register be abolished by Proclamation of the Amendment (Statutes of Ontario, 1999, chapter 2, Section 27) that repealed section 75; and by Proclamation of the Amendment (Statutes of Ontario, 1999, chapter 2, Section 28) that repealed section 76.

Protection from liability for CAS board of directors

The OACAS recommends that subsection 15(6) be amended such that the first part of the provision provides that: "No action shall be instituted against an officer or employee of a Society or a member of a Society's board of directors, including any proceeding for lost wages under the Corporations Act*..."*

Child Abuse Review Teams

The OACAS recommends that section 73 be repealed.

Five-year review of the Act

The OACAS recommends that section 224 be amended as follows:

- *that the words "or those provisions of it specified by the Minister" contained in subsection 224(1) be deleted.*
- *that the words "and what provisions of this Act are included in the review" contained in subsection 224(2) be deleted.*

APPENDIX B

Draft Proposed Amendments to Ontario Regulation 206/00 (Differential Response)

Section 3 would be amended to include a clause (c) as follows:

(c) a decision is made, in accordance with the safety assessment conducted and recorded pursuant to clauses (a) and (b), whether the case requires the continuation of a full child protection investigation or a modified protection/family assessment.

Subsection 4 (1) would be amended to read as follows:

4. (1) If the determination referred to in clause 3(c) is to continue with a full child protection investigation, upon its completion, a society shall,

Clause 4 (2)(a) would be amended to read as follows:

(a) carry out, in accordance with the Ontario Risk Assessment Model, a risk assessment and a strengths based family assessment within the child's community and cultural context.

Subsection 4 (2) would be amended to include a clause (d), which reads as follows:

(d) determine if, at any point, the case requires a modified protection/family assessment rather than a continued full child protection investigation;

Subsection 4 (2) would be amended to include a clause (e), which reads as follows:

(e) if it is determined under clause 4 (2)(d) that a modified protection/family assessment is required, comply with the requirements set out in subsection 4(5).

Subsection 4(5) would need to be added as follows:

4(5) If the determination referred to in clause 3(c) is to proceed with a modified protection/family assessment, the society shall,
(a) complete a full strengths based family assessment within the child's community and cultural context;
(b) determine if, at any point, the case requires a continued full child protection investigation rather than a modified protection/family assessment; and
(c) if it is so determined that a full continued child protection investigation is required, clause 4(2)(a) applies.

APPENDIX C

Customary Care: Recommendations in OACAS Discussion Paper, June 2004

The following recommendations, with minor revisions, are taken from the OACAS Discussion Paper, *Customary Care: Considerations for Child Welfare in Ontario*, and identify specific areas of legislative and policy reform, which would further endorse the practice of customary care as it intersects with the concerns of child welfare.

The OACAS recommends the following areas of review and amendment to legislation:

- **Definitions of terms:** Customary and kinship care need to be clearly defined in the legislation. The definition of customary care must remain permeable to the variety of its interpretations and practices among First Nations.
- **Reference to Indian and Native Persons as the only explicit rights holders:** Only Indian and Native persons are able to claim the benefits of Part X of the *Child and Family Services Act*. It is important to consider changing the terminology to include entitlements for First Nations and Aboriginal persons.
- **Time limits (12 and 24 months):** Time limits applicable to children in care would not appear to apply in cases of a customary care arrangement, but this needs to be clarified in the *CFSA*. Customary care arrangements must remain fluid and may involve a child residing exclusively with one caregiver over a short or an extended period, or experiencing several caregivers from within the community as needed under the guidance of the Band or tribal leadership.
- **Access to parents:** Whatever relationship is possible between child and parent should be supported as long as it is not detrimental to the child. The parents of the child, by tradition, are frequently and preferably available to the child throughout the customary care placement.
- **Supports to caregivers:** Customary caregivers must be recognized as requiring adequate levels of financial and service support.
- **Confidentiality:** Issues of confidentiality within First Nations communities may require legislative flexibility to accommodate community practices. Traditional practices of sharing information with Elders, traditional and other leaders, and Band representatives may need to be addressed in legislation. Consideration may need to be given to situations where the privacy concerns of a First Nations person contradict the Band's right to information.
- **Place of safety:** Customary care homes need to be considered carefully as potential first placements for children in need of protection. Issues of standards and the ensuring of immediate child safety must be addressed.
- **Rights of children in customary care:** Rights may need to be revisited under Part V of the *CFSA*, with a view to expanding the rights of all First Nations children in care as well as those placed in customary care through child welfare processes.

- **Funding for band representatives:** Compensation for band representation must be ensured by legislation.
- **Band responsibility for plan for child:** It is important that the *CFSA* set out a requirement for the Band to present a plan for the care of the child at the earliest possible opportunity in congruence with the best interests of the child. This will avoid disputes where the Band presents a competing plan after the child has developed a significant attachment with his/her foster parents or other caregivers.

APPENDIX D

OACAS CFSA/FLR Committee Working Groups (2004)

(Chair: Marv Bernstein)

#	Working Group Area	Included topics	Members
1	**Confidentiality and Access to Records**	Part VIII Expanded use of FTIS	**Kristina Reitmeier*** Gail Vandermeulen Mary Ballantyne Carol VandenHoek ◊ David Feliciant ¤
2	**Permanency Planning – Adoption**	Adoption with contact Open Adoption agreements/mediation Legal status to support all	**Brenda Nutter*** Marv Bernstein Richard Newton-Smith Daniel Moore
3	**Permanency and Placement Options – Non-Adoption**	Places of safety Use of hostels for teens Extend ECM Licensing – kin placements, non-compliance, "stretches" Special needs post 18 years – SNA's vs Crown wardship Crown ward Disclosure Placement on apprehension Customary care Part V or Part VI issues o/s	**Bruce Burbank*** Daniel Moore Len Kennedy Martha Downey Smith
4	**Legal Issues**	Terms and conditions of SO, SW and access orders Evidentiary issues Technical issues-legal tests Mediation, family group conferencing, other ADR Interplay with other Acts Modernizing terminology Pre-finding assessment & restraining orders Bifurcated hearing	**Tracy Engelking*** **Robin McDonald *** Susan Verrill
5	**Services & Protection**	Investigative powers & procedures Reporting duty Protection grounds 37(2), includ'g Domestic Violence Investigations in institutions Jurisdiction – age, territorial 5-day rule on apprehension	**Larry Marshall*** Wayne Herter Domenic Gratta ◊ Helen Murphy ¤

* Denotes Working Group Lead on OACAS *CFSA/FLR* Committee
◊ Denotes member who left Committee in September 2004
¤ Denotes member who joined Committee in September 2004

APPENDIX E

Summary of OACAS Recommendations regarding Adoption Disclosure Bill 77 (December 2001)[51]

Recommendations:

Having reviewed Bill 77 in detail, we respectfully make the following recommendations:

1. That, subject to the further proposed amendments to Bill 77 outlined in these recommendations, Bill 77 should be supported and enacted, as it reflects a positive shift towards openness, which will bring Ontario into line with similar adoption reforms in other provinces in Canada. These positive changes are:
   - The adult adoptee is to be given unqualified access to his/her original birth registration upon attaining his/her eighteenth birthday.
   - The birth parent is given access to the original birth registration of the child he/she placed for adoption, as well as the substituted birth registration and adoption order, subject to the right of the Registrar of Adoption Information to refuse to disclose such information where "it might result in serious physical or emotional harm to any person". In addition, this right of access to this prescribed identifying information cannot be exercised by the birth parent until the adoptee's nineteenth birthday, in order to provide the adult adoptee with a sufficient grace period in which to decide whether or not to file a "no-contact notice."
   - Adult adoptees and birth parents are entitled to file a "no-contact notice", which would prohibit any contact with the person who files the notice. This option is available to adult adoptees and birth parents involved in adoptions completed both before and after these amendments come into force.
   - Counselling will continue to be made available at different disclosure points, to adoptees, adoptive families and birth families, in recognition that adoption is a life-long process, but will not be mandatory. This change makes sense, so long as the parties are fully informed as to their entitlement to counselling, as well as to the benefits which can derive from effective and supportive counselling.

2. That Bill 77 be further amended, so as to require the birth parent or adult adoptee to sign a written undertaking not to violate a no-contact notice, before being able to access identifying information. This would provide an additional level of protection in response to the concern that a birth parent or adult adoptee might use the identifying information to force contact on a person who has previously filed a no-contact notice. This additional measure of protection could be advantageous in the area of

[51] Adoption disclosure is now addressed in Bill 14, introduced by Marilyn Churley in December 2003. See: M. Bernstein and M. Allan, *"Submission to Standing Committee on General Government regarding Bill 77: Adoption Disclosure Law Amendment Act, 2001*, Journal of the Ontario Association of Children's Aid Societies, Vol. 45, Number 2, December 2001, at pp. 12-20.

public sector adoptions of Crown wards, where in rare instances, the safety of the adult adoptee could be an issue.

3. That Bill 77 be further amended, so as to increase the maximum penalty of $5,000 for violating a no-contact notice. In this regard, we are concerned that this form of maximum sanction would be an insufficient deterrent to those persons, who are prepared to risk a monetary fine in order to violate a no-contact notice. For this reason, we favour the British Columbia legislation, which prescribes a maximum penalty of a $10,000 fine and/or six months in jail. In recommending this amendment, we envision the court using discretion in sentencing and that a jail term would be reserved for only the most flagrant and persistent forms of violating the no-contact notice, such as where there is evidence of continuing harassment and/or stalking. This again could provide some extra measure of protection that could be helpful in the area of public sector adoptions of Crown wards, where in a very small percentage of cases, the safety of the adult adoptee could be a concern.

4. That Bill 77 be further amended, so as to require the birth parent to provide all relevant medical and genetic information, as outlined in the Bill, before being entitled to file a no-contact notice. We are concerned with the permissive approach being taken in Bill 77 to the provision of this information, and feel that such information is part of the adoptee's birthright and is critical to the adoptee's physical and emotional well-being, as well as to the holistic health of succeeding generations.

5. That Bill 77 be further amended, so as to permit the renewal of a no-contact notice, where it has been previously withdrawn. We are concerned with Bill 77's prescription that any withdrawal of a no-contact notice must continue permanently. It seems to us that there may be justifiable reasons, relating to changed life circumstances, or new information that comes to the attention of the adult adoptee or birth parent (for example, that relates to the violent history of the other person), that may justify the renewal of a no-contact notice.

6. That Bill 77 be further amended, so as to change the nomenclature from "no-contact notice" to "contact veto". This is the language used in other jurisdictions and would more clearly describe the nature and effect of the document, once filed.

7. That the enactment of Bill 77 be preceded by an expansive public education campaign outlining the proposed changes in practice and those locations where people can obtain additional information and support.

8. That the enactment of Bill 77 be accompanied by adequate resources for CASs in order to ensure that the response to those affected can be prompt, comprehensive and professional. This would include sufficient resources to enable adult adoptees to review their social and family history at the offices of the placing CAS before deciding whether to exercise a contact veto.

APPENDIX F

Proposed Massachusetts legislation to ban the use of corporal punishment

The following is the wording of proposed legislation for the State of Massachusetts governing the use of corporal punishment of children.

CHAPTER 265 of the General Laws

An act prohibiting corporal punishment of children

Be it enacted by the Senate and House of Representatives of the General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 265 of the General Laws, is hereby amended by inserting after Section 13J, a new Section 13J 1/2, as follows:

Section 13J 1/2. Corporal punishment of children prohibited; use of reasonable force.

(a) For the purposes of this section, the following words shall, unless the context indicates otherwise, have the following meanings:

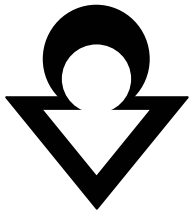
"Child", any person under eighteen years of age.

"Corporal punishment", the willful infliction of physical pain, including but not limited, to hitting, whipping, slapping, spanking, kicking, biting, striking with an object, pinching, punching, poking eyes, twisting limbs, boxing ears, shaking, "hot-saucing" (placing Tabasco sauce or soap in the mouth), administering electric shocks, or any other unreasonable use or degree of force.

(b) It shall be unlawful in the Commonwealth of Massachusetts for any adult to inflict corporal punishment upon a child.

(c) The provisions of this section shall not preclude any adult from using such reasonable force as is necessary to protect himself and others from imminent, serious, physical harm, including assault by a child, to divest a child of a dangerous instrument, to prevent injury to property, or to remove a child from a life-threatening or injurious situation.

(d) The provisions of this section also shall not preclude any adult from using incidental or minor physical contact designed to maintain order and control, or other discipline, which does not constitute corporal punishment. The provisions of this section are not intended to be used to separate children from their parents or to discourage discipline of children, but are intended to encourage the use of other means than corporal punishment to discipline children, because of the emotional harm and risks of bodily harm associated with corporal punishment of children.



Proposed *Child and Family Services Act* Amendments:

A Position Paper of the Ontario Association of Children's Aid Societies

OACAS *CFSA/FLR* Committee

February 2005